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IMPORTANT TO AMERICAN LAWYERS,

FROM THE ENGLISH, IRISH, SCOTCH AND CANADIAN LAW REPORTS,

WITH

NOTES AND REFERENCES.

BY
JOHN GIBBONS, LL. D.,
OF THE CHICAGO BAR.

VOL. VIII.

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AMERICAN

CRIMINAL REPORTS.

Crown Cases Reserved.

The Queen v. Whitchurch and others.

(24 L. R., Q. B. Div., 420.)

Abortion: *Conspiracy to procure abortion — Woman not with child.*

Conspiracy to procure abortion — Woman not with child. — A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion.

Case stated by Wills, J. At the assizes for the county of Northampton on November 28, 1889, Thomas William Whitchurch, John Howe and Elizabeth Cross were indicted in the following terms: The jurors, etc., present that Thomas William Whitchurch, John Howe and Elizabeth Cross, believing that the said Elizabeth Cross was then pregnant and that in due course of nature she would be delivered of a child begotten by said John Howe, and wickedly intending and contriving to conceal such pregnancy and to prevent such her delivery in due course of nature, on June 1, 1889, did amongst themselves unlawfully, knowingly and wickedly, conspire, combine, confederate and agree together feloniously and unlawfully to procure the miscarriage of said Elizabeth Cross by unlawfully administering to and causing to be taken by her certain noxious things, and by unlawfully using certain instruments and other means, with intent to procure the miscarriage of the said Elizabeth Cross. The indictment then set out a number

of acts done in pursuance of the conspiracy, but it is unnecessary for the purposes of this case to set out more of the indictment than I have already given. The evidence established that the prisoners all believed that Elizabeth Cross was pregnant, and that for the purpose of procuring abortion Whitchurch and Howe, with her consent and by her procurement, both administered to her noxious drugs and used, or caused to be used, upon her, instruments; but there was no evidence that she was in fact pregnant, and for the purposes of the present case it must be taken that she was not in fact pregnant. Mr. Hammond Chambers then objected that for a woman not being pregnant to do, or cause to be done, acts upon herself for the purpose of procuring abortion was no offense either at common law or by statute law, and therefore she could not be convicted of conspiracy with other persons that they should do upon her and she should suffer the same acts. I was of opinion that, whether or not it was no offense for a woman not pregnant to do acts to herself intending thereby to procure an abortion which was actually impossible, it would none the less be criminal in her to conspire to commit a felony (which the administration of drugs and the use of instruments would have been in her as well as in the men if she had been pregnant, see 24 & 25 Vict., ch. 100, sec. 58), because the commission of the felony was rendered impossible by circumstances unknown to her. I was further of opinion that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained, if effected by herself alone and without the help of the men, might not have been criminal, and I directed the jury, if they believed the evidence, to convict the prisoners. The jury convicted all the prisoners. The men had been previously convicted of the felony of administering drugs and using instruments for the purpose of procuring the miscarriage of the female prisoner. The question for the court was whether the conviction against the woman could be sustained.

Hammond Chambers, for the prisoner, Elizabeth Cross. The conviction is wrong, because the prisoner is charged with conspiring to do an act which, if actually done, would not be a

crime on her part. To procure abortion was not a crime at common law, but is made a crime by statute; and the statute now in force (24 & 25 Vict., ch. 100, sec. 58) expressly provides that for a woman to administer drugs to herself, or use instruments on herself, with intent to procure abortion, is a crime only in the event of the woman being with child, in contradistinction to the case of other persons, on whose part the act is criminal whether the woman is with child or not.

The following authorities are referred to: *Rex v. Turner*, 13 East, 228; *Rex v. Fowle*, 4 C. & P., 592; *Reg. v. Rowlands*, 2 Den. C. C., 364; 17 Q. B. 671; *Reg. v. Esdaile*, 1 F. & F., 213; *Reg. v. Collins*, L. & C., 471; *Reg. v. Warburton*, L. R. 1 C. C., 274; *Reg. v. Boulton*, 12 Cox, C. C., 87.

Etherington Smith, for the prosecution, was not called on.

Lord Coleridge, C. J. I am of opinion that the conviction ought to be affirmed.

The question arises on an indictment charging a woman, who, we must take it, was not in fact with child, with conspiring with others to procure abortion on herself. There might have been something to be said if the indictment had been for an attempt to procure abortion, for in that case the words of the section would not apply. This, however, is an entirely different case. The prisoner is charged with the offense of conspiracy,— that is, a combination to commit a felony,— and I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the intended offense.

Pollock, B. I am of the same opinion.

Hawkins, J. I am of the same opinion. The prisoner is not charged with using instruments, or administering drugs to herself, for the purpose of procuring abortion, but with conspiring with others to procure abortion. It is clear that she could not lawfully call in other persons to do that which when done by them is a crime punishable with penal servitude.

What she did was a conspiracy to commit a criminal act.

GRANTHAM, J. In stating the law as to conspiracy in the case of *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. D., 544; affirmed 23 Q. B. D., 598, Lord Coleridge, C. J., said: "In an indictment it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous, and which gives the public an interest to interfere by indictment." 21 Q. B. D., 549. This shows that the conviction in the present case was right.

CHARLES, J. I am of the same opinion.

Conviction affirmed.

NOTE.— *Attempt to commit an impossible crime.*— Mr. Bishop, in his work on Criminal Law, section 671, points out a conflict in the English decisions, and calls attention to the case of *Reg. v. Collins*, 1 L. & C., 471, where it was declared that where a man put his hand into another's pocket, and there was nothing in the pocket to steal, he could not be convicted of an attempt to steal. The contrary doctrine has always been held in the United States. As said by Butler, J., in *State v. Wilson*, 30 Conn., 500, "It would be a startling proposition that a known pickpocket might pass around in a crowd, in full view of a policeman, and even in the room of a police-station, and thrust his hands into the pockets of those present with intent to steal, and yet not be liable to arrest or punishment until the policeman had ascertained that there was in fact money or valuables in some one of the pockets upon which the thief had experimented." See, also, Bishop's Criminal Law, vol. I, §§ 671–693.

The first reported case in this country upon the subject is the case of *Commonwealth v. McDonald*, 5 Cush., 365, where it is said that "To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavor, to use exertion for some purpose. A man may attempt to steal by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still, he nevertheless remains chargeable with the attempt and with the act done towards the commission of the offense." It was decided, however, that, in a charge of conspiracy to cheat and defraud, the offense is not complete, although there may have been an intention to defraud, if the means used could not possibly have had that effect. *Marsh v. People*, 7 Barb., 391. The conflict of authority referred to by Mr. Bishop no longer exists.

The rule announced in *Reg. v. Collins* is not, however, the law anywhere at this time, because its doctrine was expressly overruled by Lord Coleridge in the late case of *Reg. v. Brown*, 24 Q. B. Div., 357.

Accomplice to an abortion.— It is doubtful whether the doctrine of *Reg. v. Whitechurch* would be fully accepted in this country; because it is held by many respectable authorities here that the woman upon whom an abortion is committed is not an accomplice, which view would seem to militate against the doctrine laid down in the foregoing case. For instance, it is held

in Kentucky that the law looked upon her rather as a victim than as a co-offender. *People v. Commonwealth*, 87 Ky., 487; 9 S. W., 509. The same view was taken in *Dunn v. People*, 29 N. Y., 523; *Commonwealth v. Wood*, 11 Gray, 85; *State v. Owens*, 22 Minn., 238; *State v. Hyer*, 39 N. J. L., 598.

That the dying declarations of the woman are not admissible, see *State v. Gedecke*, and note, 4 Am. Cr. R., 6; *Railing v. Commonwealth*, 5 Am. Cr. R., 7.

Abortion — Evidence.— Where the evidence shows that the defendant operated with a knife on the womb of a healthy woman nineteen years old, so that she was delivered of a partly-grown child, and was then attacked with peritonitis, of which she died, an inference that the operation was not necessary to save her life is warranted. *Hatchard v. State* (Wis.), 48 N. W., 380.

The fact that the woman had threatened to commit suicide unless she could be relieved of the child with which she was pregnant does not show such a necessity to perform the operation in order to save her life as is contemplated by the statute. *Id.* See, also, *State v. Forsythe*, 78 Ia., 494.

HENDERSON ET AL. V. PEOPLE.

(124 Ill., 607.)

ABDUCTION: *Elements of the offense — Concubinage — Prostitution.*

1. ABDUCTION — WHAT CONSTITUTES.— Defendants were indicted under the Criminal Code of Illinois, section 1, which provides that whoever entices an unmarried female of chaste life from her home for the purpose of prostitution or concubinage shall be punished, etc. It was proved that the principal defendant, a dissolute and impecunious young man, induced the prosecutrix, a girl of fifteen, to elope with him by promises of marriage, but no arrangements had been made or suggested as to time and place of such marriage, and the defendant was without means to defray traveling expenses. For the avowed purpose of taking a night train, defendant took her to a neighboring city, where they slept together at an hotel, he representing her to be his wife, keeping her hid until late the next day, when, without any effort to take a train, they returned to the town where the girl lived, and, still keeping secluded, slept together that night until aroused by the approach of the girl's parents and the police, when they fled together, and were together when arrested, two or three days later. *Held*, an enticing for the purpose of concubinage, within the meaning of said statute.
2. SAME.— No length of time nor long continuance of illicit intercourse is necessary to constitute concubinage. That relation is formed when a single woman consents to unlawfully cohabit with a man generally as though the marriage relation existed between them.

3. INSTRUCTIONS — DEFINITION OF WORDS IN STATUTE.— It is not error for the court, in giving a general charge to a jury upon its own motion, to omit to give a definition of words used in the statute and indictment under which the trial is had; such words being of general use and not technical terms nor words of art. A party desiring such words defined to the jury should prepare and submit instructions for that purpose.

Error to circuit court, Champaign county, Hon. C. B. Smith, Judge, presiding.

John M. & John Mayo Palmer and *Patton & Hamilton*, for plaintiffs in error.

George Hunt, attorney-general, for defendants in error.

MULKEY, J. At the September term, 1887, of the Champaign circuit court, the grand jury returned into open court an indictment founded upon the first section of the Criminal Code against William Henderson, John Henderson, Carroll Shutt and Julia Shutt. The first count charges that the defendants on the 2d day of September, 1887, unlawfully and feloniously enticed and took away one Joanna Carman, then and there being an unmarried female of chaste life and conversation, from her parents' house, for the purpose of prostitution. In another count of the indictment the defendants are charged with enticing and taking away the prosecutrix for the purpose of concubinage. In other respects the latter count is like the first. Upon consideration of the evidence in the light of the charge of the court, the jury returned a verdict of guilty against all the defendants, fixing their respective times in the penitentiary as follows: William Henderson at eight years, Carroll Shutt at two, John Henderson at one, and Julia Shutt at one. A motion for a new trial having been made and overruled, the court pronounced sentence and judgment upon the defendants in conformity with the verdict.

The question to be considered is whether the finding of the jury and the judgment and sentence of the court are warranted by the law and the evidence. The defendants, William and John Henderson, are brothers. Julia Shutt is their sister, and the wife of Carroll Shutt. The prosecutrix, Joanna Carman, is the daughter of Benjamin F. and Eliza Carman, and at the time of the alleged abduction was about fifteen years old. The Shutts and Carmans lived near each other in the city of

Urbana, and had been on visiting terms some three years prior to this occurrence. William Henderson, the principal in the affair, is a barber by trade, and a dissolute, drunken character, who spent most of his time in the vicinity of Urbana, and was frequently at Shutt's house, with whom his brother John was temporarily stopping at the time in question. About the 1st of July, 1887, William Henderson commenced making calls at Carman's house and paying his attentions to the prosecutrix. It was not long before Mrs. Carman, her mother, became acquainted with his dissolute habits and bad reputation, and forbade his coming to her house any more. He, nevertheless, managed to meet with her daughter at Shutt's house and other places, and finally, by means of promises, threats, etc., induced her to consent to an elopement for the purpose, as he put it, of getting married, and she doubtless so understood it. In settling the preliminaries, he told her that they could start from Mrs. Shutt's, his sister's; "that she would not give them away." They accordingly did start from there on the evening of the 2d of September, a little after dark. John Henderson, about dark of that evening, went to Carman's house, where he found Joanna out in the yard, and, without attracting the attention of any of the family, told her that William was ready to go, and was upon the corner of the street waiting for her. After joining him on the street, the two repaired to Shutt's house, where all four of the defendants met together and talked over the matter of the elopement, which was accelerated by the approach of Joanna's sister; upon discovering which John remarked, in the presence of them all: "Will, I tell you what is the matter. You want to hurry up and get out of here, because here comes Stell, and she is long-nosed and will give it away." It was understood by all present that the two were to go to the Doyle House, in Champaign City, a short distance from Shutt's, for the purpose, as was stated to her, of waiting for the night train. But nothing seems to have been said about where they were to go beyond there, or their ultimate plans or purposes. On arriving at the hotel about 8 o'clock, instead of sitting up for the train or ordering separate rooms and making arrangements to be called for the train, Henderson engaged a single room "for [as he put it] himself and wife;" and the two were at once conducted to it, where they lodged together as hus-

band and wife. They remained at the hotel together, under that assumed relation, until next evening about 5 o'clock, when they returned a-foot to Shutt's house; John Henderson going back with them. They reached Shutt's some time before night. John had visited them at the Doyle House three times that day — in the morning, at noon and in the evening — and told them that they would have to keep hid or they would be found. After their return to Shutt's on Saturday evening, Joanna's father came to the front gate and was engaged in a conversation with Carroll Shutt. Joanna was at the time in the back yard, though she recognized her father's voice and heard him make the remark, "That girl is in this town and I am going to find her." The parties, however, were not speaking sufficiently loud to enable her to understand anything else that passed between them. While this conversation was going on, Mrs. Shutt and John and William Henderson were most of the time out in the back yard with Joanna; all of whom knew of the conversation, and that the object of Carman's call there was to find his daughter. Occasionally John Henderson would go around in front and participate in the conversation for a short time, and then return and caution the parties to speak lower or they would be discovered. After Carman had left and about 11 o'clock at night, the party out of doors, being informed the coast was clear, went into the house; whereupon Mrs. Shutt brought some bedding into the bed-room adjoining the kitchen and threw it down on the floor, telling William to fix his bed, and he and Joanna were left in that room by themselves, where they slept together until about 2 o'clock in the morning, when John Henderson, Mrs. Shutt, her daughter and mother rushed into the room where William and Joanna were sleeping, and told them to jump up; that her father and mother, with the police, were at the gate. Being thus warned, they hastily retreated through a door leading to the rear of the building, whence, by means of an alley, they made their escape; John accompanying them to the fair grounds, but a short distance from the house. The latter, on parting with them, remarked, "I will bet before to-morrow night I will be taken up for this." The two fugitives, after parting with John, proceeded a-foot to Talona, thence to Sadovis, thence to Ivesdale, and thence towards Bement. On Sunday night they

lodged in a corn-field within about a mile and a half of that place. Monday morning Henderson went into the town and brought back with him a young man, who, by his direction, took her to Bement, and left her at an hotel, where, in a short time afterwards, she was taken into custody by an officer. Henderson, who had gone to the town by another route, was soon afterwards discovered and placed under arrest. This statement presents the substance of the prosecutrix's testimony, and we do not think its force or effect is materially impaired by the other evidence in the record.

The section of the statute above referred to, and on which the indictment is founded, is as follows: "Whoever entices or takes away an unmarried female of chaste life and conversation from her parents' house, or wherever she may be found, for the purpose of prostitution or concubinage, and whoever aids and assists in such abduction for such purpose, shall be imprisoned in the penitentiary not less than one nor more than ten years." The elements which go to make up the offense created by this section of the statute are so plainly and concisely expressed that it would be useless to attempt to make any change in the language used, with the hope of presenting them in a more concise or perspicuous form. Indeed, the section in both these respects may be regarded as a specimen of model legislation.

But two questions are made in the brief of counsel for plaintiffs in error, and they will be considered in the order made. It is contended: *First*, that the evidence fails to show that the prosecutrix was enticed and taken away from her father's house for the purpose either of prostitution or concubinage, but, on the contrary, for the purpose of marriage only. In other words, the enticing and taking away is confessed, but the purpose or intent with which it is alleged to have been done is denied. While the proofs satisfactorily show that the prosecutrix left her father's house with the intent and expectation of being married to the accused, and while it is equally clear that he professed to be taking her away for the purpose of marrying her, yet we agree with the jury and court below that that was not his real intention. On the contrary, we are of opinion that his expressed purpose to marry her was a mere subterfuge and pretense to enable him to get her completely

within his power, that he might the more certainly and effectually overcome all scruples of modesty and virtue, and finally induce her to surrender her person and honor as a willing sacrifice to his licentious passion and beastly lust. That marriage was not seriously intended on his part we think is shown by the decided weight of testimony. As a general rule, the safest way of judging one's intention about a particular matter is to look to his acts, rather than his professions respecting it, especially when they are found to be in conflict, as was the case here. The night train upon which Henderson pretended he wanted to leave did not reach the depot in Champaign City until about 1 o'clock in the night. It was in the light of the moon, and not a very long walk over to the depot, which was but a few steps from the Doyle House. Had his intentions been honorable, he would most likely have remained with his intended wife at his brother-in-law's until near train time, and then walked over to the depot; at least this would have been the more natural and appropriate course to pursue. So far as the record shows, neither the place nor time of the marriage was prearranged, nor even so much as talked about, either before or after their departure. The evidence shows that Henderson personally knew that he could not get license authorizing their marriage in this state without some one committing perjury; and the conclusion is warranted, from the evidence, that he was destitute of means to defray their traveling expenses out of the state or anywhere else. Although his bill at the Doyle House was only $1, he was not able to pay that, and was compelled to pledge his satchel and contents, consisting of a few old razors, as security for the amount, and they were still unredeemed at the time of the trial. It is reasonable to suppose his impecunious condition was known to his brother and the Shutt family; and the fact that John went over to the Doyle House Saturday morning, and called upon the prosecutrix at her room, is a circumstance tending strongly to show that he did not expect them to leave on the night train. All day Saturday, when not in or about the Doyle House, the accused was out on the streets, drinking and spreeing around as usual. At 5 in the evening, as heretofore seen, he and the prosecutrix, accompanied by John, returned to Schutt's in broad daylight, and deliberately took up their quarters there,

both occupying the same bed at night, in utter defiance of law, decency and public morals. Is there anything in all this tending to show that his object in taking her from the home of her parents was to make her his wife, rather than his kept mistress? If there is, we confess we have not been able to discover it. As before indicated, the *gravamen* of the offense is the purpose or intent with which the enticing and abduction is done; and hence, the offense, if committed at all, is complete the moment the subject of the crime is removed beyond the power and control of her parents, or of others having lawful charge of her, whether any illicit intercourse ever takes place or not. Subsequent acts are only important as affording the most reliable means of forming a correct conclusion with respect to the original purpose and intention of the accused. It is with this view we have gone so minutely into the history and details of the case as we have.

The remaining point to be considered is whether there is any material error in the court's charge to the jury for which the case should be reversed. The record shows that the court gave a general charge to the jury, on its own motion, and that no other instructions were asked or given. One of the objections taken to the charge is that the court should have explained to the jury what is meant by the terms "prostitute" and "concubinage," as they occur in the statute. The court was not asked to give an explanation of these terms, and no reason is perceived why it should have done so, in the absence of such request. At any rate, it would be going much further than we are prepared to go to reverse the judgment on that ground. The words in question are in general use, and we have no doubt that they were used by the legislature in their general or popular signification. They are in no sense words of art or technical terms; and, if it were apprehended that they would not be correctly understood by the jury, counsel should have prepared an instruction defining the words, and submitted it to the court, to be ruled upon in the usual way. It is but a fair presumption that the jury understood the words in the sense in which they are used in the statute, and that they were used by the court in its charge in the same sense. It is said that "nothing short of continuous and regular illicit intercourse would constitute concubinage," within

the meaning of the statute, and *Slocum v. People*, 90 Ill., 274, is cited in support of the statement. Conceding this to be so, it does not follow that the court erred in neglecting to give an instruction that was not asked for. With respect to the case cited, it was clearly decided right. Yet we think there are certain expressions in the opinion which were not necessary to a decision of the case, that is, applied to cases under the statute that might be suggested, would need modification. If, by the above statement, it is intended to assert that any great length of time, or long-continued illicit intercourse, is necessary to the establishment of that relation which results in concubinage, the proposition, in our judgment, is unsound. The relation which gives rise to the disreputable state of woman indicated by that term may, like that of marriage, be contracted or assumed in a day as easily as in a year. When a single woman consents to unlawfully cohabit with a man, generally, as though the marriage relation existed between them, without any limit as to the duration of such illicit intercourse, and actually commences cohabiting with him, in pursuance of that understanding, she becomes his concubine, or, as it is usually expressed in modern times, "his kept mistress," which amounts to the same thing. So we hold in this case that when the heartless libertine, by his seductive arts or other means, induces his confiding or intimidated victim, as the case may be, to abandon home and the wholesome restraints of parental authority to accompany him whithersoever he may see proper to take her, without limit as to time or place, for the purpose of submitting to his licentious embraces and ministering to his unbridled lust, he clearly brings himself within the provisions of the section of the statute we are now considering, and subjects himself to the punishment therein denounced. In short, we do not think any of the objections pointed out to the charge of the court materially affect the result, or are in any view of so serious a character as to require a reversal of the judgment. Upon the whole, we think the charge was fully as fair to the accused as it ought to have been.

In our opinion, a clear case is made out against William Henderson, and, if it be possible to make out a case of aiding and assisting in the commission of an offense, it must be ad-

mitted that it has been done in this as to the other defendants. The evidence not only shows them guilty, but demonstrates that they knew at the time they were violating the law. Judgment affirmed.

NOTE.—*Abduction, what constitutes.*—It has been held under a statute forbidding the enticing away of a female child under the age of eighteen for the purpose of prostitution that the offense is not established by proof that the defendant enticed away a girl under eighteen years of age for the purpose of illicit intercourse with himself. *State v. Brow*, 64 N. H., 577 (15 Atl., 216). And in Alabama it was decided that an Indian prisoner who escaped from the reservation, taking with him a girl eleven years old and forcibly having sexual intercourse with her, did not offend against a statute punishing the taking of a girl under fourteen years old from the person having legal charge of her for the purposes of prostitution, marriage or concubinage. *United States v. Zes Cloya*, 35 Fed. R., 493. The Minnesota Penal Code provides that "a person who inveigles or entices an unmarried female under the age of twenty-five years into a house of ill-fame or assignation, *or elsewhere*, for the purposes of prostitution or sexual intercourse, is guilty of abduction." The supreme court of that state holds that the place to which the girl must be enticed in order to come within the bar of the statute is a house of ill-fame or assignation or a place of similar character, and that to entice a girl into a dwelling-house for illicit purposes does not constitute the offense. *State v. McCrum*, 38 Minn., 154 (36 N. W., 102). Evidence that a woman employed a girl under eighteen years of age to work as a domestic in a house of prostitution was held sufficient in California to sustain a charge under a statute of that state punishing the enticing away a minor for the purpose of prostitution. The court says: "If a person is to be presumed to intend the natural consequences of his acts, it is certainly fair to presume that when a woman takes a young girl without the knowledge or consent of her parents and puts her to work as a domestic servant in a house of prostitution she intends to lead her to take up that sort of life, for it is very certain that amidst such surroundings she cannot long preserve either reputation or modesty." *Ex Parte Estrado*, 26 Pac. R. (Cal.), 209. In order to constitute the crime of abduction the child must be taken from the custody of the person having its legal charge. So where a woman left her husband and another assisted her in stealing her child from the custody of its father, the person so assisting was held to be not guilty of the crime of abduction, because under the law of Kansas, where the acts occurred, the mother and father are both legal guardians of their children.

What constitutes.—See *People v. Demousset*, 7 Am. Cr. R., 1, and note; *People v. Platte*, 6 Am. Cr. R., 1.

People v. Stokes.

(71 Cal., 263.)

ADULTERY: *Proof of marriage — Certificate — Cohabitation.*

1. ADULTERY — PROOF OF MARRIAGE — MARRIAGE CERTIFICATE — STATUTES — CONSTRUCTION.— Statutes of California, 1871–72, page 380, providing for the punishment of adultery, and making a recorded certificate of marriage proof of marriage for the purpose of the act, does not exclude other proof of the marriage.
2. EVIDENCE TO IDENTIFY PERSONS NAMED IN CERTIFICATE.— Where, in a trial of one John W. Stokes for adultery, the record of a marriage certificate introduced in evidence shows a marriage of John Stokes to *Rebecca* Gibson, the testimony of a witness that he was present when defendant was married to *Rachael* Gibson, in the year when, at the place where, and by the person by whom, the record shows the marriage was performed, is admissible as tending to identify the parties named in the certificate.
3. REAL NAMES OF PARTIES MAY BE SHOWN.— Evidence of the real names of the parties, which differ from the names in a marriage certificate, does not contradict the certificate, the minister not being required to guaranty that the persons named were married in their true names.
4. COHABITATION.— Evidence that defendant and Rachael Gibson lived as man and wife for many years, and that she bore him children, if not admissible as proof of marriage in a trial on a charge of adultery, is admissible as tending to identify the parties named in the certificate.
5. MARRIAGE — PRESUMPTION OF CONTINUANCE OF STATUS.— The *status* of marriage, having been proved, is presumed to continue, and the presumption can only be overcome by evidence of death or divorce.

Appeal from superior court of Tulare county.

Atwell & Bradley, for appellant.
E. C. Marshall, attorney-general, for the people.

McKINSTRY, J. The defendant was found guilty of the misdemeanor defined in the first section of "An act to punish adultery," which reads: "Every person who lives in a state of open and notorious cohabitation and adultery is guilty of a misdemeanor, and is punishable," etc. St. 1871–72, p. 380. The third section of the act provides: "A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this act."

At the trial the prosecution called the county recorder of Tulare, the custodian of the records, who read from his records as follows:

"John Stokes to Rebecca Gibson. This certifies that on the 22d day of May, in the year of our Lord 1859, John Stokes of Tulare county, California, and Rebecca Gibson, of the same county and state, were by me united in marriage at the schoolhouse, in the Persian district, in the said county, according to the laws of California and the customs of the church to which I belong. E. B. LOCKLEY, Methodist Preacher."

"Filed for record June 18, 1859, at 10 A. M., and recorded same day, at 2 o'clock P. M.

"E. E. CALHOUN, Recorder."

To the record the defendant objected that it was irrelevant, immaterial and incompetent because it did not appear that the John Stokes married was the defendant. When the objection was made the district attorney said: "We propose to follow this up with proof that the John Stokes mentioned in this record is the person mentioned in the indictment as John W. Stokes," and thereupon the objection was overruled.

The prosecution subsequently called a witness who testified that in the year 1859 he was present in the "Persian schoolhouse," when a marriage was celebrated by a Methodist preacher, named Lockley, between the defendant and *Rachael* Gibson. This of itself was evidence of the defendant's marriage. The statute does not exclude all evidence of marriage other than the record of the certificate. If it be suggested that the jury may have disbelieved the witness and relied on the record of the certificate as proof of the marriage, still the testimony of the witness was admissible as tending to identify the parties named in the certificate. There was also evidence that the defendant and Rachael lived together, avowedly as man and wife, for many years. Under our law, that would be evidence of a marriage in prosecution for bigamy. Penal Code, sec. 1106. Even if it should be conceded that in this action it would not be evidence of marriage, it was evidence tending to identify the defendant and Rachael Gibson as the persons mentioned in the certificate.

It is said the record of a marriage between *John* Stokes

and *Rebecca* Gibson was contradicted by evidence tending to prove that *John W.* Stokes was married to *Rachael* or *Rachael M.* Gibson. Counsel argue that in a criminal case the jury "could not infer" against the defendant that Rachael M. Gibson was the person referred to in the certificate. But the jury were not left to infer the identity of the persons from the bald fact of identity in their surnames. There was evidence tending to prove that John W. Stokes and Rachel M. Gibson were the very persons married by the Methodist preacher, Mr. Lockley, in the Persian school district, in the year 1859; and other evidence tending to prove that John W. and Rachel M. were the persons mentioned in the certificate of record by the names of John and Rebecca. The marriage was a valid marriage, even if the parties gave the wrong names to the preacher or the latter mistook the names. Men and women are conjoined in matrimony, and a defendant charged with bigamy or adultery cannot, in this country, base a defense on the ground that he or his wife was married under an assumed name, not his or her real name. In such case evidence of the real names does not *contradict* the certificate, since the minister or other person authorized to perform the marriage ceremony is not required to guaranty the fact that the persons married were married in their true names. Certainly the omission of a *middle* name or initial does not invalidate the marriage nor detract from the effect of the recorded certificate.

At common law, in cases of alleged bigamy, proof of an actual marriage, or at least an admission of former marriage, was ordinarily required. The presumption of a marriage (in favor of morality), arising in civil causes, from open and avowed cohabitation as man and wife, was overcome in cases where the person was charged with the crime of bigamy, by the counter-presumption of defendant's innocence. If the common-law rule obtain in prosecutions like the present, still evidence that the defendant and Rachel M. lived together for twenty years as man and wife, and that she bore children to him, tended to identify John W. and Rachel M. as the persons mentioned in the certificate by the names of John Stokes and Rebecca Gibson.

It is said that the prosecution, relying on the statutory evi-

dence of the marriage, should have proved that the parties had not been divorced. But the statute does not declare that a recorded certificate of marriage proves marriage only when accompanied by evidence that the parties have not been divorced. It proves that marriage and also the continuance of the marriage, "there being no decree of divorce." Aside from the inherent difficulty of proving the negative, a decree of divorce could not affect the evidence of the fact that marriage was contracted, since marriage must precede divorce. The *status* of marriage, being proved, is presumed to continue until death or divorce. This presumption can be overcome only by proof of the dissolution of the marriage. It was incumbent on the prosecution to prove a subsisting marriage at the time of the offense charged, but the subsisting marriage was proved *prima facie* by proof that the marriage was contracted.

Appellant also claims that there is no proof the defendant's wife was living at the time of his alleged cohabitation with the woman named in the indictment. In the absence of affirmative evidence the dissolution of the marriage is not to be presumed to have occurred, either by divorce or by the death of one of the parties to it. In the latter case the presumption of death is created by evidence that a party to the marriage has not been heard from in seven years. Code Civil Proc., 1963. There is no presumption of *law* that life will not continue for any period, however long. But juries are justified in presuming as a *fact* that a person is dead who has not been heard of for seven years. Roscoe, Crim. Ev., 18. Under our code the jury is bound to presume that a person not heard from in seven years is dead. But this presumption is disputable, and may, in its turn, like the presumption of continued life, be overcome by other evidence. Code Civ. Proc., sec. 1963. Moreover, there was affirmative evidence that the wife was still living at the time of the trial of this action. The witness Elizabeth Balaam testified: "She is in San Luis Obispo county." It would be to distort the ordinary meaning of language to hold that the witness said, or intended to say, her sister was buried in San Luis Obispo.

The jury were justified in holding that the defendant was a

married man. There was abundant evidence that while married he "lived in a state of open and notorious cohabitation and adultery."

Judgment and order affirmed.

SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.; MYRICK, J., concurred.

NOTE.—*Proof of marriage.*—Upon an indictment for living in adultery the declarations of the party are admissible to prove the fact of the marriage, and after proof that one charged with living in adultery was living for five years before with a man whom she admitted to be her husband, who since that time had removed, and had not since been heard of, it was held that the burden of proving he was dead rested upon her. *Cameron v. State*, 14 Ala., 546. But it has been held that in a criminal prosecution for adultery, when the offense depends upon the defendant being a married man or woman, the marriage must be proved in fact, and the admission of the party will not suffice. *State v. Timmens*, 4 Minn., 325; *State v. Rood*, 12 Vt., 396. If the marriage was in another state or country, the defendant's confession that he was married is sufficient proof of the fact. *Cayford's Case*, 7 Me., 57. But it is not enough to show a prior marriage to a woman under age, unless it be further shown that she acquiesced in the marriage after having attained her majority. *People v. Bennet*, 39 Mich., 208. While the fact that the parties lived together and acted as man and wife may be shown, the general belief or general reputation that they were man and wife is not sufficient to establish marriage. *Buchanan v. State*, 55 Ala., 154.

Adultery — What constitutes.—The crime of adultery was not indictable at common law, cognizance of the offense being taken by the ecclesiastical courts. The elements, therefore, which go to make up the offense, must be gathered from the particular statute in force in the jurisdiction where the crime is committed. The Texas statute, for instance, provides that adultery may be committed by the living together and having carnal intercourse; or, by a habitual carnal intercourse without living together. So it was decided that, while a single act of intercourse, if the parties lived together, rendered the defendants guilty, occasional acts of intercourse, if the parties lived apart, did not constitute the crime. *Mitten v. State*, 24 Tex. App., 346. And, under similar statutes, no conviction can be had against persons for "living together" and having carnal intercourse with one another, unless it be shown that they abide together in the same house as a common or joint residing place. *Bird v. State*, 27 Tex. App., 635; *State v. Gartrell*, 14 Ind., 280; *Clouser v. Clapper*, 59 Ind., 548. However, if it be shown that two persons live together for a single day in adultery, intending a continuance of the connection, the offense is complete, although the connection may be broken off. *Hall v. State*, 53 Ala., 463. To render the man guilty of adultery the consent of the woman is not necessary. *State v. Donovan*, 4 Am. Cr. R., 25, and note. One may be convicted of adultery, though the offense be bigamy as well. *Hildreth v. State*, 19 Tex. App., 195. And it

is no bar to conviction that the evidence showed the defendant to have been guilty of rape. *State v. Summers*, 98 N. C., 702. But a defendant upon trial for rape, where the indictment also charges facts amounting to adultery, cannot be convicted of adultery, for the reason that a person charged with one crime cannot be convicted of another and different crime, unless the allegations necessary to constitute the greater are also sufficient to constitute the lesser. *State v. Hooks*, 69 Wis. 182.

The carnal act to constitute adultery must be voluntary. If, therefore, it is so compelled by force or mistake of the person, there is no offense. So when a formal marriage is celebrated, under license, by an officer having authority, and it appears that the man has another wife living, the marriage is unlawful, but the woman is not criminally guilty of adultery unless it is shown that she had knowledge of the former marriage, or continued the cohabitation after acquiring knowledge. *Vaughn v. State* (Ala.), 7 Am. Cr. R., 58. The offense is not condoned by the subsequent marriage of the guilty parties. *Fox v. The State*, 3 Tex. App., 329. A man and a woman jointly indicted, the woman having a husband alive, cannot set up as a defense that such husband had married again, and that on that account they supposed they could lawfully intermarry, and that they were so advised by the magistrate who married them, and that relying on his advice they married in good faith. *State v. Goodenow*, 65 Me., 30.

Evidence.— The admissions of the *particeps criminis* are not admissible to prove adultery against a co-defendant. *State v. McGuire*, 50 Ia., 153. Nor is a conviction of bigamy in another state evidence on which to found a charge of adultery. *Wilson v. Wilson*, Wright (Ohio), 128. Evidence of improper familiarity between the parties accused a short time prior to the act charged is admissible. *State v. Wallace*, 9 N. H., 515. The birth of a child which might have been begotten about the time of the adulterous act charged is immaterial. *Commonwealth v. O'Connor*, 107 Mass., 219. The reputation of the woman for chastity is competent. 129 Mass., 474. Under indictment charging one act, evidence of other acts at different times and places has been held to be inadmissible. *State v. Bates*, 10 Conn., 372; *Commonwealth v. Thrasher*, 11 Gray (Mass.), 450. But see *Commonwealth v. Lehey*, 14 Gray (Mass.), 91.

GOINS v. STATE.

(46 Ohio St., 457.)

ACCOMPLICE AND ACCESSORY: *Conviction of principal — Number of challenges — Opinion of juror — Evidence — Self-defense — Sudden attack by mob.*

1. JURY — NUMBER OF CHALLENGES.— A defendant in a criminal trial is only entitled to two peremptory challenges unless he is on trial for a capital offense, and the facts that he had been indicted for murder in the first degree; that a jury of thirty-six had been summoned and were in attendance for his trial; that a *nolle* was then entered as to

the charge of murder in the first degree; and that a jury to try him for murder in the second degree was being impaneled from the thirty-six jurors so in attendance,— did not enlarge his right in this respect.

2. OPINION OF JUROR AS TO GUILT OF ACCUSED.— A juror who states on his examination that he has formed an opinion on a matter affecting the guilt of the defendant from having heard the circumstances of the crime related by one who claimed to know them may nevertheless be competent to sit as a juror if he says on oath that he believes he can render an impartial verdict in the case, and the court is satisfied he can do so.

3. ACCOMPLICE TRIED FOR MURDER ALTHOUGH PRINCIPAL CONVICTED ONLY OF MANSLAUGHTER.— One indicted as an aider and abetter of the crime of murder may be placed on trial, convicted and sentenced for that offense, notwithstanding the principal offender had been tried previously and convicted and sentenced for manslaughter only.

4. DECLARATIONS OF CO-DEFENDANT.— On the trial of one of several defendants jointly indicted for an offense, the declarations of a co-defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, are admissible when a *prima facie* case of conspiracy has been made.

5. CRIES OF MOB ADMISSIBLE.— On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it was formed, though made before the deceased joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made.

6. RIGHT TO RESIST ATTACK.— Where a number of persons, in the exercise of their lawful rights, have reason to apprehend an immediate, violent and criminal assault upon them as a party from superior numbers, it is not unlawful for them to combine for their just defense.

7. ACTS AND DECLARATIONS OF MOB ADMISSIBLE.— Where one is on trial for homicide, and is defending on the ground that the killing was done in repelling the attack of a mob, he has a right to prove, and have the jury consider, the violent, malicious and criminal acts and declarations of the mob.

8. INDEPENDENT FIGHT.— In the absence of proof of a conspiracy, one who is present when a homicide is committed by another upon a sudden quarrel, or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act.

Error to the Court of Common Pleas of Allen County.

At the April term, A. D. 1888, of the Allen county court of common pleas, William Goins, the plaintiff in error, was jointly indicted with three others for aiding and abetting one Frederick Harrison in the deliberate and premeditated mur-

der of Patrick Hughes, on the night of April 2, 1888. At a later period of the term the principal was tried for murder in the first degree, but convicted and sentenced to the penitentiary for manslaughter only. At the following October term of the same court the plaintiff in error was placed upon trial, convicted of murder in the second degree, and sentenced to the penitentiary for life. During the trial he, by his counsel, excepted to certain rulings of the court which were embodied in a bill of exceptions that sets forth all the evidence, the charge of the court, and all the other proceedings in the case, from which it appears that the killing occurred on Main, one of the principal streets in the city of Lima, Ohio, on the evening of the day of the spring election for the year 1888; that during the evening that street, and the saloons along it, were thronged with men, waiting to learn the result of the election, among whom were the plaintiff in error and the four men who were indicted with him, all of whom were colored. One of the colored men, Frank Crowder, was intoxicated, and was about to engage in a fight with a white man named Casey, but was held back, and taken away by Goins. After this these colored men walked back and forth along Main and other streets, going in and out of the saloons, not always in a body, and at times one or more of them in company with one or more of some three or four other colored men, who were about during the evening. No further quarrels were had, though some of the colored men used expressions indicating animosity towards the "Irish boys," as the white crowd was called. About 8 o'clock, P. M., as the colored men went north on Main street, they were followed by a crowd of men, which, in the evidence, is called the "Irish boys." This crowd, expressing dislike towards the colored men, kept increasing as it progressed. It soon began gathering stones, and, overtaking the colored men, the fight began, without any quarrel or interchange of words between the parties. Patrick Hughes joined the white crowd, but was not shown to have done any act of violence. There was no evidence of any ill will on the part of the colored men towards him personally, or towards any other member of the white crowd, except Casey, and no other evidence of ill will towards him except what may be inferred from the affray between the

colored man Crowder and him in the early part of the evening. Nor was there any evidence of any purpose or conspiracy by the colored men to do any injury to any particular individual of the white crowd. Whatever feeling the colored men expressed throughout the evening was towards the Irish generally, by whom they were outnumbered in the proportion of about twenty to one. Any further facts necessary to understand the questions decided will be found in the opinion of the court.

James L. Price and *J. W. Halfhill*, for plaintiff in error.
Isaac S. Motter and *T. D. Robb*, for the state.

BRADBURY, J. The plaintiff in error, William Goins, was indicted for aiding and abetting murder in the first degree. The day set for his trial having arrived, there was in attendance a panel of thirty-six jurors, from which a jury to try him was to be selected as the statute in such case provides. Thereupon the prosecuting attorney, by leave of court, entered a *nolle prosequi* to the charge of murder in the first degree. The court then proceeded to impanel from the thirty-six jurors in attendance on the case a jury for his trial. To this no objection was offered; but, after plaintiff in error had peremptorily challenged two jurors, and his challenge of Christian Stettler had been overruled, as will hereafter appear, he peremptorily challenged him; the court, however, holding the prisoner to be entitled to only two peremptory challenges, overruled this challenge, and Stettler sat as a juror in the case; to all of which the plaintiff in error excepted. The right of peremptory challenge is to be determined by the provisions of section 7272, Revised Statutes, as amended in 1888 (84 Ohio Laws, 86), together with those of section 7277. Section 7272, as amended, reads: "Every person indicted . . . [for a capital offense] . . . shall be entitled to challenge sixteen of the jurors peremptorily." 84 Ohio Laws, 86. And section 7277 provides that, "except as otherwise provided, . . . every defendant may peremptorily challenge two of the panel." It is only "otherwise provided" in capital offenses; so that, except in capital cases, the defendant in a criminal case is only entitled to two peremptory challenges.

After the *nolle* had been entered to the deliberation and premeditation charged in the indictment, the prisoner did not stand indicted for a capital offense. The charge against him was reduced to aiding and abetting murder in the second degree, and his right of challenge was governed by section 7277, Revised Statutes. That the jury had been drawn and summoned under section 7267, Revised Statutes, made no difference in this respect. He may have been entitled to be tried by a jury drawn and summoned in the usual way, if he had so demanded; but, whether he was or not, as he did not choose to exercise the right, his neglect to do so did not enlarge his right to peremptory challenges, this right being determined by the offense charged against him, and not by the manner in which the jury had been brought in. In this ruling of the court we see no error.

2. Christian Stettler was called and examined touching his qualifications as a juror in the case. He stated that the father of the deceased had talked with him about the killing, and went into the particulars of the transaction as if he knew the facts; that he had also read of the case in a newspaper, and had formed an opinion respecting the guilt of the principal. Thereupon the defendant challenged him for cause. The court then, as the statute directs, inquired further of the juror, who stated that he believed he could render an impartial verdict in the case, and that he could do so even if the principal were on trial. The challenge was then overruled, and the prisoner excepted. In respect of challenge for cause, section 7278, Revised Statutes, as amended (81 Ohio Laws, 54), provides: ". . . If a juror has formed . . . an opinion, . . . the court shall thereupon proceed to examine such juror as to the grounds of such opinion; and, if such juror shall say that he believes he can render an impartial verdict notwithstanding such opinion, and if the court is satisfied that such juror will render an impartial verdict on the evidence, it may admit him as competent to serve in such case as a juror." The court did not expressly find that it was "satisfied" that the juror could render an impartial verdict in the case, but the fact of admitting him as a juror must be taken to include, by necessary implication, a finding by the court that it was satisfied of his impartiality. Upon no other ground could the court le-

gally admit him as a juror. The trial court had before it the juror and his statements. We have these statements embodied in a bill of exceptions, from which it appears not only that the juror had read an account of the case in a newspaper, but had received from the father of the deceased a narrative of the circumstances of the homicide, and had at one time formed an opinion respecting the guilt of the principal. Under that state of fact, to admit him as a juror was an extreme application of the discretion permitted by the statute; yet, standing by itself, it is not such an abuse of that discretion as to warrant a reversal of the judgment on that ground alone; but, in view of the difficulty nearly all men experience in getting rid of opinions based upon hearing a detail of the circumstances of a transaction by one who professes to know them, it might well become an important factor in the case, were we reviewing the whole record, to ascertain if a fair trial had been had and substantial justice done.

3. The principal in the homicide having been convicted and sentenced for manslaughter, the prisoner moved the court to order that he should not be put upon trial for a higher degree of offense; and, in support thereof, introduced the record of the trial, conviction and sentence of the principal. The motion was overruled, and the prisoner tried and convicted of murder in the second degree. Whether this question could be raised *in limine* by a motion we need not stop to inquire, for the record discloses the result of the trial of the principal, and the motion for a new trial brought the question again before the court. The precise question whether, in the case of a crime admitting of degrees of guilt, where the principal offender has been tried and convicted of one of the lower degrees, one indicted with him as an aider and abettor can afterwards be tried and convicted of one of the higher degrees of the crime, has never been decided by this court; but cases decided by it can be found, which, in their principle, determine the question. The statute relating to aiders and abettors provides that "whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." R. S., § 6804. Under this statute, or others like it in this respect, aiding, abetting, or procuring a crime to be committed, has been held to constitute a

substantive offense, and that the aider, abettor or procurer might be tried before the principal offender. *Noland v. State*, 19 Ohio, 131; *Brown v. State*, 19 Ohio St., 496; *Hanoff v. State*, 37 Ohio St., 178. If, as has been held, this crime is a substantive one, for which the offender may be tried and convicted before the conviction of the principal, it necessarily follows that he should be convicted of that degree of the crime which the evidence against him establishes; and, if this may be done before, no reason is apparent why it should not be done after, the trial of the principal; and the circumstance that the principal offender, through failure of proof or caprice of the jury, had been convicted of a lower grade, or even acquitted, before the aider or abettor was put on trial, cannot affect the question of the guilt or innocence of the latter. The degree of the guilt of the aider and abettor, as well as the question whether he is guilty at all, is to be determined solely by the evidence in the case, and the record of the trial of the principal is not competent evidence for either of those purposes. We therefore hold that it was not error to place the prisoner on trial for a higher grade of the offense than that of which his principal had been convicted.

4. The court, on trial, admitted in evidence, over the objection of the plaintiff in error, certain declarations of one Samuel Thomas, who was jointly indicted with him, but not then on trial. The exception to the ruling of the court in admitting evidence of these declarations, as to all except two of them, may be disposed of on the ground that they were made in the presence of, or so near to, the plaintiff in error that he must be held to have heard them. The two others having been made under similar circumstances, only one of them will be noticed,— that testified to by Wallace Standish,— which is as follows: "If we get them, we will give them hell." Its admissibility depended upon its having been made by a co-conspirator in furtherance of the common purpose. Much latitude is necessarily left to the trial court in determining whether or not there has been introduced sufficient *prima facie* proof of a conspiracy to admit evidence of the acts and declarations of one claimed to be a co-conspirator with the defendant on trial. In the case at bar there was some evidence of a common purpose among the colored men.

Whether it extended beyond a purpose to exercise the right to pass along the public streets of the city may admit of grave doubt; but the determination of that question is not necessary to determine the question of the admissibility of the evidence. There being some evidence of a common purpose, the declarations of a co-conspirator in furtherance of it was competent evidence, and the court did not err in admitting it to go to the jury. Counsel contend that, to render the acts and declarations of a co-conspirator competent evidence, the indictment should have, in express terms, charged a conspiracy. This is true where the act of conspiring is itself the crime charged; but, where some other act is the real offense, and the conspiracy is a common purpose leading to the commission of the main criminal act, a conspiracy need not be alleged in express terms, and, if any allegation in respect thereof is at all necessary, the charge in the indictment that it was jointly done is sufficient for that purpose.

5. The plaintiff in error offered to prove certain cries or exclamations of the white or Irish crowd, by which, as he claimed, he and his fellow colored men were subsequently attacked. They were excluded, and he excepted. It was the night after the April election, and a large crowd of people, mostly white, had assembled about and between the post-office and the De La Flora saloon, two well-known points in the city of Lima. Some colored men, not shown to have exceeded ten or twelve, were about in the crowd, some four or five of whom had been passing along the street, in and out of the saloons and through the crowd, and by something in their bearing or reported sayings seem to have excited the animosity of the white portion of the crowd. One of them was drunk, and perhaps one or more of the others showed some slight effects of liquor. A policeman had ordered them to go home. They started north on Main street, and had gone a short distance, estimated from twenty to thirty yards, when a party, estimated to contain from twenty to thirty or more young white men, mostly Irish, started after them. At this point plaintiff in error offered to prove that some of this party cried out: "There go the black sons of bitches! Let's follow, and give them hell." Daniel Steinour then testified that he met the colored men, four in number, about a square further north,

near what he called "Rush's tin-shop;" that behind them was the white party, increased to from fifty to seventy-five in number, some of whom were gathering stones; that the white party went on north at a pretty lively gait, and soon after he saw the crowd moving back and forth among themselves and heard the rattle of stones. The plaintiff in error proposed to prove by the witness that cries, similar to those he before offered to prove, came from the white party as they were gathering the stones. In both instances above referred to, the evidence was rejected by the court, and exceptions taken. The state claims in argument that the first cries occurred too long before the homicide to be admissible, and the last after it was in fact committed, and that they, on those respective grounds, were properly rejected. The claim is not borne out by the bill of exceptions. No doubt there is some uncertainty respecting the exact order in which events occurred that night, which is greatly intensified as we approach closely the beginning of the fight; but there is abundant evidence tending to show that these cries were made before the killing, and near enough to it to explain the purpose, and reflect upon the attitude, of the white party at the moment of the attack. It is also claimed by counsel for the state that the deceased, when these cries were made, had not yet joined the mob, and that there was no evidence of a conspiracy between him and the balance of the white party, or even between the members of the white party, to injure or wrong the colored men. It is probably true that when the first set of cries were made the deceased had not joined the crowd, but did so about the time the last set were uttered; for it seems entirely clear that he, with some ten or fifteen more men, rushed out of Manning's saloon and joined it just before the conflict began. The claim that there was no evidence of a common purpose among the white crowd to wrong the colored men is not supported by the bill of exceptions. The evidence that there was such a purpose can be gathered from almost every page of it. The colored men went into Manning's saloon, where the deceased at the time was. They remained a moment, then went out, and were at once followed by the deceased and ten or fifteen others, nearly all of whom were in the saloon, and he was one of those who, it is claimed, circled round and hemmed in the colored men a

moment before the fight began. It may be he was merely an innocent spectator, but the circumstances justify the inference that he had grasped the purpose of the crowd and joined in its execution; but, whether he had or not, it cannot affect this question of the admissibility of the cries of the mob. The colored men could not be required to single out and separate friend from foe. The claim of the plaintiff in error was that he and his fellows saw behind and around them a mass of men, fifteen to twenty times their number, apparently hostile; and he had a right to show to the jury the desperate nature of the situation, as it appeared to him and them, and in this view of the question it is wholly immaterial whether or not the deceased had joined in the alleged purposes of the mob or was there merely as an innocent spectator; for his presence, as well as that of every other innocent spectator, swelled the numbers of the white party that was menacing the colored men. The colored men, from their standpoint, had a right to treat the white party as a unit; to show to the jury its origin, its purposes and its appearance. How can this be done but by proof of the acts and declarations of its members? The cries of a mob have been admitted in evidence from an early period of our law, whenever it was material to show its purposes and temper. Indeed they are in the nature of verbal acts, accompanying and explaining the movements of the mass, and have little or no analogy to mere uncommunicated threats of an individual, with which counsel for the state insist they should be classed. In this case they were made so short a time before the attack which plaintiff in error claims was made on the colored party by the mob, that they reflect in a most important manner upon the attitude of the white party at the moment the attack was made, and upon that ground were also admissible. The nature of the transaction required the fullest investigation of every circumstance that led to the creation of the white party, and by which its existence and progress can be traced to its culmination. We think the rejection of this evidence was error.

6. Counsel for plaintiff in error prepared and presented to the court certain special instructions, which he requested to be given to the jury. The court declined to give any of them and proceeded to charge the jury. To this refusal of the court

to charge the special instructions requested to certain specified parts of the charge, and to the charge as a whole, the plaintiff in error excepted.

The first proposition of the first request reads that, before the jury can consider the acts and declarations of co-conspirators, made out of the presence of the defendant on trial, it must appear "that there was formed by the parties a combination or conspiracy for the purpose of the committing of the crime charged, or some unlawful act of similar kind. . . ." This proposition states the law too favorably for the plaintiff in error. The authorities are conclusive that the conspiracy is sufficiently shown when it is made to appear that the common purpose was to commit an unlawful act quite dissimilar from the crime in fact committed, if the latter crime was one that might have been contemplated, reasonably, as likely to result from the attempt to commit the act intended; and some respectable authorities go yet further, and hold the conspirators responsible for an accidental homicide of a co-conspirator, when committed while he is engaged in advancing the common unlawful purpose. 4 Amer. & Eng. Cyclop. Law, 619, and authorities cited. But the first proposition is sufficient to justify the court in refusing this request.

The second proposition requested was not, in view of the evidence, of sufficient importance to make its rejection error.

7. The third and fourth propositions requested by the plaintiff in error, and refused by the court, are as follows: *Third request.* "It is not sufficient to establish the guilt of defendant Goins of aiding and abetting Harrison in the commission of the homicide charged in the indictment that he was present on the scene with others where the alleged killing was done, for he may have been present, not knowing that any crime was about to be committed; and if he was there not in furtherance of an understanding or common purpose to commit some unlawful act, and was in company with Harrison, without knowledge that Harrison or any of his co-defendants contemplated the commission of an offense, he is not responsible for the acts of Harrison or his other co-defendants, if he (Goins) did not participate in the commission of the offense charged." *Fourth request.* "Again, if the only purpose made known to Goins prior to the killing of Hughes, and the

only one contemplated or entered upon by him, was a defense of himself and his companions from an attack by a party of men superior in numbers and strength, which had been threatened, and neither the defendant nor his comrades were to be aggressors, or attack the opposing party, then such common purpose of defense merely was not unlawful and criminal."

The two preceding propositions are closely related to each other, and will be considered together. Had no evidence been given by the defense, but, instead, the case submitted to the jury on the evidence of the state alone, yet that evidence was fairly susceptible of a construction that made those two propositions applicable. When, from that evidence, we consider the great numerical superiority of the white crowd, the conduct of the colored men and the circumstances of the attack, together with the absence of any testimony showing any ill will on the part of the colored men towards the deceased or any other individual of the white crowd, unless towards Casey, with whom Crowder had quarreled earlier in the evening, and that there was no evidence of a purpose to harm him, we at once see strong grounds for Goins to contend that the purpose of himself and his comrades, in the light of that evidence alone, was none other than that assumed in those propositions. Therefore those propositions were pertinent, and should have been given to the jury, and the jury, on that evidence alone, aided by pertinent instructions, might well have found a verdict in favor of plaintiff in error. When, however, we consider the evidence for the defense, the necessity is at once apparent that these propositions, or similar ones, with even greater elaborations, should have been given to the jury to enable them to determine the issue intelligently by applying correct and pertinent legal propositions to the evidence before them. This evidence sufficiently appears in another part of this opinion, and will not be repeated here. The court erred in refusing to charge these two propositions, and, upon a careful examination of the whole charges, we find no substitute for them.

8. *Fifth request.* "And, further, if the defendant Goins and his co-defendants were in the exercise of their lawful rights in passing along the streets at the time of the conflict wherein Hughes was killed, and neither of the accused par-

ties began the affray or attack, then the defendant, and those accused with him, had the right to repel the assault with such force as was necessary to do so, and had a right to defend themselves from danger to life or great bodily harm; and if they were suddenly assailed, or surrounded by superior numbers, armed with weapons dangerous to life, or calculated to do great bodily harm, the defendants had a right to stand on their defense, to repel force by force, even to the taking of life, if they believed, and had reasonable grounds to believe, that it was necessary to do so to prevent either death or great bodily harm to themselves, and if necessary they may use such weapons as will accomplish the purpose."

This proposition ought to have gone to the jury. It was applicable to the evidence given in behalf of plaintiff in error. That evidence tended to prove that the plaintiff in error and his comrades were passing along the street in a lawful manner; that they were pursued by a mob which outnumbered them more than twenty times; that the mob overtook, surrounded, and attacked them with stones in a most violent and savage manner, and that what they did was in their lawful defense against this violence. The evidence in the case called for a full and careful statement of the principles of the law of self-defense, yet only six or eight lines of a long and elaborate charge were directly devoted thereto, and they were followed by a statement considerably longer, and much more explicit, limiting and qualifying the right. Subsequently, directions were given to the jury with a view to aid them in applying the law of self-defense, as it had before been laid down to them, to the evidence in the case; but we think these directions were not as full and explicit as the evidence and the circumstances of the case required. However, had they been sufficiently full and explicit in this respect, yet they were prefaced by a statement that substantially deprived plaintiff in error of their benefit. This statement required the jury to find that the plaintiff in error and his comrades "were without fault, and in the peace of the state," before they would be clothed with the right of self-defense. Ordinarily this language might have been a harmless rounding up of a sentence; but when we see that evidence had been given from which the jury might have found that at least one of these colored men was drunk; one

or more of the others slightly in liquor; that their conduct was regarded as insolent and offensive; that they had been ordered to go home by a peace officer,— they may have well supposed that colored men so conducting themselves were not free from fault and not in the peace of the state, and therefore not clothed with the right of self-defense. The jury should have been made to understand that it was not the province of the white crowd to prescribe and regulate the conduct and demeanor of the colored men, though one or more of them may have been drunk and insolent, or all displayed a spirit of offensive bravado; that, notwithstanding such conduct, the colored men, while in the exercise of their lawful right to pass and repass along the streets of the town, were still clothed by law with the right to defend themselves from the malicious and violent attack of a numerous mob. We have carefully read the evidence and can only account for the verdict in this case upon the ground that the jury misconceived the law in this or some other respect. In this connection, and in the light of the evidence, we think the following portion of the instructions given to the jury was prejudicial to the plaintiff in error: "That the Irish boys, white people, or whoever they may have been, who are claimed to have been connected in the conflict in which Patrick Hughes was killed, as the antagonists of the prisoner, and those with him or in any controversies prior to that time, are not now upon trial, nor are their acts, sayings or doings, however wicked or criminal, under investigation in this case, with a view to determine the extent of the guilt of such parties." It is true the "Irish boys" were not upon trial in the sense that the jury could convict them, but they formed a party hostile to the colored men, and the more violent, malicious and criminal their conduct was made to appear, the more complete was the justification of the colored men. It was, as appears by the bill of exceptions, the central purpose of counsel for plaintiff in error to exhibit to the jury the conduct of the white crowd in its most offensive and criminal aspect. The great mass of his evidence had been directed to that sole end. The justification of the means used by the colored men to repel the attack depended to a great extent upon its violent and savage character, and any admonition to the jury tending to divert

their attention from this feature of the case could not be otherwise than highly prejudicial to the defense.

9. The sixth request was as follows: "If you, the jury, find from the evidence that Frederick Harrison, named as principal in the indictment, did take the life of Patrick Hughes, but did it in a sudden quarrel, or in the heat of passion, his offense would be but manslaughter; and if you further find that the defendant William Goins did no overt act and took no active part in the killing, but was merely present when the quarrel arose or fight began, you cannot in such case find him guilty as an aider and abettor of Harrison." In view of the evidence this charge should have been given. No doubt there may be such a crime as aiding and abetting manslaughter. This court has so held (*Hagan v. State*, 10 Ohio St., 459); but each case must stand upon its own circumstances, and in the case at bar there was no evidence that the plaintiff in error said a word or did an act, at the time the fight began or was in progress, that could be construed as aiding or abetting Harrison in taking the life of the deceased; so that if that act of Harrison was the result of a sudden quarrel, or done in the heat of passion, instead of being done pursuant to a prior conspiracy, the plaintiff in error had no criminal connection with it, and was entitled to have the jury charged accordingly, and the refusal was error.

10. Misconduct of the jury is alleged, and the affidavits of the jurors offered to prove it, from which it appears that the jury at first stood six for assault and battery, and, as a compromise, the six agreed to vote for manslaughter, and the vote then stood six for manslaughter and six for murder in the second degree; that it was then agreed to prepare twenty-four ballots,— twelve for manslaughter and twelve for murder in the second degree,— place all of them in a hat, and each juror draw one ballot therefrom, and render a verdict either for manslaughter or murder in the second degree, as the majority should appear; that the first drawing was a tie, but the second one resulted in eight ballots for murder in the second degree and four for manslaughter, and thereupon, according to the agreement, a verdict was rendered for murder in the second degree. There was no other evidence of this misconduct than the affidavits of the two jurors; for, while an affidavit

of the prisoner was offered in corroboration of them, it is apparent on its face that his statement was only hearsay, and for that reason properly rejected. There only remained in proof of the alleged misconduct the two affidavits of the two jurors. This was ample proof, in the absence of evidence to contradict them, if the evidence was competent at all. The court held them not competent, which consequently left the allegation of misconduct without proof. The almost unbroken current of authority supports this holding (*Kent v. State*, 42 Ohio St., 426; Thomp. & M. Juries, 539); and thus it may appear to all the world, by the subsequent statements of the jurors, that the liberty of a citizen has been gambled away in a jury room, yet the court is powerless to interfere, because the policy of the law is: *First*, to seclude the jury; and *second*, not to allow their evidence to impeach their verdict. As a general rule, no doubt, this doctrine is founded on the soundest principles of public policy, otherwise the rendition of a verdict, in nearly every jury trial, would become merely the beginning of a new controversy over the mode of its rendition, endangering the stability of verdicts and the security of judgments rendered thereon; and the time and attention of courts would be wasted in investigating alleged misconduct of jurors, frequently of the most frivolous character. But a case like this at bar strains the principle to its utmost tension, and suggests a doubt whether there may not be found a carefully guarded exception to a rule, the universal application of which may present a spectacle so discreditable to our jury system. It may be said there is a remedy afforded in the power of the court to grant new trials on the ground that the verdict is not supported by, or is contrary to, the manifest weight of the evidence. This is no doubt true to some extent, but its inefficiency is apparent to all who are familiar with the rules of law and the practice of courts on the subject of new trials, and is especially exemplified by the case at bar. We do not care, however, to press the question further. Its determination is not necessary to a decision of the case, but, being one of the questions presented by the record, we give it this passing notice. Judgment reversed.

NOTE.— *Who are principals.*— It appearing that defendant struck deceased with an axe, and that another shot him, and that, deceased having run some distance and fallen, neither went to his assistance, it was proper

to instruct that defendant might be found guilty as principal, whether death was caused by the axe or the pistol, as he was guilty as principal if he was present aiding and abetting. *Morris v. Com.* (Ky.), 11 S. W. R., 295.

A person may be guilty of a murder actually perpetrated by another, if he combines with such other party to commit a felony, engages in its commission, and death ensues in the execution of the felonious act. *State v. Barrett*, 40 Minn., 77.

If two or more persons, having confederated to attack and rob another, actually engage in the felony, and in the prosecution of the common object the person assailed is killed, all are alike guilty of the homicide. *Id.*

Aiding and abetting — Indictment, etc.— Penal Code of California, section 971, abrogates the distinction between an accessory before the fact and a principal in felony, and provides that they shall be prosecuted as principals, "and no other facts need be alleged . . . against such an accessory than are required . . . against his principal." By section 950 an information must contain "a statement of the acts constituting the offense in ordinary and concise language," and, by section 960, is not insufficient by reason of defect in matter of form. *Held*, that an information alleging that defendant did encourage and advise, and also that he did aid, assist and procure one G. to commit a felony, but without alleging whether he was present at its commission, is sufficient, as it shows facts constituting defendant an accessory at common law, and hence a principal under the statute. *People v. Rozelle*, 78 Cal., 84.

Under Code of Iowa, section 4314, which provides that "the distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, must be hereafter indicted, tried and punished as principals," an accessory is properly charged as principal in an indictment; and evidence is admissible to show that he simply aided and abetted in the commission of the crime. *State v. Pugsley*, 75 Iowa, 742.

Defendant was indicted under the provisions of the Code of Georgia, section 4489, prescribing a penalty for such offense, as an accessory after the fact for buying and receiving goods stolen by two others, one of whom had fled, the other having been acquitted on the ground of infancy. *Held* that, before the defendant could be convicted, it was necessary for the state to show that the principal, whether taken or not, is guilty, and the acquittal of one of the principals on the ground of infancy does not relieve the state of this burden. *Edwards v. State*, 89 Ga., 127.

Accessory after the fact for receiving stolen goods.— The indictment contained no allegation as to who had stolen the goods, but charged simply that defendant had bought the goods of two persons named, one of whom had fled the state, and the other had been acquitted of larceny on the ground of infancy. *Held*, that the indictment was insufficient to support a verdict of guilty. *Id.* But it is held in Kentucky, under a statute providing that accessories before the fact shall be liable as principals, that it applies only to offenses under the common law, or, where created by statute, to all who are guilty, and, under the statute providing for the punishment of a woman concealing the birth of her bastard child, aiders and abettors cannot be punished. *Frey v. Com.*, 83 Ky., 190.

Evidence against principal.— One cannot be convicted as an accomplice where there is no evidence that the principal committed the crime. *Leonard v. State*, 77 Ga., 764.

Withdrawal of plea of guilty by principal.— Where the principal enters a plea of guilty, the trial of the accessory before the fact may proceed, and the withdrawal of his plea by the principal during the trial of the accessory does not affect the validity of his conviction. *Groves v. State*, 76 Ga., 808.

Acquittal of principal.— The guilt of the alleged principal is, under the common law, essential to the conviction of one indicted as an accessory before the fact. Where an indictment is against three persons, charging each of them with murder as principal in the first degree, and the others as his accessories before the fact, as at common law, and one of them is put on trial, and the jury finds him guilty under a count charging him as accessory, and subsequently, but before the entry of the judgment on this verdict, the one charged as principal in the count mentioned is tried and acquitted, judgment cannot be entered against the one found guilty as an accessory. *Bowen v. State*, 25 Fla., 645.

Corroboration of accomplice.— *State v. Deitz*, 7 Am. Cr. R., 22 and note; *State v. Maury*, id., 25 and note.

As to declarations of co-conspirators and the like, see *The Anarchist Cases, Spies v. People*, 6 Am. Cr. R., 570.

State v. Harrell.

(107 N. C., 944.)

Affray: *Self-defense — Instructions.*

1. Evidence.— On an indictment for an affray for fighting in a public place, the testimony of a party thereto of his apprehension of danger to himself and sons when he saw the other parties two miles away, and of his grounds for such apprehension, is immaterial, as it does not show that he or his sons fought only in their own defense.
2. Same.— Evidence that the fight terminated when the other parties were wounded and fled, that the father and sons pursued them, and shouted to the wounded men "to stop, and shoot it out like men," was competent, as showing their willingness to fight and prolong the conflict.
3. Instructions.— It was sufficient for the court to charge that they had the right to fight in their own defense, and in defense of each other, without going into details in respect thereto.

(Avery, J., dissented.)

Appeal from superior court, Mitchell county; Bynum, Judge.

The evidence tended to prove that William Cox, now deceased, and James Sivige, on one side, and the appellants, on the opposite side, engaged in a dangerous fight with guns and

pistols. All of the parties except Cox were indicted for an affray, and pleaded not guilty. The appellants contended that they fought only in defense of themselves, and did no more than they might lawfully do in that respect. On the trial there was evidence tending to prove that all the parties fought willingly, the appellants successfully, and wounding both their opponents. The appellant Clingman Harrell was examined as a witness on his own behalf and that of his co-appellants, who are his sons. He was examined at length, and particularly he offered to testify that the parties fought at the house of Neely Campbell; that he first saw Cox and Sivige two miles from that place, going in the direction of it; that he apprehended their purpose in going up that way, brandishing their pistols. He further proposed to give what knowledge he had, and the grounds of his apprehension of their purpose; to state that, in the forenoon of same day,—the day of the fight,—he saw them and others flourishing their pistols; that his brother informed him that they threatened his sons, and were pursuing them to kill them; that, in consequence of this information and what he saw, he hastened to find his sons, to prevent a difficulty, and save his boys. The solicitor for the state objected to the admission of the proposed evidence. The court sustained the objection and the appellants excepted. The appellants further proposed to ask the witness this question and obtain an affirmative answer to the same: "When you fired a shot, did you believe you and your boys were in danger of great bodily harm or death?" Objection by solicitor sustained by the court, and exception by the appellants. There was a verdict of guilty, and judgment thereupon against the defendants, from which they all except Sivige appealed to this court.

Mr. W. H. Malone, for the defendants.
The Attorney-General, for the state.

MERRIMON, C. J. The testimony proposed by the appellants, and rejected by the court, was irrelevant and immaterial. They and others were indicted for an affray for fighting together in a public place, to the terror of the good citizens of the state thereabout. The evidence rejected could not prove that they did or did not so fight, nor could it prove that they

fought only in their own defense. The apprehensions of the witness and the grounds of them did not enter into and make up an element or give quality thereto of the offense, nor did these at all relieve him and his sons from guilt, if they fought as charged. Evidence of what was done or attempted to be done or said, or what was not done or not said, by the parties at the time of the fight, just before it begun, during its progress, and just at its close,—such things as made part of the *res gestæ*,—was pertinent and relevant to prove the offense charged, or the innocence of the parties. As to that offense, no matter what may have been their intent, or the provocation to them, or their fears or apprehensions if they fought otherwise than on the defensive, such evidence might be pertinent and important in some classes of cases. This is not one of them. *State v. Norton*, 82 N. C., 628; *State v. Downing*, 74 N. C., 184. Nor could the belief of the witness, in the course of the conflict, that he and his sons were about to be shot or suffer great bodily harm, prove that he and they fought only in their own defense. However fiercely and aggressively he might have joined in the fight, he might have had such belief, but this would not prove that he was on the defensive. The surrounding facts and circumstances, not his simple belief, constituted evidence to show that he fired his gun, not as an active aggressive participant in the fight, but only on the defensive.

A witness for the state testified, the appellants objecting, that the fight terminated when Cox and Sivige were wounded and fled; that two of the appellants were going pretty fast in the direction of them, when he stopped them; that one of them had his gun, and they cried out after the wounded men "to stop and shoot it out like men." This evidence was competent, certainly as to the appellants who pursued the wounded men, because it tended to show their willingness to fight, and to prolong the conflict, though their adversaries were disabled.

The appellants requested the court to instruct the jury specially that a man has a right to defend himself when attacked, to repel force by force; that, when attacked with felonious intent, he is not bound to fly, but may stand, and fight and kill his assailant, if necessary, etc.; that a man may take

his adversary's life, whether the danger is real or not, if the danger is apparently so imminent as that a prudent man might suppose himself in such peril as to deem it necessary to kill, etc. The court declined to give, in terms, the instructions asked for, but we are of the opinion that it gave the substance of so much thereof as the appellants were entitled to have. This is not a case in which it became necessary or proper to enter into an explanation of the law in respect to assaults with felonious intent, and point out when a party shall retreat, or when he may stand, and fight and kill his assailant, etc. The offense charged is a simple affray, which, as the evidence showed, was a serious one. The court gave the jury full, fair and intelligent instructions. As to the appellants, and a party who was acquitted, it told them, among other things, that "the mere presence of a man at a difficulty is not sufficient evidence of aiding and encouraging, but, being present, they must do or say something tending to aid or encourage the parties fighting." It told the jury repeatedly and plainly that the appellants had the right to fight in their own defense, and, being father and sons, they had the right to fight in defense of each other. It directed the attention of the jury to the evidence, its purpose and application, and told them that some of the parties might be guilty, and others not guilty. The latter part of the instructions obviously had particular reference to the father, and the party acquitted, because, while there was evidence tending strongly to prove the father's guilt, there was other evidence tending not so strongly to show his innocence. The appellants had no just grounds of complaint at the instructions the court gave the jury, and it was sufficiently comprehensive to embrace every material aspect of the case. We may add that the exception simply "to the charge as given" is too indefinite, and in effect no exception. Judgment affirmed.

NOTE.— *Affray — Unlawful assembly, riot — Rout.*— The common-law offenses of affray, unlawful assembly, riot, rout are somewhat analogous to one another. If three or more persons congregate to do some unlawful act, this is called an unlawful assembly; or, at least, it is so when its object is riotous; and, when it is not, it is indictable either as an unlawful assembly, or as an attempt or conspiracy to do the ulterior intended mischief. If the three or more persons, being together, take some step towards the commission of a riot, but do not go far enough to become guilty of the complete

offense, what they do is called a rout. Lastly, if the three or more assembled persons wrongfully perform such an act or series of acts as is calculated to excite terror or apprehension of danger in the minds of other persons, or generally if they commit violence, they become guilty of riot. It is said by some authors and judges that an affray differs from riot and rout in requiring only two persons instead of three, and being more nearly related to assault and to dueling. When persons come together without a premeditated design to disturb the peace, and suddenly break out into a quarrel among themselves, they are guilty of affray. *People v. Judson*, 11 Daly (N. Y.), 83.

On a trial for an affray growing out of the separation of defendant's wife from him, which separation he claimed was caused by her brother's persuasion, the evidence showed that she had once before left him of her own will, and that during the fight she struck him. Counsel for defendant requested a charge to the effect that if Rowland persuaded his sister, the wife of Weathers, to leave her husband, the latter was justified in the use of force in fighting to prevent it, provided no more force was used than necessary to that end. The court, refusing to so charge, told the jury that, it being in evidence that she had separated herself from him previously, even if her brother did persuade her to go with him, and she went of her own will, and was not restrained of her liberty in any way, the defendant would not be justified in fighting Rowland to prevent her from going. The attention of the jury was called to the testimony that she struck her husband, when engaged in the fight with her brother, in passing upon the question whether she acted upon her own volition, or under the persuasion of him. In our opinion, says the court, "this was a correct statement of the law, and the court did not err in declining to give the instruction asked, nor that superadded, that if the disposition of the wife to depart from her husband was brought about by her brother's persuasion and influence, the accused would not be amenable to the law in using no more force than was necessary to prevent her going away with him." *State v. Weathers*, 105 N. C., 000.

If a number of persons being met together at a fair or market, or on any other lawful occasion, happen on a sudden quarrel to fall together by the ears, it seems agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those actually engaged in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention. 1 Russell on Crimes (9th Am. Ed.), 406. The common-law definition of an affray does not involve an agreement to fight, and one might become engaged in such affray without culpable fault. *Supreme Council, etc. v. Garrigus*, 104 Ind., 133. An affray and an assault are distinct offenses. *Champer v. State*, 14 Ohio St., 437.

In Alabama it is held that a person indicted for an affray may be convicted of an assault and battery, the latter offense being necessarily included in the former. *McClellan v. State*, 53 Ala., 640; *Thomson v. State*, 70 Ala., 26.

If one person, by such abusive language as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray though he may be unable to return the blow. *State v. Perry*, 5 Jones' L. (N. C.), 9; *State v. Robbins*, 78 N. C., 431; *State v. Davis*, 80 N. C., 351; *State v. Sumner*, 5 Strob. (S. C.), 53.

WEBB v. STATE.

(51 N. J. L., 189.)

ARREST WITHOUT WARRANT: *Constables.*

1. In cases of ordinary misdemeanors a constable cannot arrest the offender without warrant, unless he is present at the time of the offense.
2. The fact that a warrant has issued directed to any constable of the county will not avail such officer, unless such precept be in his possession at the time the arrest be made.

Error to court of quarter sessions, Morris county; Childs, Judge.

Alfred Mills, for plaintiff in error.
Williard W. Cutler, for the state.

BEASLEY, C. J. The plaintiff in error was a policeman, having the powers of a county constable. It appeared that, a complaint having been made before a justice of the peace that one Ann Dugan had sold liquor contrary to law, a warrant had been issued for her apprehension, and that such warrant had been delivered, not to the defendant, but to a constable of the county. This precept was addressed, in the usual form, to any constable of the county. Under these circumstances, the plaintiff attempted to arrest the alleged culprit, not at the time having, and never having had, the warrant referred to in his possession; and such arrest was forcibly prevented by the husband of the woman, and thereupon the plaintiff took the man into custody upon the charge that he had forcibly prevented him from executing his duty as a peace-officer. This latter arrest was regarded as illegal, and the plaintiff was thereupon indicted and convicted of an assault and battery upon the husband of Ann Dugan. The complaint is that the court of quarter sessions refused to charge the jury that the plaintiff in error had the right to arrest Ann Dugan, but, to the contrary, told the jury that such act was unjustifiable and altogether illegal. We think that the instruction thus questioned was entirely right. It has always been, in the common law, the rule that a constable or other peace-officer, in cases of mere misdemeanor, could not take the offender, unless in some instances where the offense had been committed in his

presence. This is the principle that has also always prevailed in this state. I remember arguing the question many years ago before this court, and the prevalence of the common-law doctrine on the subject was then established, but the case does not appear to have been reported. Nor is the present instance to be differentiated on the ground that a complaint had been made and a warrant had been issued directed to any constable of the county. Such a proceeding could in nowise empower the plaintiff, as such warrant was not in his hands to be executed, but, on the contrary, was in the possession of another officer. In the case of *Codd v. Cabe*, L. R., 1 Exch. Div., 352, this precise question was decided in the way above indicated. The first clause of the syllabus, showing the doctrine that was maintained, is in these words, viz.: "When a warrant has been issued to apprehend a person for an offense less than a felony, the police-officer who executes it must have the warrant in his possession at the time of his arrest." The conviction of the plaintiff in error is, so far as the law is concerned, unobjectionable. Let the judgment be affirmed.

NOTE.— *Arrest without warrant.*— An officer may arrest without warrant for felony committed in his presence, but he cannot without a warrant arrest for a past offense, unless it be a case of felony, and in such case it must be upon reasonable suspicion, founded either on his own knowledge or the information of others, that a felony has been committed; it is otherwise, however, if the offense be a misdemeanor. Unless the officer has a warrant, he cannot arrest in such a case, and he and all other persons who take part with him in making an arrest without warrant act at their peril. In a recent and well-considered case in the supreme court of Michigan it is held that the fact that a woman has the reputation of being a street-walker, and that the officer knows of her reputation and believes her to be plying her vocation, does not justify his arresting her without a warrant while walking along the street doing nothing to indicate such a purpose. And in a civil action against the officer to recover damages for such arrest, it is held that evidence of specific acts of lewdness on the part of plaintiff is inadmissible. *Pinkerton v. Yerberg* (Mich.), 44 N. W. R., 579. He can only arrest a prostitute when disorderly conduct is committed in his presence. *People v. Pratt*, 22 Hun (N. Y.), 300.

At common law officers are authorized to arrest street-walkers. *Miles v. Weston*, 60 Ill., 361. Also night-walkers or prowlers. *Roberts v. State*, 14 Mo., 138; *Brown v. State*, 2 Lea (Tenn.), 158; *Com. v. Sullivan*, 5 Allen (Mass.), 511; *Com. v. Carter*, 108 Mass., 17; *State v. Maxcy*, 1 McM. (S. C.), 503. By night-walkers is meant such persons as are in the habit of being out at night for some wicked purpose. *Watson v. Carr*, 1 Lewin, 6. A person shouting and making a noise at night may be arrested without a war-

rant. *State v. Russell*, 1 Houst. Cr. Cas. (Del.), 122. Arrest on Sunday by railroad policemen without warrant, who kept the prisoner till Monday, when the necessary papers were made, *held* legal. *Corbett v. Sullivan*, 54 Vt., 619. A peace-officer may arrest for a breach of the peace committed against himself as well as for those committed against others. *Davis v. Burgess*, 54 Mich., 514. A peace-officer has the right to arrest, without warrant, for a misdemeanor where the arrest is made *flagrante delicto;* and he is possessed of the same powers in making such arrest, and is authorized to employ the same force, and to resort, where necessary, to the same extreme measures in overcoming resistance, as in case of a felony. *State v. McNally*, 87 Mo., 644.

A breach of the peace must have proceeded far enough to sustain proceedings against the person to authorize his arrest. Many state statutes expressly authorize peace-officers to apprehend persons suspected of crime without a warrant. The reason which supports an arrest without a warrant are clearly stated by Dewey, J., in *Rohan v. Swain*, 5 Cush. (Mass.), 281. He says: "The public safety and the due apprehension of criminals, charged with heinous offenses, imperiously acquire that such arrest should be made without warrant by the officer of the law. As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested; and the arrest can only be justified by proving such guilt. But as to constables and other peace-officers, acting officially, the law clothes them with greater authority, and they are held to be justified, if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show, in order to sustain a justification of an arrest, for the purpose of detaining the party to await further proceedings under a complaint on oath and a warrant thereon."

Not only must the officer act upon reasonable grounds of suspicion that the person to be arrested is the actual felon, but he must also act in good faith. *Eams v. State*, 6 Humph. (Tenn.), 53. The jury must judge of the reasonableness of the grounds upon which the officer acted. *State v. McNinch*, 90 N. C., 695; *Harris v. Atlanta*, 62 Ga., 491; *Cochran v. Toher*, 14 Minn., 385. The question as to what constitutes probable suspicion is sometimes not easy to determine. It is clear that it must be solved by the circumstances of each case. Two main ideas must always be kept in view in cases of this nature: First, the liberty of the citizen; and second, the detection and suppression of crime; in other words, the public interest concerned. When public officers are vigilant, and endeavor in good faith to discharge their duties to the community, they should be protected. The following cases will illustrate and explain the rules stated: *State v. Underwood*, 75 Mo., 230; *State v. Grant*, 76 Mo., 236; *State v. Sims*, 16 S. C., 486; *State v. Bowen*, 17 S. C., 58; *Floyd v. State*, 79 Ala., 39; *Malcolmson v. Scott*, 56 Mich., 459; *Quinn v. Heisel*, 40 Mich., 576; *Drennen v. People*, 10 Mich., 169; *Ballard v. State*, 43 Ohio St., 340; *Kennan v. State*, 8 Wis., 132; *Bryan v. Bates*, 15 Ill., 87; *Marsh v. Smith*, 49 Ill., 396; *Cahill v. People*, 106 Ill., 621; *Taylor v. Strong*, 3 Wend. (N. Y.), 384; *Farnam v. Feeley*, 56 N. Y., 451; *Fulton v. Staats*, 41 N. Y., 498; *Holley v. Nix*, 3 Wend. (N. Y.), 350; *Wade v. Chaffee*,

8 R. I., 224; *Touhey v. King*, 9 Lea (Tenn.), 422; *Brockway v. Crawford*, 3 Jones (N. C.), 432; *Neal v. Joyner*, 88 N. C., 287; *In re Powers*, 25 Vt., 261; *Doering v. State*, 49 Ind., 56; *Scircle v. Neeves*, 47 Ind., 289; *Johnson v. State*, 30 Ga., 426; *Russel v. Shuster*, 8 Watts & S. (Pa.), 308; *McCarthy v. DeArmit*, 99 Pa. St., 53; *Commonwealth v. Tobin*, 108 Mass., 426; *Caffrey v. Drugan*, 144 Mass. 294; *Hutchinson v. Sangster*, 4 G. Greene (Ia.), 340; *Montgomery v. Sutton*, 67 Ia., 497; *O'Connor v. Bucklin*, 59 N. H., 589. Where a criminal offense has been committed, as shooting at a person, and an officer is informed of the fact, so that he has reasonable grounds for believing the person to be arrested has committed such offense, he is authorized to arrest such person without a warrant. *Cahill v. People*, 106 Ill., 621.

Arrest upon information.— If an officer without a warrant arrests a person upon charge of felony which is made by a third party, the officer will be justified; but the person making the charge will be liable for the arrest if no felony was committed and if the charge is false. *Holley v. Mix*, 3 Wend. (N. Y.), 350; *Burns v. Erven*, 40 N. Y., 463; *Farnam v. Feeley*, 56 N. Y., 451; *Hawley v. Butler*, 54 Barb. (N. Y.), 490.

Arrest beyond limits of municipality.— In Vermont, in a very recent case, it is held that an arrest by a fish-warden out of the jurisdiction of the town in which he was appointed is lawful under acts providing that the selectmen of any town may appoint a fish-warden in their town, who may arrest on any of the waters or shores of Lake Champlain any person found violating the fish laws, and may prosecute such offender before the proper tribunal; and that an arrest of a "person found violating" the law is lawful without a warrant. *Sheets v. Atherton* (Vt.), 19 Atl. R., 926.

In this case the court also holds that where the evidence shows that there were barrels of freshly-caught fish on the grounds, and that the offender was removing nets from the water, and that he threatened the warden, it is sufficient to justify the arrest. It is also held that where pursuit was begun at the fishing grounds, the arrest is lawful though made some distance away; for the pursuit and arrest are deemed one continuous act.

In *State v. Sigman*, 106 N. C., 728, which was an indictment for assault with a deadly weapon, it appeared the defendant Sigman was, at the time when the assault was alleged to have been committed, town constable of the town of Lenoir, and arrested the prosecutor, Robert Tuttle, on a lawful warrant, issued by the mayor of said town, and charging the prosecutor with having committed an assault within the corporate limits of said town. The defendant Sigman first arrested Tuttle by virtue of said warrant within the limits of the municipality, but by an artifice he escaped from custody and fled to a point three miles beyond said limits. Subsequently Sigman pursued and arrested him at a house three miles from the town, and, while *en route* for the town with the prisoner, met the defendant Campbell, and, summoning Campbell to assist, placed Tuttle in his custody. After Campbell had taken the prisoner into the town of Lenoir, the latter again escaped, and fled beyond the corporate limits. The defendants pursued him, Campbell taking one direction and Sigman another. The defendant Sigman found Tuttle outside of the town, and ran after him some distance, till he fled out of his sight; but Tuttle ran near to the defendant Campbell, who pursued him, threatening to shoot. Campbell was within about thirty yards,

when, seeing that he could not outrun Tuttle, he fired his pistol. Tuttle testified that the ball whistled by him, while Campbell swore that it was not aimed at him at all, but was pointed towards the ground near to himself, and fired into the ground, in order to frighten Tuttle. *Held*, that defendant was protected, in arresting the prosecuting witness within the town, by a warrant of the mayor, charging him with a misdemeanor, and in retaking him beyond the town limits, after an escape.

Killing officer — Want of knowledge of his official capacity.— Fleetwood v. Com., 4 Am. Cr. R., 36, and note.

COMMONWEALTH v. DONAHUE.

(148 Mass., 529.)

ASSAULT AND BATTERY: *Owner retaking property by force.*

One whose property has been wrongfully taken by another may thereupon retake it from him, using no more than reasonable force; and what is such force is a question of fact for the jury.

John McIlvene, for defendant.

A. J. Waterman, attorney-general, for the commonwealth.

HOLMES, J. This is an indictment for robbery on which the defendant has been found guilty of an assault. The evidence for the commonwealth was that the defendant had bought clothes amounting to $21.55 of one Mitchelman, who called at the defendant's house by appointment for his pay; that some discussion arose about the bill, and that the defendant went up stairs, brought down the clothes, placed them on a chair and put $20 on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money and put it in his pocket, and told the defendant he owed him $1.55, whereupon the defendant demanded his money back, and on Mitchelman refusing attacked him, threw him on the floor and choked him, until Mitchelman gave him a pocket-book containing $29. The defendant's counsel denied the receiving of the pocket-book, and said that he could show that the assault was justifiable under the circumstances of the case, as the defendant believed he had a right to recover his own money by force, if necessary. The presiding justice stated

that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions, and declined to introduce evidence. The jury were instructed as stated, and found the defendant guilty.

On the evidence for the commonwealth it appeared, or at the lowest the jury might have found, that the defendant offered the $20 to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, since Mitchelman, of course, whatever the sum due him, had no right to that particular money except on the conditions on which it was offered (*Com. v. Stebbins*, 8 Gray, 492), he took the money wrongfully from the possession of the defendant; or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud. *Com. v. Devlin*, 141 Mass., 423; *Chisser's Case*, T. Raym., 275, 276; *Reg. v. Thompson*, Leigh & C., 225; *Reg. v. Stanley*, 12 Cox, Crim. Cas., 269; *Reg. v. Rodway*, 9 Car. & P., 784; *Rex v. Williams*, 6 Car. & P., 390; 2 East, P. C., ch. 16, §§ 110–113. See *Reg. v. Cohen*, 2 Denison, Cr. Cas., 249, and cases *infra*. The defendant made a demand, if that was necessary — which we do not imply — before using force. *Green v. Goddard*, 2 Salk., 641; *Polkinhorn v. Wright*, 8 Q. B., 197; *Com. v. Clark*, 2 Metc., 23, 25, and cases *infra*. It is settled by ancient and modern authority that under such circumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding, or the employment of a dangerous weapon. *Com. v. Lynn*, 123 Mass. 218; *Com. v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Baxt., 608; *State v. Elliot*, 11 N. H., 540, 545; *Rex v. Milton*, Moody & M., 107; Y. B., 9 Edw. IV., 28, pl. 42; 19 Hen. VI., 31; pl. 59; 21

Hen. VI., 27, pl. 9. See *Seaman v. Cuppledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac., 224; Yelv., 157; 1 Brownl., 215; *Shingleton v. Smith*, Lutw., 1481, 1483; 2 Inst., 316; Finch, Law, 203; 2 Hawk. P. C., ch. 60; 3 Bl. Comm., 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. *Baldwin v. Hayden*, 6 Conn. 453; Y. B., 19 Hen. VI., 31, pl. 59; *Rogers v. Spence*, 13 Mees. & W., 571, 581; 1 Hawk. P. C., ch. 60, § 23; 3 Bl. Comm., 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. (N. S.), 713; 12 C. B. (N. S.), 501; 13 C. B. (N. S.), 844; 11 H. L. Cas., 621; *Com. v. McCue*, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgeden v. Hubbard*, 18 Vt., 504. See *Johnson v. Perry*, 56 Vt., 703. On the other hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas., 81. See *Barnes v. Martin*, 15 Wis., 240; *Andre v. Johnson*, 6 Blackf., 375; *Davis v. Whitridge*, 2 Strob., 232; 3 Bl. Comm., 4. It is unnecessary to decide whether in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain, if he could, even if he knew that Mitchelman still had the identical money upon his person. If the force used by the defendant was excessive, the jury would have been

warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as a matter of law. *Com. v. Clark*, 2 Metc., 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and, coupling that statement with the defendant's offer of proof and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed, to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like *Reg. v. Boden*, 1 Car. & K., 395, 397; *Reg. v. Hemmings*, 4 Fost. & F., 50; *State v. Hollyway*, 41 Iowa, 200. Compare *Com. v. Stebbins*, 8 Gray, 492; *Com. v. McDuffy*, 126 Mass., 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. *State v. Nash*, 88 N. C., 618. The facts were as the defendant believed them to be.

Exception sustained.

NOTE.— *Assault in defense of property.*— To justify an assault by a man in defense of his son or his property the danger should be such as to induce one exercising a reasonable and proper judgment to interfere to prevent the consummation of the injury. *Hill v. Rogers*, 2 Ia., 67. An attack made for the purpose of unlawfully obtaining property may be repelled with force, and if captured, then sufficient force may be used to rescue the property from the hands of its unlawful captors. *State v. Miller*, 12 Vt., 437; *Johnson v. Tompkins*, Bald., 571; *Com. v. Lakeman*, 4 Cush., 597; *Fulkins v. People*, 69 N. Y., 101; *Harrington v. People*, 6 Barb., 608. But see *State v. Gilman*, 69 Me., 163. The contrary is, however, expressly held in *Hendrix v. State*, 1 A. Cr. R., 57.

So it has been held that a man may employ as much force as necessary to prevent a levy of execution on articles exempt by law (*State v. Johnson*, 12 Ala., 840); or to prevent an illegal levy. *Com. v. Kennard*, 8 Pick., 133; *Copely v. State*, 4 Ia., 477. But upon this question there is a conflict of authority, it having been decided in the cases of *State v. Downer*, 8 Vt., 424, and *Farris v. State*, 3 Ohio St., 159, that one must seek his remedy against an illegal levy in the courts.

The owner of a chattel which has come into the peaceable possession of another has no right to retake it by force, whether such possession be lawful or not. *Barnes v. Martin*, 15 Wis., 240. A tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of a co-tenant. *Causee v. Anders*, 4 Dev. & B. (N. C.) L., 246.

The rightful owner of a house having obtained possession thereof peaceably, and having the right to possession, will not be guilty of assault and battery in using all necessary force to defend his possession. *Corey v. People*, 45 Barb., 262. If the owner of a dwelling finds it unoccupied he may draw the staples from the door and thus effect an entrance; and will be deemed to have obtained peaceable possession, notwithstanding the former occupants, claiming title, may have continued to use it for a storehouse; and the tenant of the rightful owner may thereafter employ force to retain the possession. *Id.* But a mere suspicion or fear of encroachment is no ground for using force. *McAuley v. State*, 3 Greene (Ia.), 435.

Mechanics in charge of a house which they are building have the right to gently eject a person who comes upon the premises without authority. *United States v. Bartle*, 1 Cranch, C. Ct., 236. But that a person without right shut off the water and prevented the working of a mining claim will not justify assault. *Montana v. Drennan*, 1 Mon., 41. Nor will assault be justified because the person assaulted stopped assailant's horse, making him step back a few paces. *Com. v. Ford*, 5 Gray, 475.

MULLIGAN v. STATE.

(25 Tex. App., 199.)

ARSON: *Evidence — Term defined.*

Under Penal Code of Texas, articles 661, 652, defining arson as the wilful burning of any building, edifice or structure inclosed with walls, and covered, a person cannot be convicted of arson for burning the materials of a crib after having torn it down.

Appeal from district court, Rusk county; J. G. Hazlewood, Judge.

Defendant, Wilson Mulligan, was convicted of the crime of arson and sentenced to imprisonment in the penitentiary for five years. He appeals.

J. H. Wood, for appellant.

Assistant Attorney-General Davidson, for the state.

WHITE, P. J. Appellant was convicted of arson. Two counts were contained in the indictment — one for the burning of a house, and the other for the wilful burning of a "pile of wood, the same being a set of house-logs." Defendant's motion to quash the indictment was sustained to the second, or the count for wilful burning. Appellant was the tenant of one Duke, and during his tenancy had erected a crib upon the rented premises, which crib the landlord, Duke, refused to pay for when the parties were having their settlement, with a view to the expiration of the lease. Defendant declared time and again that he would burn the crib. About the time he was moving, or preparing to move, from the premises, he pulled down the crib, and, the night before he moved, the logs of which the crib had been built, and which he had torn down, were set fire to and burned. Two questions present themselves in connection with these facts: (1) Was a house burned? (2) If a house was burned, could defendant be convicted for burning it when he was still in possession of the leased premises upon which it stood?

Arson is defined by our code to be the "wilful burning of any house included within the meaning of the succeeding article of this chapter." Penal Code, art. 651. Article 652 defines a house as "any building or structure inclosed with walls, and covered, whatever may be the material used for building." *Smith's Case*, 23 Tex. App., 357. We think it clear that when the building was torn down it ceased to be a "building" or "structure," because it had lost the arrangement of its parts — its form, make and construction. It had no longer the inclosure of walls and it was no longer covered. It had lost all the essential characteristics of a "house." The logs might still be called "house-logs," but they had ceased to be a "house." They might perhaps be classed as lumber or wood, and as such appellant might perhaps have been prosecuted and convicted for wilfully burning them, under provision of article 665, Penal Code, provided he was at all liable for their destruction.

And this brings us to a consideration of the second proposition, viz.: "Could defendant be prosecuted and convicted for arson whilst he was still in possession and control of the leased premises upon which the property was situate when destroyed?" At common law a man could not "commit arson

of a house in which he has a lawful claim to abide as a tenant from year to year, or from month to month, be his term however short, or under an agreement for lease." 2 Bish. Crim. Law (7th ed.), § 13. Mr. Wharton says: "A tenant (occupancy being the test) cannot be guilty at common law of arson in burning the property he occupies on lease. On the other hand, a landlord, it would seem, may be guilty of arson in burning his house in a tenant's possession." 1 Whart. Crim. Law (8th ed.), § 836; *State v. Hannett*, 54 Vt., 83. Our statute (Penal Code, art. 659) provides for certain exceptions to the rule that even the owner may destroy his own house, one of which is "when there is in it any property belonging to another; and article 660 expressly declares that "one of the part owners of a house is not permitted to burn it." Under our statute, the tenant, during his lease, should be considered only a part owner in the house; and the landlord certainly has a property in it, which the tenant could not destroy with impunity. Still the tenant is the party entitled to the possession; and arson is regarded as an offense against the security of the habitation, rather than the property and true ownership. But an indictment against an owner or part owner for burning his own house (arts. 658, 659, 660) must allege ownership in the accused and the particular facts which may bring him within the exceptions as amenable to prosecution. *Fuller v. State*, 8 Tex. App., 501; Will. Tex. Crim. Forms, 411. Appellant being a tenant, entitled to occupancy and possession, was at least a part owner, and occupied such relations to the premises as, in our opinion, required that the indictment should have alleged the particular facts making him amenable to prosecution for arson, in case a house had been burned by him.

Our conclusions upon the law and facts of the case are: (1) The indictment is insufficient in allegation to warrant the conviction of this defendant as a tenant; (2) if the indictment had been sufficient, the evidence totally fails to establish the crime of arson, that is, the "burning of a house." The judgment is reversed and the cause is remanded.

NOTE.—*Arson—What constitutes.*—If any part of a dwelling, however small, is consumed, the offense is complete. *Com. v. Van Schaak*, 16 Mass., 105; *State v. Sandy*, 3 Ired. (N. C.) L., 570; *State v. Mitchell*, 5 id., 350. That something in the house was burned is not sufficient; it must have been a

portion of the house. *Reg. v. Russell*, Car. & M., 541. Where cotton stored in a warehouse was set on fire, but was extinguished before any part of the building was burned, there was no arson. *Graham v. State*, 40 Ala., 659. But see *Reg. v. Lyons*, 5 Up. Can. L. J., 70. But the offense is completed notwithstanding the fire has been extinguished or that it went out of its own accord. It is not essential that the woodwork of the house should blaze. *Reg. v. Russell*, 1 Car. & M., 541; *Reg. v. Stallion*, 1 Moody, C. C., 398. It is sufficient if the wood be charred in a single place, so as to destroy its fiber. *People v. Haggerty*, 46 Cal., 354; *People v. Simpson*, 50 id., 304; *State v. Sandy*, 3 Ired., 570; *State v. Mitchell*, 5 id., 350; *Com. v. Tucker*, 110 Mass., 403; *Reg. v. Russell*, Car. & M., 541; *Reg. v. Parker*, 9 Car. & P., 45. Evidence that a wooden building was charred by fire, and in one place burned through, is sufficient burning, though the fire was extinguished. *People v. Simpson*, 50 Cal., 306; *People v. Haggerty*, 46 id., 354. If any of the fiber of the wood-work is wasted by the fire, it is immaterial how small the quantity. *State v. Mitchell*, 5 Ired., 350. Nor is it necessary that any flame should be external or visible (*Reg. v. Stallion*, 1 Moody, C. C., 398); but where the floor was scorched black it was not sufficient. *Reg. v. Russell*, Car. & M., 541. The burning of a series of houses by one ignition may be charged as one act. *Woodford v. People*, 62 N. Y., 117. The sufficiency of the burning is a question of fact. *Com. v. Betton*, 5 Cush., 427. The agency of the burning is immaterial, but there must be a casual connection between the ignition and the conflagration. *McDade v. People*, 29 Mich., 50; *Rex v. Cooper*, 5 Car. & P., 535. See, generally, 1 Whart. C. L. (8th ed.), sec. 153; 2 Russ. Cr. R. (9th ed.), 1025.

Buildings subject to arson.— Where the information charged the prisoner with burning a dwelling-house, and it appeared that the building was designed and built for a dwelling-house, was constructed like one, was not painted, though designed to be, and some of the glass in an outer door had not been put in, and it had not been occupied, *held*, that this was not a dwelling-house, in such a sense that the burning of it would constitute the crime of arson. *State v. McGowan*, 20 Conn., 245. The law is otherwise with regard to a dwelling once inhabited as such and from which the occupant was but temporarily absent; but in that case it is the duty of the court to instruct the jury as to the law and have them find, as a question of fact, whether or not the building was a dwelling-house. *Id.* Although a building which was erected for a dwelling, and had been occupied as such, but not within ten months previous to the fire, nor at the time of the fire, is not a dwelling the burning of which would be arson at common law. *Hooper v. Com.*, 13 Gratt. (Va.), 763. To set fire to a building which is so near a dwelling that the latter is endangered is held in South Carolina to be arson. *Gage v. Shelton*, 3 Rich., 242. See, also, 4 A. Cr. R., 38; *Winslow v. State*, 5 id., 43; *Stultz v. State*, id., 48; *State v. Melick*, id., 52.

PEOPLE v. RODRIGO.

(69 Cal., 601.)

ASSAULT WITH DEADLY WEAPON.

1. CRIMINAL LAW — SETTING ASIDE INFORMATION.— An information will not be quashed, on the ground of illegality of the commitment, merely for slight informality or irregularity before the committing magistrate; but it must at least appear that the defendant was deprived of some substantial right.
2. SAME — EVIDENCE — REPUTATION.— Until it is shown that a witness has lived in the same county with or knows the defendant's general reputation in the county, it is not proper to question him in regard thereto.
3. ASSAULT AND BATTERY — INSTRUCTION — "DEADLY WEAPON" DEFINED. There is no error in instructing a jury, on a trial for assault with a deadly weapon, that "a deadly weapon is any weapon or instrument by which death may be produced, or would be likely to be produced, when being used in the manner in which it may appear it was used in the affray. The jury are the judges as to whether the weapon was or was not a deadly weapon."
4. ASSAULT WITH DEADLY WEAPON — JUSTIFICATION — REASONABLE DOUBT. In a prosecution for assault with a deadly weapon, it is not proper to instruct the jury that they must find defendant not guilty if they entertain a reasonable doubt that he acted under a reasonable apprehension of great bodily injury. If such a state of facts existed, still the defendant would not be justified, unless the use of a deadly weapon was necessary to prevent the injury.
5. BURDEN OF PROOF — WEAPON.— In a prosecution for assault with a deadly weapon, when the defendant sets up in defense no distinct and independent facts, but contends upon the facts and circumstances, as proved by the evidence, constituting the transaction charged as criminal, that he is not guilty, the burden of proof is on the government to satisfy the jury beyond a reasonable doubt that the assault as charged was unjustifiable, and the burden of proof does not shift throughout the case.
6. WITNESS — IMPEACHMENT — CONVICTION OF FELONY.— A party seeking to impeach a witness may ask him with respect to a judgment in a prosecution for felony against him, and this includes the right to ask him whether he was convicted of felony, and, if so, what sentence was imposed on him.

In bank.

Information for assault with a deadly weapon. The facts are all stated in the opinion, except with relation to the following instruction, which was given at the request of the prosecution, viz.: "A 'deadly weapon' is any weapon or instrument by which death may be produced, or would be likely to be produced, when being used in the manner in which it

may appear it was used in the affray. The jury are the judges as to whether the weapon was or was not a deadly weapon." The appellant's attorney objected to the instruction, on the ground that it was too extensive, inasmuch as under it there is no exception to anything material being a deadly weapon; and also on the ground that the latter sentence of the instruction stated that a deadly weapon had been used, whereas this was a matter for the jury.

W. I. Foley, for appellant.
Attorney-General Marshall, for respondent.

McKinstry, J. The defendant was found guilty of an assault with a deadly weapon. The defendant moved to set aside the information on the ground that, before the filing thereof, he had not been legally committed by a magistrate. It is urged that the testimony taken before the committing magistrate was not taken as prescribed by section 869 of the Penal Code. But our attention has not been called to any particular defect or irregularity in the mode of taking the depositions, or in certifying the same, or in the order of commitment. The commitment is in accordance with the statute. Penal Code, 872. Each deposition is signed by the witness. Each is signed and declared "approved," in writing, by the magistrate, which is a certification. Penal Code, 869, subds. 4, 5. Subdivision 3 of the same section was complied with. Each of the deposing witnesses stated his name and place of residence. Subd. 1. All the witnesses (except T. B. Hudson) stated their respective occupations or professions. The statute was complied with in every substantial respect.

Section 995, which authorizes and directs an information to be set aside on motion of a defendant, when the defendant has not been "legally committed," does not require the information to be set aside for every informality or irregularity before the magistrate. To justify the quashing of the information it must, at least, appear that the defendant was deprived of some substantial right. In the case at bar the witness, Hudson, was cross-examined by the defendant when his deposition was taken before the magistrate. The mere omission of the district attorney or justice of the peace to ask of the witness

his profession or business could not have injured the defendant.

We cannot say the court erred in sustaining the objection to the question asked of the witness W. B. Baker: "What is his (defendant's) general reputation for peace and quiet in this county, so far as you know?" The witness had not stated that he lived in the county or knew the defendant's general reputation in the county.

The instruction given by the court defining "deadly weapon" is not subject to the objection urged by counsel for appellant.

The court below was justified in refusing to give the instruction asked by the defendant, by which the jury were told it was their duty to find the defendant not guilty if they entertained a reasonable doubt that he acted under a reasonable apprehension of great bodily injury. Even if it were conceded that the instruction asked was correct in other respects, the defendant would not be justified, although acting under a reasonable apprehension of great bodily injury, unless the use of a deadly weapon was necessary to prevent the injury. The instruction assumes that the bare fear, if reasonable, would justify the defendant's act. But if all the circumstances supposed by the instruction were shown to exist, it would still remain for the jury to determine whether his acts were necessary, and, therefore, justifiable.

Counsel for the defendant requested the court to charge the jury as follows: "In any criminal charge, if the defendant relies upon no separate, distinct or independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof never shifts, but remains upon the government throughout the whole case to prove the act a criminal one beyond a reasonable doubt." The court refused to so instruct the jury. This was error. The instruction was refused as "not called for by the evidence." We think it appropriate and clearly applicable to the case. An assault is an *unlawful* attempt, etc. Penal Code, 240. Where the attempt or actual battery, with or without weapon, is justifiable there is no offense. That the instruction requested correctly declares the law is made apparent by the reasoning in *Com. v. McKie*, 1 Gray, 61.

It is claimed that the rule in cases of assaults with a deadly

weapon should be the same as in cases of homicide, and that in cases of homicide the burden of proof is changed. Even in cases of homicide, however, the burden of proving beyond a reasonable doubt that a killing is criminal is upon the prosecution. This does not mean that the prosecution must anticipate a defense, and affirmatively establish (by evidence other than that of the killing) that the homicide was *not* justifiable. When the people have proved the killing, and no evidence has been given tending to prove justification, they have performed the task imposed upon them and proved *prima facie* the guilt of the defendant beyond a reasonable doubt. By reason of statutory rule of evidence the *prima facie* case of the prosecution can be overcome only by proof of justification established by a preponderance of evidence. In case the prosecution has given evidence tending to prove self-defense, the defendant is entitled to the benefit of it. If not sufficient of itself to establish self-defense, the defendant is entitled to connect it with evidence which *he* may introduce; and if all the evidence bearing on the subject taken together preponderates in his favor as to the issue of justification, he should be acquitted. Section 38 of the act of 1850, "concerning crimes and punishments," and section 1105 of the Penal Code, do not change the rule which casts on the prosecution the burden of proving (beyond a reasonable doubt) the act of a defendant to a crime. They fix the *quantum* of evidence which is necessary to overcome the proof on the part of the prosecution which, until overcome, establishes beyond a reasonable doubt the guilt of the defendant. Nothing was decided in the *Cases of Milgate, Stonecifer, Arnold* or *Hung Ah Duck*, 5 Cal., 127; 6 Cal., 405; 15 Cal., 476; 61 Cal., 387, which conflicts with these views. That a rule, at least as broad as that laid down in the instruction asked and refused, is correct in cases other than homicides seems decided in *People v. Cheong Foon Ark*, 61 Cal., 528.

At the trial below one Francisco Ballesteros was called and examined as a witness on the part of the prosecution. On his cross-examination counsel for the defendant asked the witness: "Did you plead guilty on March 17, 1882, in the superior court of this county, to the crime of robbery?" To which the witness answered: "Yes, sir." Counsel for defendant then

asked: "Were you sentenced on that occasion to punishment for eighteen months in the penitentiary?" The last question was objected to as irrelevant and immaterial. The objection was sustained and counsel for defendant duly excepted. We do not find it necessary to express any opinion as to whether the word "penitentiary," in the question objected to, can be interpreted "state prison," but we entertain no doubt that a party may ask a witness with respect to the fact of a judgment and sentence against him for a felony. A felony is a crime which is punishable with death or by imprisonment in the state prison. Penal Code, § 17. Robbery is a felony. Penal Code, § 213. The defendant had the right to prove by the witness that he had been convicted of a felony. "Conviction" is usually defined the legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded. Bouv. Law Dict. The term is sometimes applied to the finding of a person guilty by verdict of a jury (1 Bish. Crim. Law, 223), but it is sometimes used to denote final judgment. Bouv. Law Dict.; Dwar. St. (2d ed.), 683. Conviction of certain crimes, when accompanied by judgment, disqualified the person convicted as a witness. Bouv. Law Dict.; *Keithler v. State*, 18 Miss., 192; *Utley v. Merrick*, 11 Metc., 302. A witness may be shown to have been guilty of a felony by "his examination" or "by the record of the judgment." Penal Code, § 205. The proof of the conviction by the oral examination of the witness is a substitute for proof of the judgment by the record; and, in view of the pre-existing law, which required the conviction to be proved by the judgment, and of the section which permits proof by the witness *or* by the record of the judgment (proof by the witness instead of by the record), we hold that the party seeking to impeach the witness may ask him with respect to the judgment.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; ROSS, J.; MCKEE, J.; THORNTON, J.

NOTE.— *Assault.*— An assault has been variously defined as "an unlawful setting upon one's person" (3 Bl. Com., 120); "an inchoate violence which is considerably higher than bare threats; and, therefore, though no actual

suffering is proved, a party may have his civil action." 9 Ala., 82. Any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote at the time an intention to do it, coupled with present ability to carry the intention into effect. *Traver v. State*, 43 Ala., 356. Where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, it is an assault. *State v. Malcolm*, 8 Ia., 413. The intent to injure is the gist of the assault. *Rickets v. State*, 1 Sneed (Tenn.), 606. It must be committed against the will of the other party. *Duncan v. Com.*, 6 Dana (Ky.), 295; *Smith v. State*, 12 Ohio St., 466. Exposing a child to the inclemency of the weather is an assault. *Com. v. Stoddard*, 9 Allen, 280; *Reg. v. Marsh*, 1 Car. & K., 496. Where the parties put a new-born child into a bag and hung it on some park palings and there left it, it was an assault. *Id.*

Indirect assault.— The courts have, in many instances, gone beyond the line of the definitions laid down in the text-books. Indeed the principle is well established that anything attached to the person is as inviolable as the body itself. A blow upon the skirt of one's coat is an assault and battery. So it is also to strike a cane held in one's hand. *Respublica v. De Longchamps*, 1 Dall., 114; *State v. Davis*, 1 Hill (S. C.), 46. To attack and strike with a club the horse before a carriage in which a person is riding is an assault on the person. *De Marentitle v. Oliver*, 2 N. J. L., 379.

Putting in fear.— Whether or not an *apparent* attempt to commit personal violence upon another, where there was no real intention to do so, constitutes an assault, is an unsettled question. If one point an unloaded gun at another, threatening to shoot, and the person threatened believes the gun to be loaded and believes that harm is intended, it has been held that the first person is guilty of an assault. *Com. v. White*, 110 Mass., 407; *People v. Smith*, 2 Humph., 457; *Com. v. McLaughlin*, 5 Allen, 507. But the contrary doctrine has been expressly affirmed in *State v. Swails*, 8 Ind., 524. See, also, *State v. Cherry*, 11 Ired., 475; *State v. Sheppard*, 10 Ia., 126; *Crow v. State*, 41 Tex., 468; *Beach v. Hancock*, 27 N. H., 223. To ride a horse so near one as to endanger one's person and create a belief in his mind that it is the intention of the rider to ride over him is an assault. *State v. Sims*, 3 Strobh. (S. C.), 137. Where one was in the custody of an officer under arrest and escaped, and the officer shot at him, the officer is guilty of assault whether he intended to hit the fugitive or not. *State v. Segman*, 106 N. C., 728.

It is well settled, also, that if under the influence of a threat to commit personal violence, coupled with the ability to carry the threat into execution, one is obliged to do an act against his will, there is an assault. So if a man raises a club over the head of a woman and threaten to strike her if she open her mouth, this is an assault. It shows an intent to strike upon the violation of a condition he had no right to impose. *United States v. Richardson*, 5 Cranch, C. Ct., 348. To approach a person brandishing a knife and threatening him with it unless the assailed yield possession of certain property is an assault. Stopping and preventing another by means of threats from passing along a public highway is an assault. *Bloomer v. State*, 3 Sneed (Tenn.), 66. See, also, *Chapman v. State*, 6 A. Cr. R., 37.

Deadly weapon.— A deadly weapon includes any instrument with which

a person may be wounded by cutting or stabbing. *Com. v. Branham*, 8 Bush, 388. A weapon likely to produce death or great bodily harm. *Kouns v. State*, 3 Tex. App., 15. It has been held that a loaded pistol is such a deadly weapon that the courts will take notice of its character without proof. *United States v. Williams*, 2 F. R., 64. The supreme court of Illinois say, "a hoe, both in popular and legal signification, is *per se* a deadly weapon — fully as much so as a loaded pistol or an ax;" and the court held that it was not necessary to prove that such an instrument was a deadly weapon. *Hamilton v. People*, 113 Ill., 34. So it has been held that a club is a deadly weapon. *State v. Phillips*, 104 N. C., 786. The contrary view has been taken in Texas, where the doctrine is maintained that no weapon is necessarily a deadly weapon, and that its character must be proved. So it is decided that an ax is not necessarily a deadly weapon. *Gladney v. State* (Tex.), 12 S. W., 868. Neither is a pistol nor brass knuckles. *Ballard v. State* (Tex.), 13 S. W., 674.

THE QUEEN v. TOLSON.

BIGAMY: *Honest belief on reasonable grounds of death of husband or wife.*

(Queen's Bench Division, January 26, 1889.)

The prisoner was convicted under 24 and 25 Vict. (ch. 100, § 57) of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead. *Held*, by Lord Coleridge, C. J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grandham and Charles, JJ. (Denman, Field and Manisty, JJ., and Pollock and Huddleston, BB., dissenting), that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defense to the indictment, and that the conviction was wrong.

Case stated by Stephen, J., and reserved by the court for the consideration of all the judges.

At the summer assizes at Carlisle in 1888 the prisoner, Martha Ann Tolson, was convicted of bigamy.

It appeared that the marriage of the prisoner to Tolson took place on September 11, 1880; that Tolson deserted her on December 13, 1881, and that she and her father made inquiries about him and learned from his elder brother and from general report that he had been lost in a vessel bound for America, which went down with all hands on board. On

January 10, 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony was in no way concealed. In December, 1887, Tolson returned from America.

Stephen, J., directed the jury that a belief in good faith and on reasonable grounds that the husband of the prisoner was dead would not be a defense to a charge of bigamy, and stated in the case that his object in so holding was to obtain the decision of the court in view of the conflicting decisions of single judges on the point. The jury convicted the prisoner, stating, however, in answer to a question put by the judge, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage, and the judge sentenced her to one day's imprisonment.

The question for the opinion of the court was whether the direction was right. If the direction was right, the conviction was to be affirmed; if not, it was to be quashed.

Wills, J. In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death, which the jury found that she upon reasonable grounds believed to be true. A few months after the second marriage he reappeared.

The statute upon which the indictment was framed is the 24 and 25 Vict. (ch. 100, § 57), which is in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labor for not more than two years," with a proviso that "nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time."

There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married,

married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past.

It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. "It is a principle of natural justice and of our law," says Lord Kenyon, C. J., "that *actus non facit reum, nisi mens sit rea.* The intent and act must both concur to constitute the crime." *Fowler v. Padget*, 7 T. R., 509, 514. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute — fornication or seduction, for instance — which, nevertheless, no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice, and, indeed, the foundations of civil society, rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. By-laws are constantly

made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offense and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-law that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is, that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference, for instance, in the kind of language used by acts of parliament which made the unauthorized possession of government stores a crime, and the language used in by-laws which say that if a man builds a house or a wall so as to encroach upon a space protected by the by-law from building he shall be liable to a penalty. Yet in *Regina v. Sleep*, Leigh & C., 44; 30 L. J., M. C., 170, it was held that a person in possession of government stores with the broad arrow could not be convicted when there was not sufficient evidence to show that he knew they were so marked; whilst the mere infringement of a building by-law would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from the pavement in front of his house before a given hour in the morning, and if he fail to do so shall pay a penalty, and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet I suppose that in the first case the penalty would attach if the thing were not done, whilst in the other case it has been held, in *Hearne v. Garton*, 2 El. & E.,

66, that where the sender had made a reasonable inquiry and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had in fact sent the vitriol not properly marked. There is no difference between the language by which it is enacted that "whosoever shall unlawfully and wilfully kill any pigeon under such circumstances as shall not amount to a larceny at common law" shall be liable to a penalty, and the language by which it is enacted that "if any person shall commit any trespass by entering any land in the day-time in pursuit of game" he shall be liable to a penalty; and yet in the first case it has been held that his state of mind is material (*Taylor v. Newman*, 4 Best & S., 89); in the second, that it is immaterial. *Watkins v. Major*, L. R., 10 C. P., 662. So again there is no difference in language between the enactments I have referred to in which the absence of a guilty mind was held to be a defense, and that of the statute which says that "any person who shall receive two or more lunatics" into any unlicensed house shall be guilty of a misdemeanor, under which the contrary has been held. *Regina v. Bishop*, 5 Q. B. D., 259. A statute provided that any clerk to justices who should, under color and pretense of anything done by the justice or the clerk, receive a fee greater than that provided for by a certain table, should for every such offense forfeit £20. It was held that where a clerk to justices *bona fide* and reasonably but erroneously believed that there were two sureties bound in a recognizance beside the principal, and accordingly took a fee as for three recognizances when he was only entitled to charge for two, no action would lie for the penalty. "*Actus*," says Lord Campbell, "*non facit reum, nisi mens sit rea.* Here the defendant very reasonably believing that there were two sureties bound, beside the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is, 'for every such offense.' If, therefore, the table allowed him to charge for three recognizances where there are a principal and two sureties, he has not committed an offense under the act." *Bowman v. Blyth*, 7 El. & B., 26, 43.

If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there

is, and sometimes that there is not, an offense when the guilty mind is absent, it is obvious that assistance must be sought *aliunde*, and that all circumstances must be taken into consideration which tend to show that the one construction or the other is reasonable, and amongst such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight, if the words be incapable of more than one construction; but I have, I think, abundantly shown that there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offense entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken into account. In a case in which a woman was indicted under 9 and 10 Wm. III. (ch. 41, § 2) for having in her possession, without a certificate from the proper authority, government stores, marked in the manner described in the act, it was argued that by the act the possession of the certificate was made the sole excuse, and that, as she had no certificate, she must be convicted. Foster, J., said, however, that though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration; otherwise a law calculated for wise purposes might be made a handmaid to oppression, and directed the jury that if they thought the defendant came into possession of the stores without any fraud or misbehavior on her part, they ought to acquit her. Frost, C. L. (3d ed.) App., 439, 440. This ruling was adopted by Lord Kenyon in *Rex v. Banks*, 1 Esp., 144, who considered it beyond question that the defendant might excuse himself by showing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof and making it necessary for the defendant to show matter of excuse, and to negative the guilty mind, instead of its being necessary for the crown to show existence of the guilty mind. *Prima facie* the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been

committed accidentally or innocently so far as he was concerned. Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself and the other marked government stores, and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defense could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute? In *Fowler v. Padget*, 7 T. R., 509, the question was, whether it was an act of bankruptcy for a man to depart from his dwelling-house whereby his creditors were defeated and delayed, although he had no intention of defeating and delaying them. The statute which constituted the act of bankruptcy was 1 Jac. 1, ch. 15, which makes it an act of bankruptcy (amongst other things) for a man to depart his dwelling-house "to the intent or whereby his creditors may be defeated and delayed." The court of king's bench, consisting of Lord Kenyon, C. J., and Ashurst and Grose, JJ., held that there was no act of bankruptcy. "Bankruptcy," said Lord Kenyon, "is considered as a crime, and the bankrupt in the old laws is called an offender; but," he adds in the passage already cited, "it is a principle of natural justice and of our law that *actus non facit reum, nisi mens sit rea*," and the court went so far as to read "and" in the statute in place of "or," which is the word used in the act, in order to avoid the consequences which appeared to them unjust and unreasonable. In *Rex v. Banks*, 1 Esp., 144, above cited, Lord Kenyon referred to Foster, J.'s ruling in this case as that of "one of the best crown lawyers that ever sat in Westminster Hall." These decisions of Foster, J., and Lord Kenyon have been repeatedly acted upon. See *Regina v. Willmett*, 3 Cox, C. C., 281; *Regina v. Cohen*, 8 id., 41; *Regina v. Sleep* (in the court for C. C. R.), Leigh & C., 44; 30 L. J., M. C., 170; *Regina v. O'Brien*, 15 L. T. (N. S.), 419.

Now, in the present instance, one consequence of holding that the offense is complete if the husband or wife is *de facto* alive at the time of the second marriage, although the defendant had, at the time of the second marriage, every reason to believe the contrary, would be that though the evidence of

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death should be sufficient to induce the court of probate to grant probate of the will or administration of the goods of the man supposed to be dead, or to prevail with the jury upon an action by the heir to recover possession of his real property, the wife of the person supposed to be dead, who had married six years and eleven months after the last time that she had known him to be alive, would be guilty of felony in case he should turn up twenty years afterward. It would be scarcely less unreasonable to enact that those who had in the meantime distributed his personal estate should be guilty of larceny. It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon, when dealing with a statute which, literally interpreted, led to what he considered an equally preposterous result, "I would adopt any construction of the statute that the words will bear in order to avoid such monstrous consequences." *Fowler v. Padget*, 7 T. R., 509, 514.

Again, the nature and extent of the penalty attached to the offense may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the act of 24 and 25 Vict., to the loss of civil rights, to imprisonment with hard labor, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have trangressed morally as well as unintentionally done something prohibited by law. I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great; but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a court of probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. It is, as it seems to me, undesirable in the highest degree without neces-

sity to multiply instances in which people shall be liable to conviction upon very grave charges, when the circumstances are such that no judge in the kingdom would think of pronouncing more than a nominal sentence.

It is said, however, in respect of the offense now under discussion, that the proviso in 24 and 25 Vict. (ch. 100, § 57), that "nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for seven years last past, and shall not have been known by such person to be living within that time," points out the sole excuse of which the act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party without any further inquiry from criminal liability; and I think it is an argument of considerable weight, in this connection, that under 9 and 10 Wm. III. (ch. 41, § 2), where a similar contention was founded upon the specification of one particular circumstance under which the possession of government stores should be justified, successive judges and courts have refused to accede to the reasoning, and have treated it, to use the words of Lord Kenyon, as a matter that "could not bear a question" that the defendant might show in other ways that his possession was without fraud or misbehavior on his part. *Rex v. Banks*, 1 Esp., 144, 147.

Upon the point in question there are conflicting decisions. It was held by Martin, B., in *Regina v. Turner*, 9 Cox, C. C., 145, and by Cleasby, B., in *Regina v. Horton*, 11 id., 670, that *bona fide* belief, at the time of the second marriage, upon reasonable grounds, that the first husband or wife was dead, was a defense. In *Regina v. Gibbons*, 12 Cox, C. C., 237, it is said that it was held by Brett, J., after consulting Willes, J., that such a belief was no defense. The report, however, is most unsatisfactory, as, if the facts were as there stated, there was no reasonable evidence of such belief upon any reasonable grounds, and in *Regina v. Prince*, L. R., 2 C. C. R., 154, Brett, J., gave a very elaborate judgment containing his matured and considered opinion upon a similar question, which is quite impossible to reconcile with the supposed ruling in *Regina v. Gibbons*, 12 Cox, C. C., 237.

In *Regina v. Bennett*, 14 Cox, C. C., 45, Bramwell, L. J., is reported to have followed *Regina v. Gibbons*, 12 id., 237, and to have said that he had always refused to act upon *Regina v. Turner*, 9 id., 145. But here again the report is eminently unsatisfactory, for it proceeds to state that the prisoner was convicted of two other offenses, forgery and obtaining money by false pretenses, and sentenced to ten years' penal servitude, which is a greater sentence than he could have received for bigamy. Except for the purpose of bringing out the sort of man that the prisoner was, and so emphasizing the fact that he deserved condign punishment, the bigamy trial might have been omitted.

In *Regina v. Moore*, 13 Cox, C. C., 554, Denman, J., after consultation with Amphlett, L. J., directed the acquittal of a woman charged with bigamy, the jury having found that, although seven years had not elapsed since she last knew that her husband was living, she had, when she married a second time, a reasonable and *bona fide* belief that he was dead, saying that in his opinion and that of Amphlett, L. J., such belief was a defense. He added, however, that his opinion was not to be taken as a final one, and that, had the circumstances not been such that the prisoner would, if the conviction could be sustained, have deserved a substantial sentence, he should have directed a conviction, and reserved the question.

There is nothing, therefore, in the state of the authorities directly bearing upon the question, to prevent one from deciding it upon the grounds of principle. It is suggested, however, that the important decision of the court of fifteen judges in *Regina v. Prince*, L. R., 2 C. C. R., 154, is an authority in favor of a conviction in this case. I do not think so. In *Regina v. Prince*, L. R., 2 C. C. R., 154, the prisoner was indicted under 24 and 25 Vict. (ch. 100, § 55), for "unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father." The jury found that the prisoner *bona fide* believed upon reasonable grounds that she was eighteen. The court (*dissentiente* Brett, J.) upheld the conviction. Two judgments were delivered by a majority of the court, in each of which several judges concurred, whilst three of them, Denman, J., Pollock, B., and Quain, J., concurred in both. The first of

the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the legislature was that, if a man took an unmarried girl under sixteen out of the possession of her father, against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he make a mistake upon this point so much the worse for him; he must bear the consequences. The second of the two judgments, being that of seven judges, gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the legislature, as illustrated by other associated sections of the same act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind" as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then, in taking her out of the possession of the father, against his will, was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the *mens rea*." L. R., 2 C. C. R., 175.

The case of *Regina v. Prince*, L. R., 2 C. C. R., 154, therefore, is a direct and cogent authority for saying that the intention of the legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion.

In my opinion, therefore, this conviction ought to be quashed. My brother Charles authorizes me to say that this judgment expresses his views as well as my own.

Cave, J. In this case the prisoner was convicted of bigamy. She was married on September 11, 1880, and was deserted by her husband on December 13, 1881. From inquiries which she and her father made about him from his brother, she was

led to believe that he had been lost in a vessel bound for America, which went down with all hands. In January, 1887, she married again, supposing herself to be a widow. Her first husband returned from America in December, 1887. The jury found that the prisoner in good faith, and on reasonable grounds, believed her husband to be dead at the time of her second marriage.

At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defense. This doctrine is embodied in the somewhat uncouth maxim, "*actus non facit reum, nisi mens sit rea.*" Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common-law doctrine will readily occur to the mind. So far as I am aware, it has never been suggested that these exceptions do not equally apply in the case of statutory offenses, unless they are excluded expressly or by necessary implication. In *Regina v. Prince*, L. R., 2 C. C. R., 154, in which the principle of mistake underwent much discussion, it was not suggested by any of the judges that the exception of honest and reasonable mistake was not applicable to all offenses, whether existing at common law or created by statute. As I understand the judgments in that case, the difference of opinion was as to the exact extent of the exception, Brett, J., the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which, if true, would have made his act not criminal, while the majority of the judges seem to have held that, in order to make the defense available in that case, the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act not only not criminal, but also not immoral. Whether the majority held that the general exception is limited to cases where there is an honest belief, not only in facts which would make the act not criminal, but also in facts which would make it not immoral, or whether they held that the general doctrine was correctly stated by Brett, J., and that the further limitation

was to be inferred from the language of the particular statute they were then discussing, is not very clear. It is, however, immaterial in this case, as the jury have found that the accused honestly and reasonably believed in the existence of a state of circumstances, viz., in her first husband's death, which, had it really existed, would have rendered her act not only not criminal, but also not immoral.

It is argued, however, that, assuming the general exception to be as stated, yet the language of the act (24 and 25 Vict., ch. 100, § 57) is such that that exception is necessarily excluded in this case. Now, it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right; just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the act. It is said that this inference necessarily arises from the language of the section in question, and particularly of the proviso. The section (omitting immaterial parts) is in these words: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony; provided, that nothing in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." It is argued that the first part is expressed absolutely; but surely it is not contended that the language admits of no exception, and, therefore, that a lunatic who, under the influence of a delusion, marries again, must be convicted; and, if an exception is to be admitted where the reasoning faculty is perverted by disease, why is not an exception equally to be admitted where the reasoning faculty, although honestly and reasonably exercised, is deceived? But it is said that the proviso is inconsistent with the exception contended for; and, undoubtedly, if the proviso covers less ground or only the same ground as the exception, it fol-

lows that the legislature has expressed an intention that the exception shall not operate until after seven years from the disappearance of the first husband. But if, on the other hand, the proviso covers more ground than the general exception, surely it is no argument to say that the legislature must have intended that the more limited defense shall not operate within the seven years because it has provided that a less limited defense shall only come into operation at the expiration of those years.

What must the accused prove to bring herself within the general exception? She must prove facts from which the jury may reasonably infer that she honestly and on reasonable grounds believed her first husband to be dead before she married again. What must she prove to bring herself within the proviso? Simply that her husband has been continually absent for seven years; and if she can do that, it will be no answer to prove that she had no reasonable grounds for believing him to be dead, or that she did not honestly believe it. Unless the prosecution can prove that she knew her husband to be living within the seven years she must be acquitted. The honesty or reasonableness of her belief is no longer in issue. Even if it could be proved that she believed him to be alive all the time, as distinct from knowing him to be so, the prosecution must fail. The proviso, therefore, is far wider than the general exception; and the intention of the legislature, that a wider and more easily established defense should be open after seven years from the disappearance of the husband, is not necessarily inconsistent with the intention that a different defense, less extensive and more difficult of proof, should be open within the seven years.

Some difficulty in seeing that the proviso is wider than the general exception has arisen from the establishment of the presumption of a man's death after he has not been heard of for seven years, and from the increased facilities for transmitting intelligence which are due to modern science. If we turn to the 1 Jac. 1, chapter 11, the first statute which made bigamy an offense punishable by the courts of common law, we find an enactment substantially the same as that now in force, "If any person being married do marry any person, the former husband or wife being alive, every such offense shall be felony,

and the person offending shall suffer death; provided always that this act, nor anything therein contained, shall extend to any person whose husband or wife shall absent him or herself the one from the other by the space of seven years together in any parts within his majesty's dominion, the one of them not knowing the other to be living within that time." When this act was passed the presumption of a man's death after he had not been heard of for seven years had not been established. In *Doe d. Knight v. Nepean*, 5 Barn. & Ad., 86, at page 94, it is expressly stated by Lord Denman, C. J., that that period was adopted as the ground for such presumption in analogy to the statutes 1 Jac. 1, chapter 11, relating to bigamy, and 19 Car. II., chapter 6, as to the continuance of lives on which leases were held. In the absence of such presumption it would have been difficult at that time for the accused to prove, even when her husband had been away seven years, that she had reasonable grounds for believing him to be dead; while, on the other hand, if she had succeeded in satisfying judge and jury that she honestly so believed on reasonable grounds, and had married in such belief after he had gone away six years only, if the contention on behalf of the crown is right, the jury must have convicted her and the judge must have sentenced her to death, for doing what they were satisfied she honestly and reasonably believed she had a perfect right to do. For these reasons I am of opinion that the conviction cannot be supported.

In this judgment my brothers Day and A. L. Smith concur.

Stephen, J. The cases were both reserved by me, *Regina v. Tolson*, on a trial which took place at Carlisle on the summer circuit of 1888, and *Regina v. Strype*, on a trial which took place in December last at Winchester in the autumn circuit of 1888. [It is unnecessary in this report to further allude to the case of *Regina v. Strype*, the decision in which followed that in the present case.] In each case precisely the same point arose. In each the prisoner, a woman, was indicted for bigamy. In each case the prisoner lost sight of her husband, who deserted her, and in each case she was informed that he was dead, and believed the information, as the jury expressly found, in good faith and on reasonable grounds.

In each case the second ceremony of marriage was performed within the term of seven years after the husband and wife separated.

For the purpose of settling a question which had been debated for a considerable time, and on which I thought the decisions were conflicting, and not as the expression of my own opinion, I directed the jury that a belief in good faith and on reasonable grounds in the death of one party to a marriage was not a defense to the charge of bigamy against the other who married again within the seven years. In each case I passed a nominal sentence on the person convicted, and I stated, for the decision of this court, cases which reserved the question whether my decision was right or wrong. I am of opinion that each conviction should be quashed, as the direction I gave was wrong, and that I ought to have told the jury that the defense raised for each prisoner was valid. My view of the subject is based upon a particular application of the doctrine usually, though, I think, not happily, described by the phrase "*non est reus, nisi mens sit rea.*" Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds: It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a "*mens rea*," or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. "*Mens rea*" means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory, indeed, to describe a mere absence of mind as a "*mens rea*," or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; and in other words, that immorality is essential to crime. It will, I think, be found

that much of the discussion of the law of libel in *Shipley's Case*, 4 Doug., 73; 21 St. Tr., 847, proceeds upon a more or less distinct belief to this effect. It is a topic frequently insisted upon in reference to political offenses, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents.

Like most legal Latin maxims the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. It is not one of the "*regulæ juris*" in the digest. The earliest case of its use which I have found is in the "*Leges Henrici Primi*," volume 28, in which it is said: "*Si quis per coaccionem abjurare cogatur quod per multos annos quiete tenuerit, non in jurante set cogente perjurium erit. Reum non facit nisi mens rea.*" In Broom's Maxims the earliest authority cited for its use is 3d Institute, ch. 1, fol. 10. In this place it is contained in a marginal note, which says, that when it was found that some of Sir John Oldcastle's adherents took part in an insurrection "*pro timore mortis et quod recesserunt quam cito potuerunt*," the judges held that this was to be adjudged no treason, because it was for fear of death. Coke adds: "*Et actus non facit reum nisi mens sit rea.*" This is only Coke's own remark, and not part of the judgment. Now Coke's scraps of Latin in this and the following chapters are sometimes contradictory. Notwithstanding the passage just quoted, he says in the margin of his remarks on opinions delivered in parliament by Thyrning and others in the 21st R., 2: "*Melius est omnia mala pati quam malo consentire*" (22–3), which would show that Sir J. Oldcastle's associates had a *mens rea*, or guilty mind, though they were threatened with death, and thus contradicted the passage first quoted.

It is singular that in each of these instances the maxim should be used in connection with the law relating to coercion.

The principle involved appears to me, when fully considered, to amount to more than this. The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any

conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently" or "knowingly," but it is the general — I might, I think, say the invariable — practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

The meanings of the words "malice," "negligence" and "fraud," in relation to particular crimes, has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence.

With regard to knowledge of fact, the law, perhaps, is not so clear, but it may, I think, be maintained that in every case knowledge of fact is, to some extent, an element of criminality as much as competent age and sanity. To take an extreme illustration, can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime, in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. *Levet's Case*, 1 Hale, 474, decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation, as far as regarded the homicide, as if he had killed a burglar. In the decision of the judges in *McNaghten's Case*, 10 Cl. & F., 200, it is stated that if under an insane delusion one man killed

another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bona fide* claim of right excuses larceny, and many of the offenses against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule, that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offense.

I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: A constable, reasonably believing a man to have committed murder, is justified in killing him to prevent his escape, but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the cases reserved fall under the general rule as to mistakes of fact, and that the convictions ought to be quashed.

I will now proceed to deal with the arguments which are supposed to lead to the opposite result.

It is said, first, that the words of 24 and 25 Vict. (ch. 100, § 57) are absolute, and that the exceptions which that section contains are the only ones which are intended to be admitted, and this, it is said, is confirmed by the express proviso in the section — an indication which is thought to negative any tacit exception. It is also supposed that the case of *Regina v. Prince*, L. R., 2 C. C. R., 154, decided on section 55, confirms this view. I will begin by saying how far I agree with these views. First, I agree that the case turns exclusively upon the construction of section 57 of 24 and 25 Vict. (ch. 100). Much was said to us in argument on the old statute, 1 Jac. 1 (ch. 11).

I cannot see what this has to do with the matter. Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

In the first place, I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the Consolidation Acts of 1861, in passing over the general mental elements of crime which are presupposed in every case. Age, sanity, and more or less freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words wilfully and maliciously, or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes, but there are some cases in which this cannot be said. Such are section 55, on which *Regina v. Prince*, L. R., 2 C. C. R., 154, was decided; section 56, which punishes the stealing of "any child under the age of fourteen years;" section 49, as to procuring the defilement of any "woman or girl under the age of twenty-one," in each of which the same question might arise as in *Regina v. Prince*, L. R., 2 C. C. R., 154; to these I may add some of the provisions of the Criminal Law Amendment Act of 1885. Reasonable belief that a girl is sixteen or upwards is a defense to the charge of an offense under sections 5, 6 and 7, but this is not provided for as to an offense against section 4, which is meant to protect girls under thirteen.

It seems to me that, as to the construction of all these sections, the case of *Regina v. Prince*, L. R., 2 C. C. R., 154, is a direct authority. It was the case of a man who abducted a girl under sixteen, believing, on good grounds, that she was above that age. Lord Esher, then Brett, J., was against the conviction. His judgment establishes at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows: "That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no

offense at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England."

Lord Blackburn, with whom nine other judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the legislature intended to be done at the peril of the person who did them, but not all.

The judgment delivered by Lord Blackburn proceeds upon the principle that the intention of the legislature in section 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse."

Lord Bramwell's judgment proceeds upon this principle: "The legislature has enacted that if any one does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had her father's consent, though wrongly, he would have no *mens rea;* so if he did not know she was in any one's possession nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute."

All the judges, therefore, in *Regina v. Prince*, L. R., 2 C. C. R., 154, agreed on the general principle, though they all, except Lord Esher, considered that the object of the legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not), it was to be supposed that they intended that the wrong-doer should act at his peril.

As another illustration of the same principle, I may refer to *Regina v. Bishop*, 5 Q. B. D., 259. The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 and 9 Vict. (ch. 100, § 44). Itwas proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds, that they were not lunatics. I held that this was immaterial, having regard to the scope of the act and the object for which it was apparently passed, and this court upheld that ruling.

The application of this to the present case appears to me to be as follows: The general principle is clearly in favor of the prisoners, but how does the intention of the legislature appear to have been against them? It could not be the object of parliament to treat the marriage of widows as an act to be, if possible, prevented as presumably immoral. The conduct of the women convicted was not in the smallest degree immoral; it was perfectly natural and legitimate. Assuming the facts to be as they supposed, the infliction of more than a nominal punishment on them would have been a scandal. Why, then, should the legislature be held to have wished to subject them to punishment at all?

If such a punishment is legal, the following, amongst many other cases, might occur: A number of men in a mine are killed, and their bodies are disfigured and mutilated, by an explosion; one of the survivors secretly absconds, and it is supposed that one of the disfigured bodies is his. His wife sees his supposed remains buried; she marries again. I cannot believe that it can have been the intention of the legislature to make such a woman a criminal; the contracting of an invalid marriage is quite misfortune enough. It appears to me that every argument which showed, in the opinion of the judges in *Regina v. Prince*, L. R., 2 C. C. R., 154, that the legislature meant seducers and abductors to act at their peril, shows that the legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honorable marriage, with a liability to seven years' penal servitude.

It is argued that the proviso that a remarriage, after seven years' separation, shall not be punishable, operates as a tacit exclusion of all other exceptions to the penal part of the section. It appears to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to show, not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time. It would, to my mind, be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of

recovering a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger. It remains only to consider cases upon this point decided by single judges. As far as I know, there are reported the following cases:

Regina v. Turner (1862), 9 Cox, C. C., 145. In this case Martin, B., is reported to have said: "In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness. Still the jury are to say if, upon such testimony, she had an honest belief that her first husband was dead."

In *Regina v. Horton* (1871), 11 Cox, C. C., 670, Cleasby, B., directed the jury that if the prisoner reasonably believed his wife to be dead he was entitled to be acquitted. He was convicted.

In *Regina v. Gibbons* (1872), 12 Cox, C. C., 237, Brett, J., after consulting Willes, J., said. "*Bona fide* belief as to the husband's death was no defense, unless the seven years had elapsed," and he refused to reserve a case, a decision which I cannot reconcile with his judgment three years afterward, in *Regina v. Prince*, L. R., 2 C. C. R., 154. In *Regina v. Moore* (1877), 13 Cox, C. C., 544, Denman, J., after consulting Amphlett, L. J., held that a *bona fide* and reasonable belief in a husband's death excused a woman charged with bigamy. In *Regina v. Bennett* (1877), 14 id., 45, Lord Bramwell agreed with the decision in *Regina v. Gibbons*, 12 id., 237.

The result is that the decisions in *Regina v. Gibbons*, 12 Cox, C. C., 237, and *Regina v. Bennett*, 14 id., 45, conflict with those of *Regina v. Turner*, 9 id., 145; *Regina v. Horton*, 11 id., 670, and *Regina v. Moore*, 13 id., 544. I think, therefore, that these five decisions throw little light on the subject. The conflict between them was in fact the reason why I reserved the cases.

My brother Grantham authorizes me to say that he concurs in this judgment.

MANISTY, J. I am of opinion that the conviction should be affirmed.

The question is whether, if a married woman marries another man during the life of her former husband and within

seven years of his leaving her, she is guilty of felony, the jury having found as a fact that she had reason to believe, and did honestly believe, that her former husband was dead.

The fifty-seventh section of the 24 and 25 Vict., ch. 100, is as express and as free from ambiguity as words can make it. The statute says: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, . . . shall be guilty of felony, and, being convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labor." The statute does not even say if the accused shall feloniously or unlawfully or knowingly commit the act, he or she shall be guilty of felony, but the enactment is couched in the clearest language that could be used to prohibit the act and to make it a felony if the act is committed.

If any doubt could be entertained on the point, it seems to me the proviso which follows the enactment ought to remove it. The proviso is, that "nothing in the fifty-seventh section of the act shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

Such being the plain language of the act, it is, in my opinion, the imperative duty of the court to give effect to it, and to leave it to the legislature to alter the law, if it thinks it ought to be altered.

Probably, if the law was altered, some provision would be made in favor of children of the second marriage. If the second marriage is to be deemed to be legal for one purpose, surely it ought to be deemed legal as to the children who are the offspring of it. If it be within the province of the court to consider the reasons which induced the legislature to pass the act as it is, it seems to me one principal reason is on the surface, namely, the consequence of a married person marrying again in the life-time of his or her former wife or husband, in which case it might and in many cases would be that several children of the second marriage would be born, and all would

be bastards. The proviso is evidently founded upon the assumption that, after the lapse of seven years, and the former husband or wife not being heard of, it may reasonably be inferred that he or she is dead, and thus the mischief of a second marriage in the life-time of the former husband or wife is to a great extent, if not altogether, avoided.

It is to be borne in mind that bigamy never was a crime at common law. It has been the subject of several acts of parliament, and is now governed by 24 and 25 Vict. (ch. 100, § 57).

No doubt, in construing a statute, the intention of the legislature is what the court has to ascertain, but the intention must be collected from the language used, and where that language is plain and explicit and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of judges to give effect to it.

The cases of insanity, etc., on which reliance is placed, stand on a totally different principle, viz., that of an absence of *mens*. Ignorance of the law is no excuse for the violation of it, and if a person choose to run the risk of committing a felony, he or she must take the consequences, if it turn out that a felony has been committed!

Great stress is laid by those who hold that the conviction should be quashed upon the circumstance that the crime of bigamy is by the statute declared to be a felony, and punishable with penal servitude or imprisonment with or without hard labor for any term not exceeding two years. If the crime had been declared to be a misdemeanor punishable with fine or imprisonment, surely the construction of the statute would have been, or ought to have been, the same. It may well be that the legislature declared it to be a felony to deter married persons from running the risk of committing the crime of bigamy, and in order that a severe punishment might be inflicted in cases where there were no mitigating circumstances. No doubt circumstances may and do affect the sentence, even to the extent of the punishment being nominal, as it was in the present case, but that is a very different thing from disregarding and contravening the plain words of the act of parliament.

The case is put by some of my learned brothers of a married man leaving his wife and going into a foreign country

intending to settle there, and it may be afterward to send for his wife and children, and the ship in which he goes is lost in a storm with, as is supposed, all on board, and after the lapse of say a year, and no tidings received of any one having been saved, the underwriters pay the insurance on the ship, and the supposed widow gets probate of her husband's will and marries and has children, and after the lapse of several years the husband appears, it may be a few days before seven years have expired, and the question is asked, Would it not be shocking that in such a case the wife could be found guilty of bigamy?

My answer is, that the act of parliament says in clear and express words, for very good reasons, as I have already pointed out, that she is guilty of bigamy. The only shocking fact would be that some one for some purpose of his own had instituted the prosecution. I need not say that no public prosecutor would ever think of doing so, and the judge before whom the case came on for trial would, as my brother Stephen did in the present case, pass a nominal sentence of a day's imprisonment (which in effect is immediate discharge) accompanied, if I were the judge, with a disallowance of the costs of the prosecution. It may be said, but the woman is put to some trouble and expense in appearing before the magistrate, who would, of course, take nominal bail, and in appearing to take her trial. Be it so, but such a case would be very rare indeed. On the other hand, see what a door would be opened to collusion and mischief if, in the vast number of cases where men in humble life leave their wives and go abroad, it would be a good defense for a woman to say and give proof, which the jury believed, that she had been informed by some person upon whom she honestly thought she had reason to rely, and did believe, that her husband was dead, whereas in fact she had been imposed upon and her husband was alive.

What operates strongly on my mind is this: that if the legislature intended to prohibit a second marriage in the life-time of a former husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the fifty-seventh section of the act in question. In this view I am fortified by several sections of the same act, where the words "unlaw-

fully" and "maliciously and unlawfully" are used (as in section 23), and by a comparison of them with the section in question (section 57), where no such words are to be found. I especially rely upon the fifty-fifth section, by which it is enacted that "whosoever shall unlawfully" (a word not used in section 57) "take or cause to be taken any unmarried girl being under the age of sixteen years out of the possession of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Fifteen out of sixteen judges held, in the case of *Regina v. Prince*, L. R., 2 C. C. R., 154, that notwithstanding the use of the word "unlawfully" the fact of the prisoner believing and having reason to believe that the girl was over sixteen afforded no defense. This decision is approved of upon the present occasion by five judges, making in all twenty against the nine who are in favor of quashing the conviction. To the twenty I may, I think, fairly add Tindal, C. J., in *Regina v. Robins*, 1 Car. & K., 456, and Willes, J., in *Regina v. Mycock*, 12 Cox, C. C., 28.

I rely also very much upon the fifth section of the act passed in 1885 for the better protection of women and girls (48 and 49 Vict., ch. 69), by which it was enacted that "any person who unlawfully and carnally knows any girl above thirteen and under sixteen years shall be guilty of a misdemeanor," but to that is added a proviso that "it shall be a sufficient defense if it be made to appear to the court or jury before whom the charge shall be brought that the person charged had reasonable cause to believe and did believe that the girl was of or above the age of sixteen." It is to be observed that notwithstanding the word "unlawfully" appears in this section, it was considered necessary to add the proviso, without which it would have been no defense that the accused had reasonable cause to believe and did believe that the girl was of or above the age of sixteen. Those who hold that the conviction in the present case should be quashed really import into the fifty-seventh section of the 24 and 25 Vict., ch. 100, the proviso which is in the fifth section of the 48 and 49 Vict., ch. 69, contrary, as it seems to me, to the decision in *Regina v. Prince*, L. R., 2 C. C. R., 154, and to the hitherto undisputed canons for construing a statute.

It is said that an indictment for the offense of bigamy commences by stating that the accused feloniously married, etc., and consequently the principle of *mens rea* is applicable. To this I answer that it is to the language of the act of parliament, and not to that of the indictment, the court has to look. I consider the indictment would be perfectly good if it stated that the accused, being married, married again in the life-time of his or her wife or husband contrary to the statute, and so was guilty of felony.

I am very sorry we had not the advantage of having the case argued by counsel on behalf of the crown. My reason for abstaining from commenting upon the cases cited by Mr. Henry in his very able argument for the prisoner is, because the difference of opinion among some of the judges in those cases is as nothing compared with the solemn decision of fifteen out of sixteen judges in the case of *Regina v. Prince*, L. R., 2 C. C. R., 154.

So far as I am aware, in none of the cases cited by my learned brothers was the interest of third parties, such as the fact of there being children of the second marriage, involved. I have listened with attention to the judgments which have been delivered, and I have not heard a single observation with reference to this, to my mind, important and essential point. I am absolutely unable to distinguish *Regina v. Prince*, L. R., 2 C. C. R., 154, from the present case, and, looking to the names of the eminent judges who constituted the majority, and to the reasons given in their judgments, I am of opinion, upon authority as well as principle, that the conviction should be affirmed.

The only observation which I wish to make is (speaking for myself only), that I agree with my learned brother Stephen in thinking that the phrases "*mens rea*" and "*non est reus, nisi mens sit rea*" are not of much practical value, and are not only "likely to mislead," but are "absolutely misleading." Whether they have had that effect in the present case on the one side or the other it is not for me to say.

I think the conviction should be affirmed. My brothers Denman, Pollock, Field and Huddleston agree with this judgment, but my brother Denman has written a short opinion of his own, with which my brother Field agrees.

Conviction quashed.

STATE v. BORIE.

(79 Iowa, 605.)

BASTARDY: *Intimacy of woman with other men.*

In a bastardy proceeding, evidence that the prosecutrix, some seven or eight years before, was locked up in a room with one D. at a public house for several hours is material, where it was shown that she was several times in D.'s company, both at his home and riding with him, about the time that the alleged intercourse with defendant was had.

Appeal from the district court, Buchanan county; D. J. Linehan, Judge.

Proceeding under the bastardy act. From judgment for maintenance the defendant appeals.

Chas. E. Ranseer, for appellant.
H. W. Holman, for appellee.

GRANGER, J. Mary Weismiller is the mother of an illegitimate child, born April 25, 1888, and she institutes this proceeding against the defendant, as its putative father, for its support. The record presents but one question which we are required to notice. The alleged intercourse, under the statements of the prosecuting witness, occurred somewhere from the 10th to the 20th of August, 1887. In July before, the prosecuting witness was in the company of one Damon, with whom years before she had a marriage engagement, which had been abandoned or broken for some time. She rode with him from Independence to Oelwein, July 4th, some twenty miles, and the last of July she was twice in his company when she was at Oelwein on business, at each time staying at his home over night, sleeping with his mother. The last of July she went to his house on Saturday, and on Sunday he procured a horse and buggy, and they rode together to the house of one Searls. In her testimony she stated that she was at Maynard with Damon some seven or eight years before, on a Fourth of July. She was then asked if at that time she and Damon were not at a hotel, locked in a room for several hours. An objection that the testimony was incompetent, immaterial and too remote was sustained, and the appellant urges the ruling

as error. If the intimacies had not to some extent been renewed between the prosecuting witness and Damon so recently, and at the particular time they appear to have been, we might feel induced to say the circumstances sought to be proved were too remote. If it had been true that the occurrence claimed as to being locked in a room at a public house, had occurred in July, 1888, there would be no question of its materiality in a case where the testimony was conflicting as to the paternity of a child. In such a case the fact would be proper for the jury to consider. It is in evidence as to her being with Damon in July, both at his home and riding with him. Now suppose the jury should believe that the being in such a room years before was for improper purposes,—and it is a fact unexplained, from which such an inference might be drawn, though not necessarily,— would not the fact of prior misconduct be a material aid in determining the probabilities of misconduct in July, 1888? The July visits and conduct in 1888 were allowed in proof only to let the jury say if another than defendant was likely the father of the child. It does seem as if the jury could better weigh such circumstances in the light of the former conduct of the parties. If, in their former acquaintance, their conduct was exemplary and above suspicion, it might justify a like inference at the renewal of acquaintance. If otherwise, would not the fact as well aid to a just conclusion? It must not be understood that we intimate a conclusion that should be drawn from any fact which the testimony, when admitted, might establish. We only say the testimony should have been admitted and considered.

Other errors are assigned, all of which have been considered, but there is no other on which we would reverse. However, to avoid misapprehension, we will say that on some of the points the ruling would be sustained because of the condition of the record, and beyond the question of the record we have not inquired. Because of the error pointed out the judgment is reversed.

NOTE.—The proceeding is *quasi* criminal. The gist of the offense is the refusal of the father to provide for the maintenance of the child and to protect the public from the prospect of its becoming a charge. *Williams v. State*, 4 Am. Cr. R., 65. The action abates on the death of the child or the marriage of the mother and the putative father. In such case the action

is abated even though it had proceeded to final judgment. While it is a penal proceeding, it is intended to relieve the state from the duty of maintaining the illegitimate child rather than to inflict a punishment for the violation of law. *Paulk v. State*, 1 Am. Cr. R., 67; *Judge v. Kerr*, 17 Ala., 328.

Evidence.— In Illinois the action cannot be supported upon the uncorroborated testimony of the mother alone if she be contradicted. *McCoy v. People*, 1 Am. Cr. R., 71. The prior unchastity of the mother at about the time the child is said to have been begotten may also be shown. *State v. Karver*, 5 Ill., 88.

While it is a well known physiological fact that peculiarities of form, feature and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge, that during the first few weeks or even months of a child's existence it has that peculiar immaturity of features which characterizes it as an infant, and that it changes often and very much during that period. Resemblance then can be readily imagined, and it is therefore improper to exhibit the child to the jury. *Clark v. Bradstreet*, 80 Me., 454. But, in deciding upon whether the child is of negro blood or not, the rule is different. *Warlick v. White*, 76 N. C., 89; *Garvin v. State*, 52 Miss., 207.

So it was held in *Clark v. Bradstreet, supra*, that it was error to exhibit a child six weeks old to the jury; and it was decided in *Hannawolt v. State*, 6 Am. Cr. R., 65, where a child less than a year old was so exhibited, such exhibition was prejudicial error.

But when the child was two years and one month old the court held this might be done. *State v. Smith*, 54 Ia., 104.

See further upon the law of bastardy: *Paulk v. State*, 1 Am. Cr. R., 67; *People v. Christman*, id., 70; *McCoy v. People*, id., 71; *Hopkins v. People*, 2 id., 178; *Kolbe v. People*, id., 177; *Baker v. State*, id., 606; *Hall v. People*, 3 id., 21; *In re Wheeler*, 6 id., 70.

DAVIS v. BEASON.

(133 U. S., 333.)

BIGAMY: *Power of state to punish by disfranchisement — Religious liberty.*

1. The provision in section 501, Revised Statutes of Idaho, that "no person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, is permitted to vote at any election, or to

hold any position or office of honor, trust or profit within this territory," is an exercise of the legislative power conferred upon territories by Revised Statutes, sections 1851, 1859, and is not open to any constitutional or legal objection.

2. Bigamy and polygamy are crimes by the laws of the United States, by the laws of Idaho and by the laws of all civilized and christian countries; and to call their advocacy a tenet of religion is to offend the common sense of mankind.
3. A crime is none the less so, nor less odious, because sanctioned by what any particular sect may designate as religion.
4. It was never intended that the first article of amendment to the constitution, that "congress shall make no laws respecting the establishment of religion, or prohibiting the free exercise thereof," should be a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.
5. The second subdivision of section 504, Revised Statutes of Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the territory, is not open to any valid legal objection.

In April, 1889, the appellant, Samuel D. Davis, was indicted in the district court of the third judicial district of the territory of Idaho, in the county of Oneida, in connection with divers persons named, and divers other persons whose names are unknown to the grand jury, for a conspiracy to unlawfully pervert and obstruct the due administration of the laws of the territory, in this, that they would unlawfully procure themselves to be admitted to registration as electors of said county of Oneida for the general election then next to occur in that county, when they were not entitled to be admitted to such registration, by appearing before the respective registrars of the election precincts in which they resided, and taking the oath prescribed by the statute of the state, in substance as follows: "I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one years (or will be on the 6th day of November, 1888); that I have (or will have) actually resided in this territory four months, in this county for thirty days, next preceding the day of the next ensuing election; that I never have been convicted of treason, felony or bribery; that I am not registered or entitled to vote at any other place in this territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises,

counsels or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel or encourage any crime defined by law, either as a religious duty or otherwise; that I do regard the constitution of the United States and the laws thereof and the laws of this territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization or association to the contrary notwithstanding, so help me God;" when in truth each of the defendants was a member of an order, organization and association, namely, the church of Jesus Christ of Latter-day Saints, commonly known as the Mormon church, which they knew taught, advised, counseled and encouraged its members and devotees to commit the crimes of bigamy and polygamy as duties arising and resulting from membership in such order, organization and association, as they all knew, practiced bigamy and polygamy, and plural and celestial marriage, as doctrinal rites of said organization; and in pursuance of said conspiracy the said defendants went before the registers of different precincts of the county (which are designated) and took and had administered to them respectively the oath aforesaid.

The defendants demurred to the indictment, and the demurrer being overruled they pleaded separately not guilty. On the trial which followed on the 12th of September, 1889, the jury found the defendant, Samuel D. Davis, guilty as charged in the indictment. The defendant was thereupon sentenced to pay a fine of $500, and in default of its payment to be confined in the county jail of Oneida county for a term not exceeding two hundred and fifty days, and was remanded to the custody of the sheriff until the judgment should be satisfied.

Soon afterwards, on the same day, the defendant applied to the court before which the trial was had, and obtained a writ of *habeas corpus*, alleging that he was imprisoned and restrained of his liberty by the sheriff of the county; that his imprisonment was by virtue of his conviction and the judg-

ment mentioned, and the warrant was issued thereupon; that such imprisonment was illegal; and that such illegality consisted in this: (1) That the facts in the indictment and record did not constitute a public offense, and the acts charged were not criminal or punishable under any statute or law of the territory; and that (2) so much of the statute of the territory as provides that no person is entitled to register or vote at any election who is "a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization," is a "law respecting an establishment of religion" in violation of the first amendment to the constitution, and void.

The court ordered the writ to issue, directed to the sheriff, returnable before it, at 3 o'clock in the afternoon of that day, commanding the sheriff to have the body of the defendant before the court at the hour designated, with the time and cause of his imprisonment, and to do and receive what should then be considered concerning him.

On the return of the writ the sheriff produced the body of the defendant and also the warrant of commitment under which he was held, and the record of the case showing his conviction for the conspiracy mentioned and the judgment thereon. To this return, the defendant, admitting the facts stated therein, excepted to their sufficiency to justify his detention. The court, holding that sufficient cause was not shown for the discharge of the defendant, ordered him to be remanded to the custody of the sheriff. From this judgment the defendant appealed to this court. R. S., § 1909.

Mr. Jeremiah M. Wilson and *Mr. Franklin S. Richards* (with whom was *Mr. Samuel Shellabarger* on the brief), for appellant.

Mr. H. W. Smith, for appellee.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

On this appeal our only inquiry is whether the district court of the territory had jurisdiction of the offense charged in the indictment of which the defendant was found guilty. If it had jurisdiction we can go no farther. We cannot look into any alleged errors in its ruling on the trial of the defendant. The writ of *habeas corpus* cannot be turned into a writ of error to review the action of that court. Nor can we inquire whether the evidence established the fact alleged that the defendant was a member of an order or organization known as the Mormon church, called the Church of Jesus Christ of Latter-day Saints, or the fact that the order or organization taught and counseled its members and devotees to commit the crimes of bigamy and polygamy as duties arising from membership therein.

On this hearing we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and debase men. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.

The term "religion" has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment of the constitution, in declaring that congress shall make no laws respecting the establishment of

religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of any of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power

of the government for acts, recognized by the general consent of the Christian world in modern times as proper matter for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

On this subject the observations of the court through the late Chief Justice Waite, in *Reynolds v. United States*, are pertinent. 98 U. S., 145, 165 and 166. In that case the defendant was indicted and convicted under section 5352 of the Revised Statutes, which declared that "every person having a husband or a wife living, who marries another, whether married or single, in a territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term not more than five years." The case being brought here, the court, after referring to a law passed in December, 1788, by the state of Virginia, punishing bigamy and polygamy with death, said that from that day there never had been a time in any state of the Union when polygamy had not been an offense against society cognizable by the civil courts, and punished with more or less severity; and added: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rest." And referring to the statute cited, he said: "It is constitutional and valid as prescribing a rule of action for all those residing in the territories, and in places over which the United States have exclusive control. This being so, the only question that remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while

they cannot interfere with mere religious beliefs and opinions, they may with practices. Suppose that one believed that human sacrifices were a part of religious worship, would it be necessarily contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

And in *Murphy v. Ramsey*, 114 U. S., 15, 45, referring to the act of congress excluding polygamists and bigamists from voting or holding office, the court, speaking by Mr. Justice Matthews, said: "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union of life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.

It is assumed by counsel of the petitioner that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated if asserted to be a part of the religious doctrines of those advocating and practicing them.

But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion.

It only remains to refer to the laws which authorized the legislature of the territory of Idaho to prescribe the qualifications of voters and the oath they were required to take. The Revised Statutes provide that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands of other property of non-residents be taxed higher than the lands or other property of residents." R. S., § 1851.

Under this general authority it would seem that the territorial legislature was authorized to prescribe any qualifications for voters calculated to secure obedience to its laws. But, in addition to the above laws, section 1859 of the Revised Statutes provides that "every male citizen above the age of twenty-one, including persons who have legally declared their intention to become citizens in any territory hereafter organized, and who are actual residents of such territory at the time of the organization thereof, shall be entitled to vote at the first election in such territory, and to hold any office therein; subject, nevertheless, to the limitations specified in the next section," namely, that at all elections in any territory subsequently organized by congress, as well as at all elections in territories already organized, the qualifications of voters and for holding office shall be such as may be prescribed by the legislative assembly of each territory, subject, nevertheless, to the following restrictions:

First. That the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one, or persons above that age who have declared their intention to become such citizens;

Second. That the elective franchise or the right of holding

office shall not be denied to any citizen on account of race, color or previous condition of servitude;

Third. That no soldier or sailor or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote unless he has made his permanent domicile in the territory for six months; and

Fourth. That no person belonging to the army or navy shall be elected to or hold a civil office or appointment in the territory.

These limitations are the only ones placed upon the authority of territorial legislatures against granting the right of suffrage or of holding office. They have the power, therefore, to prescribe any reasonable qualifications of voters and for holding office not inconsistent with the above limitations. In our judgment, section 501 of the Revised Statutes of Idaho Territory, which provides that "no person under guardianship, *non compos mentis* or insane, nor any person convicted of treason, felony or bribery in this territory, or in any other state or territory in the Union, unless restored to civil rights; nor any person who is a bigamist or who is a polygamist, or who teaches, advises, counsels or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association or otherwise, is permitted to vote at any election or to hold any position or office of honor, trust or profit within this territory," is not open to any constitutional or legal objection. With the exception of persons under guardianship or of unsound mind, it simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offenses and those who advocate a practical resistance to the laws of the territory and justify and approve the commission of crimes forbidden by it. The second subdivision of section 504 of the Revised Statutes of Idaho, requiring every

person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the territory, is not open to any valid legal objection to which our attention has been called.

The position that congress has, by its statute, covered the whole subject of punitive legislation against bigamy and polygamy, leaving nothing for territorial action on the subject, does not impress us as entitled to much weight. The statute of congress of March 22, 1882, amending a previous section of the Revised Statutes in reference to bigamy, declares "that no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in such territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument in, under or for any such territory or place, or under the United States." 22 Stat., 31, ch. 47, § 8.

It is a general law applicable to all territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the territories over kindred offenses or over the means for their ascertainment and prevention. The cases in which the legislation of congress will supersede the legislation of a state or territory, without specific provision to that effect, are those in which the same matter is the subject of legislation by both. There the action of congress may well be considered as covering the entire ground. But here there is nothing of its kind. The act of congress does not touch upon teaching, advising and counseling the practice of bigamy and polygamy, that is, upon aiding and abetting in the commission of those crimes, nor upon the mode adopted, by means of the oath required for registration, to prevent persons from being enabled by their votes to defeat the criminal laws of the country.

The judgment of the court below is therefore affirmed.

NOTE.— The constitutions of several states, in providing for religious freedom, have declared expressly that such freedom shall not be construed to

excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state. The constitution of New York of 1777 provided as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: Provided, the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." Art. 38, 2 Charters and Constitution, 1338. The same declaration is repeated in the constitution of 1821 (art. 7, sec. 3, id. 1347), and in that of 1846 (art. 1, sec. 3, id. 1351), except that for the words "hereby granted" the words "hereby secured" are substituted. The constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada and South Carolina contain a similar declaration.

STATE v. PUGSLEY.

(75 Iowa, 744.)

BODY STEALING.

1. CONSTITUTIONAL LAW — TRIAL BY JURY — CRIMINAL JURISDICTION.— Code of Iowa, section 4160, providing that "when a public offense is committed on the boundary line between two or more counties, or within five hundred yards thereof, the jurisdiction is in either," is not in conflict with the Constitution of Iowa, article 1, section 9, which provides that "the right of trial by jury shall remain inviolate," when a statute similar to section 4160 was in force when the first constitution was adopted, and has remained so ever since.
2. INDICTMENT AND INFORMATION — VENUE — VARIANCE.— Under Code of Iowa, section 4160, which provides that "when a public offense is committed on the boundary line between two or more counties, or within five hundred yards thereof, the jurisdiction is in either;" and section 4306, declaring that "no indictment shall be deemed insufficient . . . or . . . be affected by any matter which was formerly . . . a defect, but which does not tend to prejudice the substantial rights of the defendant on the merits," — an indictment charging the offense to have been committed in R. county, when it was in fact committed in T. county, within five hundred yards of the T. county line, is sufficient, and not prejudicial to the rights of defendant. Seevers, C. J., dissenting.
3. CRIMINAL LAW — EVIDENCE — HARMLESS ERROR.— The admission or rejection of evidence that is not of a controlling character, nor of such a nature that its introduction or rejection would have affected the issue, cannot be assigned as error.
4. SAME — INSTRUCTIONS.— A refusal to charge as requested by defendant is not error when the legal thought of such instruction was contained, substantially, in the general charge.

5. BODY STEALING — EVIDENCE — MOTIVE.— On an indictment against P. for the disinterment of a dead body, which was to be burnt, and made to represent the carcass of Q., who was to disappear, and thus make payable the insurance on his life, the policies of insurance are admissible in evidence to prove the motive of the crime.
6. SAME — LAWFUL AUTHORITY.— Evidence that defendant disinterred a body secretly during the night-time, concealed it, and that there was an attempt made to burn it, warrants a refusal to grant a new trial on the ground that there was no evidence to show that the body was disinterred without lawful authority.
7. SAME — INSTRUCTIONS — INCONSISTENCY.— On an indictment for unlawful disinterment, a charge was made to the jury that before they could find the defendant guilty they must find that "he unlawfully dug open the grave mentioned in the indictment, and removed therefrom the remains, . . . or that he advised, assisted or was in some way connected with the digging up and removal of said remains;" and another paragraph of the charge said: "If you find from the evidence that the body was interred at M., and was, without legal authority, disinterred . . . and removed, and that defendant aided, . . . encouraged, . . . enticed, or in any manner procured the same to be done, then you should find him guilty." *Held*, that although the first paragraph of instruction is erroneous, there being no evidence to show that defendant dug up, or aided or assisted in any way in the removal of the body from the grave, yet, in view of the second paragraph of the instruction, the jury could not have been misled, and that, therefore, the defendant was in no way prejudiced. Seevers, C. J., and Reed, J., dissenting.
8. WITNESS — EXAMINATION — DAMAGING ANSWERS.— No just complaint can be made when it happens that, as an incidental consequence of his answers to competent questions concerning his residence and occupation, a witness discloses facts that tend to impair his credibility as a witness or to impeach his moral character.

Appeal from district court, Decatur county; John W. Harvey, judge.

Indictment against C. S. Pugsley for the unlawful disinterment and removal of the body of Arthur Lynch from a certain cemetery. Verdict of guilty and judgment accordingly. Defendant appeals.

J. L. Brown, *Laughlin & Campbell* and *E. W. Curry*, for appellants.

A. J. Baker, attorney-general, for the state, appellee.

SEEVERS, C. J. 1. The defendant took the deposition of one Stevens, and the state, on cross-examination, asked the witness certain questions, which, and the answers thereto, are as fol-

lows: "Where are you now living? *Answer.* Bedford. What are you doing there? *A.* Waiting for court to come. Where are you stopping at this time? *A.* I am in the jail of Taylor county. How long have you been in jail? *A.* Since the last part of February." To the last two questions the defendant objected when the deposition was taken, and filed a motion to strike the same out of the deposition. This motion was overruled, and the foregoing questions and answers were read to the jury. It was conceded, when the deposition was taken, the witness had been indicted for larceny and was confined in jail on such charge; but there was no evidence tending to show that he had been convicted or even tried. Counsel for the defendant insist that the object and purpose of the questions asked, and the evidence elicited in response thereto, was to disgrace the witness, cast suspicion on and weaken his evidence in chief, and that the mere fact a person had been indicted and is confined in jail has no tendency to impair his credibility as a witness or to impeach his moral character. In support of these views *People v. Elster*, 3 Pac. Rep., 884; *Same v. Hamblin*, 68 Cal., 101; *Kitteringham v. Dance*, 58 Iowa, 632; *Slocum v. Knosby*, 70 Iowa, 75, are cited. The two last cases, clearly, are inapplicable, and in the former the witness, in substance, was asked whether he had ever been arrested for a felony, and he was compelled to answer the question asked. This was held to be erroneous because the evidence had no tendency to impeach the credibility of the witness. The case at bar is essentially different. It is competent to ask a witness what is his occupation and where he resides; and such is the settled practice in this state. Therefore it follows that if, in answer to competent questions so framed as to elicit the information just stated, the facts disclosed have a tendency to disgrace the witness, affect his credibility or weaken his evidence, no just complaint can be made that such effect is produced, for the reason that it is an incidental consequence which follows or results from the introduction of competent evidence.

2. The evidence clearly shows that Mormontown cemetery is situate in Taylor county, but within five hundred yards of the line between it and Ringgold county. It will be observed that the indictment charges the criminal act was committed

in the last-named county; and it is provided by statute, "when a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county." Code, § 4160. Counsel for the defendant contend that the offense charged is of a local and not of a transitory character; that it is like burglary, which of necessity must be committed by breaking into a building, which must be described as being situate in some county; and so here the cemetery from which the disinterment is made must be properly described as being situate in a county; and the offense must be proved as stated in the indictment; that the fact that the cemetery is within five hundred yards of the county line is immaterial unless the indictment so charges. In other words, the defendant claims that he cannot be tried in Ringgold county for an offense committed in Taylor county, unless it is charged in the indictment that the offense was committed in the last-named county, and within five hundred yards of the boundary line between it and Ringgold county. In support of this proposition the following authorities are cited: *People v. Slater*, 5 Hill, 401; *Haskins v. People*, 16 N. Y., 344; *People v. Scott*, 74 Cal., 94; *Miles v. State*, 23 Tex. App., 410; *Chevarrio v. State*, 15 Tex. App., 330. The contention of the attorney-general is that the statute in express terms gives the court in either county jurisdiction of the offense, and, therefore, it may be well charged to have been committed in one county, and the defendant convicted when the evidence shows it was committed in the other, but within five hundred yards of the boundary line. He cites and relies on *State v. Robinson*, 14 Minn., 451 (Gil., 333). The indictment in that case was found in and by a grand jury of the county of Carver, and it charged the offense was committed "in the county of Scott, in the state of Minnesota, within one hundred yards of the dividing line between said county of Scott" and the county of Carver. There is a statute in Minnesota which provides that "offenses committed on the boundary lines of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment to have been committed in either of them, and may be prosecuted and punished in either county." The indictment was held to be sufficient, and there is no doubt the holding is correct. As we understand, how-

ever, the court went further, and held that the indictment would have been sufficient if it had simply alleged the offense had been committed in the county of Carver. This last holding is, however, clearly *dictum*. There was no such question before the court. It is provided by statute that no indictment shall be deemed insufficient, nor can the trial, judgment or other proceedings be affected by "any matter which was formerly deemed a defect or imperfection, but which does not tend to prejudice the substantial rights of the defendant on the merits." Code, § 4306. A majority of the court are of the opinion that, under this statute, the failure of the pleader to state accurately the place where the offense was committed was in no respect prejudicial. The thought being that the only reasons for so stating the place are, *first*, that the defendant may be informed with sufficient certainty of the particular offense charged, and while it may be considered that, ordinarily, the place where a local offense is committed is an important factor in the description of the offense, yet as in this case the cemetery, or place where it was committed, is stated, the thought is that the substantial rights of the defendant were not prejudiced by locating it in the wrong county; *secondly*, although the place is wrongly stated, the defendant could readily, had he been acquitted and again indicted, show by parol that the two offenses were in fact the same. In these views the writer hereof is unable to concur, for the reasons that in such case the defendant might be indicted in Taylor county, and in such case the indictment would accurately describe the offense as having been committed in that county. Upon introducing parol evidence to establish the identity of the two offenses he would be met with the objection that the indictments charged the offenses in two different counties. It must be conceded, I think, that there are doubts whether, in such case, parol evidence would be admissible to contradict the indictment. But, conceding it would be, it has always been held that the fact that the county or district in which the crime was committed was within the jurisdiction of the court should be accurately stated, and that the proof must sustain such allegation. *Queen v. Mitchell*, 2 Adol. & E., 636. When the place, county or district is correctly stated in the indictment, the defendant is not driven to the necessity of in-

troducing oral evidence, which he may or may not be able to obtain; but his plea of a former acquittal ordinarily is sustained by the introduction in evidence of the record in the former case. He therefore, in such case, it seems to me, is prejudiced by the failure of the indictment to state that the offense was committed in Taylor county within five hundred yards of the boundary line between it and Ringgold county. The name given to the cemetery makes no difference, unless it intensifies the error of the court, because it is described as being in Ringgold county, and there is nothing in the record which tends to show that there is not such a cemetery in that county.

3. It is urged with much force and vigor that section 4160 of the code is unconstitutional, for the reason that the constitution must be construed as if it expressly provided that an indictment can only be found by a grand jury of the county where the offense is committed, and that the trial jury shall come from such county. The first constitution of this state was adopted in 1846, and it contained the following provision: "The right of trial by jury shall remain inviolate, but the general assembly may authorize trial by jury of a less number than twelve men in inferior courts." This constitution was superseded by the one now in force, which was adopted in 1857, and it contains, in substance, the same provision. A statute precisely the same as section 4160 of the code was in force when the first constitution was adopted,—Revision (Blue Book) 1843, p. 153, § 40,—and such a statute has been in force at all times since 1843. This being so, the right of trial by jury is the same now as it was when the first constitution was adopted, and therefore the statute in question is not unconstitutional, for the reason that constitutional rights of the defendant have not been in any respect impaired. The authorities cited by counsel are not applicable.

4. A witness for the state was asked a leading question, to which counsel for the defendant objected for that reason, whereupon the court said, in the presence of the jury: "I don't know why this witness has been answering as he has. He is not answering as prompt as he might. Any person can see that. I will let the state lead him. I have no doubt about a part of that being correct, though." This language of the

court is criticised by counsel, and he contends the defendant was prejudiced thereby. The language used by the court is, we think, somewhat objectionable; but whether it was prejudicial may be doubtful, and we are not called on to determine such question. It will be observed that no objection was made to the remarks made by the court, and that the only objection made was that the question was leading. It was clearly within the sound legal discretion of the court to permit the counsel for the state to ask the witness leading questions, and our examination of the record satisfies us that such discretion was not abused.

5. The theory of the state was, and there was evidence tending to prove, that one Quigley had procured insurance on his life, and that the body was disinterred and attempt made to burn it. Quigley was to disappear, and the claim made he was dead, so as to procure the insurance. The insurance policies were introduced in evidence, against the objection of the defendant; and in this respect it is insisted that the court erred. But we think otherwise. It is always competent to prove a motive for the commission of any crime, and therefore the policies of insurance were properly admitted in evidence.

6. One Quigley was introduced as a witness by the state. His name is not indorsed on the indictment. The state claims a notice was served on the defendant that Quigley would be introduced as a witness. The proof of service of such notice is as follows: "*State of Iowa, Ringgold County:* I hereby certify that I personally served the within notice on the within-named defendants, A. E. King and C. S. Pugsley, by reading to them, and by delivering to each of them personally, a copy of the same, in Ringgold county, Iowa, on the 1st day of June, 1885. JAMES BEARD, Sheriff." It is objected that such proof of service is insufficient, because, *first*, it does not appear that the original notice was read to the defendant, but that it affirmatively appears that a copy thereof was read to and delivered to him. The proof of service is that the within notice was read, and a copy thereof delivered to the defendant. This, we think, is the proper construction of the return; for, in the absence of any showing to the contrary, it will be presumed it was written on the original notice. *Second*, it is said it should have been verified, and that the return of the sheriff is

not sufficient. But we think otherwise. The sheriff is an officer of the court, whose duty it is to serve such notices, and his return proves itself.

8. It is contended by counsel for the defendant that the court erred in submitting the case to the jury, and in refusing to grant a new trial, for the reason there was no evidence tending to show the body was disinterred without lawful authority. But we think the court did not err in this respect. There was evidence tending to show the disinterment was during the night-time, and secretly made. The body was concealed for several days, and then an attempt made to burn it. Besides this, there was evidence tending to show it was disinterred for an unlawful purpose. We have a clear conviction that the court rightly submitted the case to the jury, and that in the respect mentioned the verdict is sustained by the evidence.

9. The court instructed the jury that, before they could find the defendant guilty, they must find that he "unlawfully dug open the grave mentioned in the indictment, and removed therefrom, without lawful authority, the remains of Arthur Lynch, as alleged in the indictment, or that he aided, assisted, or advised, or was in some way connected with, the digging up and removing said remains." In another paragraph of the charge the court said: "And in this case, if you find and believe from the evidence that the body of the said Arthur Lynch was interred in the cemetery at Mormontown, and that the place of interment of said body was within five hundred yards of the Ringgold county line," and that such body "was, without lawful authority, wilfully or intentionally dug up . . . in the manner as alleged in the indictment, and the defendant aided, assisted, encouraged, enticed, or in any manner procured the same to be done, then you should find him guilty." It is objected that the first instruction is erroneous, because there is no evidence tending to show that the defendant dug up or aided or assisted in any way in removing the body from the grave; and we are unable to discover any such evidence in the record, but there is evidence tending to show that the defendant is an accessory, and advised and abetted others in the commission of the crime. A majority of the court, however,

think that, in view of the second instruction and the entire record, the jury could not have been misled by the first instruction, and therefore the defendant was in no respect prejudiced thereby. The writer and Mr. Justice Reed think otherwise, and are unable to see that the second instruction qualifies the first in any material degree, for the fact remains that, under the first instruction, the question whether the defendant dug up the body, or aided in digging it up, was submitted to the jury; and if the second qualifies this thought, it must, of course, be contradictory to the first instruction; and the rule is well settled that it is prejudicial error to give contradictory instructions if one of them is erroneous, for the reason that it is impossible to tell which the jury followed. The minority of the court think that the two instructions are in perfect accord and mean precisely the same thing. It is well settled that prejudice is presumed to follow error, and the minority are unable to comprehend how it can be fairly said no prejudice resulted from the erroneous instruction. There are many cases in which it has been held that an instruction which there is no evidence to sustain is erroneous, and the minority are unable to recall a single case in which it has been held not to be prejudicial. The case most nearly like this is *State v. Myer*, 69 Iowa, 148, in which an instruction that if the defendant aided and abetted in the larceny he was guilty of the crime charged was held to be erroneous. The converse of this holding must be equally erroneous. It is true that in the cited case it is, perhaps, evident the jury considered the question whether the defendant aided in the commission of the crime. But this can make no difference, for the reason the presumption must in all cases be indulged, and the rule has been applied in many cases that the jury must and do consider all questions submitted to them by the court and follow the instructions. This court has in many cases held that the instructions, whether right or wrong, constitute the law of the case, and that it is the duty of the jury to follow them. Therefore it is that the conclusive presumption prevails the jury did so. The court, however, is united in the opinion that the defendant, under the statute, was properly charged or described as principal in the indictment, and that evidence was admissi-

ble tending to show he simply aided and abetted in the commission of the crime. Code, § 4314; *State v. Hessian*, 58 Iowa, 68.

10. Certain evidence introduced by the state was objected to by defendant, and the objection overruled, and evidence offered by the defendant was objected to by the state, and the objection sustained. These rulings are complained of. We have carefully examined the record, and, in our opinion, the errors claimed to exist have no foundation. The evidence introduced and that rejected was not of a controlling character, and had it been introduced or rejected the result would not have been affected. As to this we have no doubt, and therefore the rulings were not prejudicial.

11. It is said the court erred in refusing the first instruction asked by the defendant, but we think the fourteenth paragraph of the charge embraces substantially the same legal thought, and therefore the court did not err in the respect mentioned. Several of the paragraphs of the charges are said to be erroneous, but we have carefully examined them all and feel well satisfied they are not well founded. The judgment of the district court is affirmed.

NOTE.— One who exhumes a body under the direction of an officer having authority to make exhumations and dissections for the purpose of discovering crime is not guilty of body stealing, nor of violation of sepulcher, even though the motive which induced the exhumation was a bad one and the officer had not taken the regular proceedings provided by law in such cases to authorize him to make such exhumation. *People v. Fitzgerald*, 7 Am. Cr. R., 101.

That it is a crime at common law to wantonly disturb a corpse, see *Com. v. Slack*, 19 Pick.; *Rex v. Lynn*, 1 Leach, 497.

It is a crime to dig up and remove a dead body for dissection, or to sell a dead body for dissection. *Reg. v. Sharp*, 7 Cox, C. C., 214; *Tate v. State*, 6 Blackf., 110; *Com. v. Loring*, 8 Pick., 370; *Reg. v. Furst*, 8 Cox, C. C., 18. At common law a wife lost all control over the body of her husband after its burial. *Wynkoop v. Wynkoop*, 6 Wright, 293.

MOTSINGER v. STATE.

(123 Ind., 498.)

BLACKMAIL: *Construction — Evidence.*

1. Under Revised Statutes of Indiana, 1881, section 1926, which provides that any one who threatens to accuse, or sends a letter threatening to accuse, any person of a crime punishable by law, or of any immoral conduct which, if true, would tend to disgrace such person, or in any way to subject such person to ridicule or contempt of society, with intent to extort gain from such person, is guilty of blackmail; and when the letter containing the threats is ambiguous, the ambiguity may be explained by parol evidence.
2. A charge that a person has solicited sexual intercourse with the wife of another is a charge of immoral conduct which, if true, would tend to disgrace him, and subject him to the contempt of society. It is immaterial whether or not the person so accused is guilty of the matter with which he is charged.

Appeal from circuit court, Washington county; Thomas L. Collins, judge.

Information against William O. Motsinger.

Mitchell & Mitchell, for appellant.

W. T. Brannaman and *L. T. Michener*, attorney-general, for the state.

COFFEY, J. This was a prosecution by the state, against the appellant, under the provisions of section 1926, Revised Statutes 1881. The court overruled a motion to quash the affidavit and information in the cause, and the appellant excepted. The question presented for decision relates to the correctness of this ruling. Omitting the caption, the affidavit charging the appellant with the crime for which he was tried is as follows: "James W. Barnett, being duly sworn, upon his oath says that William Motsinger, on the 1st day of November, 1889, at and within Washington county, in the state of Indiana, did then and there, unlawfully and feloniously, in writing, which said writing was then and there delivered by due course of mail, by which it was sent by said William Motsinger to said James W. Barnett, demanded of and from James W. Barnett a sum of money, to wit, $10, and did then and there, feloniously, in said writing, threatened to accuse the said James W. Barnett of certain immoral conduct which, if

true, would tend to degrade, disgrace, and subject to the ridicule and contempt of society him, the said James W. Barnett, to wit, insulting the wife of said William Motsinger, meaning then and there and thereby that said James W. Barnett had asked the wife of said William Motsinger to have sexual intercourse with him, the said James W. Barnett, which said writing was then and there knowingly sent by mail by said William Motsinger, and then and there received by mail at the postoffice at Pepin, Indiana, by said James W. Barnett, which said writing is in the words and figures following: 'Nov. 1 — 89. Mr. Barnett — Sir: You can come up and settle with me for the way you talked to my wife, or go to court, just as you like. I will tell it all over the country. It is a note that a woman can't go to milk without being insulted. Come up right away. Yours, WM. MOTSINGER. If you will pay what I think what is right, I won't say anything about it to anybody. $10.00 will do. W. O. M. to James W. Barnett,'— unless he, the said James W. Barnett, would then and there give to the said William Motsinger the said sum of $10 of the goods and chattels of said James W. Barnett, with the intent then and there and thereby, feloniously, to extort and gain from the said James W. Barnett the sum of $10 in current money, of the value of $10, contrary," etc. The information follows the affidavit. The statute upon which this prosecution is based provides that whoever, either verbally or by any letter or writing, or any written or printed communication, demands of any person, with menaces or personal injury, any chattel, money, or other valuable security; or whoever accuses, or threatens to accuse, or knowingly sends or delivers any letter or writing, or any written or printed communication, with or without the name subscribed thereto, or signed with a fictitious name, or with any letter, mark or designation, accusing, or threatening to accuse, any person of any crime punishable by law, or of any immoral conduct which, if true, would tend to disgrace such person, or in any way to subject him to ridicule or contempt of society, or to do any injury to the person or property of any one with intent to extort gain from such person, any chattel, money or valuable security, or any pecuniary advantage whatever, etc.,— is guilty of blackmailing.

The chief contention of the appellant, and the only one going to the merits of the case, is that the letter set out in the affidavit does not contain a threat to accuse the prosecuting witness of immoral conduct which, if true, would tend to disgrace him, or in any way subject him to ridicule or to contempt of society, and that we must look wholly to the writing itself, and cannot go behind it to look for or ascertain its meaning. We do not agree with the appellant in this contention. The charge in the affidavit is that the conduct with which the appellant intended to charge the prosecuting witness was that of soliciting the wife of the appellant to have sexual intercourse with him. The letter was ambiguous, and such ambiguity might be removed by proper averments and proof. Wharton, in his work on Criminal Law (7th ed., vol. 2, § 1665), treating of the subject under consideration, says: "A letter, when ambiguous, may be explained by parol proof of extraneous facts, as well as by declarations of the writer. The prosecutor may be asked as to what appeared to him to be the meaning of the letter. The meaning is for the jury, if the terms be ambiguous, and is to be inferred from all the circumstances of the case."

As to whether the prosecuting witness was guilty of the charge was wholly immaterial; and to charge him with soliciting sexual intercourse with the wife of the appellant would be to charge him with immoral conduct which, if true, would tend to disgrace him and subject him to the contempt of society. *Kessler v. State*, 50 Ind., 229.

In our opinion the affidavit and information before us charge the appellant with a public offense, and the court did not err in overruling the motion to quash the same.

Judgment affirmed.

NOTE.— *Parol proof is always admissible to explain.*— It is well settled that parol evidence is always admissible to explain the threat used or intended. *People v. Gillian*, 2 N. Y. S., 476; *State v. Linthicum*, 68 Me., 66; *Reg. v. Tucker*, 1 Moody, C. C., 134; *Reg. v. Cooper*, 3 Cox, C. C., 547; *Reg. v. Handy*, 4 id., 243. To prove the intent with which the words were used, evidence of prior threats is admissible, and also former statements of the writer. *Rex v. Cooper, supra; Reg. v. McDonald*, 5 Cox, C. C., 153. And then from all the circumstances proven the jury may infer the meaning of the words, if they are ambiguous, and the intention of the writer. So evidence of the relations of the parties, that the letter was sent as a joke, and

that the prosecutor had shortly before played severe jokes on the defendant, is admissible. *Norres v. The State*, 95 Ind., 73; *S. C.*, 48 Am. R., 700.

What constitutes.— The threat must be one which is naturally calculated to cause alarm. *Reg. v. Walton*, 9 Cox, C. C., 268. A false statement that a warrant has been issued to arrest a party is such a threat. *Com. v. Murphy*, 12 Allen, 449. A threat to enter a criminal complaint (*Com. v. Carpenter*, 108 Mass., 15) is indictable. Where one, under the guise of friendship, wrote a letter falsely representing that an indictment was to be preferred against the son of him to whom the letter is written, and the writer by his influence could prevent the finding of the indictment, the latter was guilty of the offense. *People v. Thompson*, 97 N. Y., 313. But it is not essential to constitute the offense that the party against whom the threat is made should be really frightened. *State v. Bruce*, 24 Me., 71. The right to take and prosecute an appeal is property within the meaning of the California code, so that a threat made to induce one to dismiss an appeal is a threat made with intent to extort property; and it is immaterial whether the letter containing it be signed or not. *People v. Codman*, 57 Cal., 562. Charges that a man has been guilty of illicit sexual intercourse constitute the offense. *People v. Wightman*, 7 Am. Cr. R., 101.

What is not.— A threat to accuse another of a crime, if made for the purpose of inducing another to pay a just debt, is not within the statute of blackmailing. *State v. Hammon*, 80 Ind., 80; *S. C.*, 41 Am. Rep., 791. A husband who in good faith employed attorneys to sue for the seduction of his wife is not criminally liable for demanding money in settlement of the suit. *McMillan v. The State*, 60 Ind., 216.

JOHNSON v. COMMONWEALTH.

(89 Ky., —; 13 S. W. R., 520.)

BRIBERY AT ELECTIONS.

1. Where a denial of the right of suffrage and to hold public office is annexed to the punishment imposed on conviction of a misdemeanor, an appeal will lie to the court of appeals, though the fine imposed is insufficient to give the court jurisdiction.
2. At a trial for receiving a bribe to vote for a certain candidate for congress, the testimony for the commonwealth was that of a single witness, who testified that he loaned defendant $5, but not to influence his vote, though he did not know that he would have loaned it but for the election; and that the accused entertained the same political views as witness. *Held*, that a motion to dismiss should have been granted.
3. Defendant requested an instruction that the jury must believe that the money was given accused to influence his vote, and that for such money the accused did vote as requested, and that if the money was in good faith loaned the accused was not guilty. *Held*, that it was improperly refused.

Appeal from criminal court of Carter county.

J. D. Jones, for appellant.

P. W. Hardin, attorney-general, for the commonwealth.

PRYOR, J. The appellant, James Johnson, was indicted by a grand jury of the Carter criminal court for the offense of unlawfully receiving a bribe in money paid to him by one Strother; that for a consideration in money paid to him by Strother he voted for T. H. Paynter, who was at the time a candidate for a seat in the house of representatives of the United States. There was a demurrer to the indictment for a failure to allege where the vote was cast, or that an election was held in the county of Carter for representative. While the indictment should have been more specific, and the demurrer sustained, it is proper to notice other questions raised, and upon which this case will be finally determined in the court below. It is first insisted by the attorney for the state that the appeal should be dismissed, as it is an indictment for a misdemeanor, and the fine imposed is only $10. The code gives this court jurisdiction (now belonging to the superior court) where the fine exceeds $50. Sec. 347, Carroll's Code. This being a misdemeanor by statute, it is urged that the extent of the punishment cannot give the jurisdiction unless the fine exceeds $50. There is no imprisonment imposed in this case, and the fine made at $10 only, which is much less than the sum fixed by the statute. It provides that "any person guilty of receiving a bribe for his vote at an election, or for his services or influence in procuring a vote or votes at an election, shall be fined from fifty to five hundred dollars, and be excluded from office and suffrage." How the jury arrived at the amount of a fine not authorized by the statute is not explained; but, if the party is guilty, the fact that he was made to pay a less fine than that authorized by the statute to be imposed affords no ground for a reversal, and if this was the only punishment inflicted the appeal would be dismissed. It is plain that if the fine had been $500, the limit prescribed by the statute, the superior court would have had jurisdiction, and a denial of the right of suffrage being annexed to the penalty and imposed by the court below, the jurisdiction of this court would attach, as a franchise involving the inesti-

mable right of suffrage is directly involved in the issue. The court below, after the verdict of guilty, pronounced this judgment: "And it is further adjudged by the court that the defendant shall hereafter be disqualified from holding or discharging the duties of any office of honor, trust or profit under the laws of this state, or any town, or city, or municipality thereof, and prohibited from exercising the right of suffrage within the state of Kentucky during his natural life." That dollars and cents are to be more highly valued in determining the jurisdiction of this court by reason of the statute than the right of suffrage or the infliction of a punishment that degrades the offender for all time cannot be conceded, and, while the offense is termed a misdemeanor, the deprivation of such a right will be treated in this court as a direct proceeding to deprive the offender of the rights of a citizen, and the judgment entered by the court below, depriving the appellant of the right to vote and of the right to hold office, being the result of the verdict imposing the fine, this court will necessarily assume jurisdiction of the entire judgment. It was never contemplated by the law-making power that an appeal could be prosecuted from the judgment imposing a fine of $500, and not from a judgment entered by the court based on a verdict for that amount, or a less sum, by which, during the natural life of the offender, he is prohibited from holding any office of trust or profit within this commonwealth. The offense is a high misdemeanor, and, depriving the citizen of a most sacred right, he can be heard in this court. *Cheek v. Com.*, 7 S. W. R., 403.

Strother, the witness for the state, says that he loaned the appellant $5, but not to influence his vote in any manner, but did not know that he would have loaned it but for the election; that the accused entertained the same political views that the witness did. On this testimony, it being all introduced by the state, the defense moved to dismiss the indictment because no offense had been proven. The court refused the motion. This was error. The distinct charge was that the accused had voted for Paynter for congress, and received a bribe to do so. The voting was by ballot, and there was no evidence by the state that any such vote was cast. The system of voting by ballot is based upon the idea that it makes

the action of the voter independent, and to enable him to cast his vote as he pleases. No one has the right to examine the ballot of the voter, or to testify as to its contents with a knowledge acquired in any other mode than the information given him by the voter himself. His ballot, says Mr. Justice Cooley, is absolutely privileged, and the veil of secrecy should be impenetrable unless the voter voluntarily lifts it. Cooley, Const. Lim., 762. It places the voter beyond the influence of wealth and power, and if the manner of his voting is open to investigation, as any other issue, the virtue of the system is destroyed. The jury, therefore, had no right to speculate as to the person for whom the vote was cast, or to reach such a conclusion from the former political convictions of the accused. The motion to dismiss should have been sustained.

The court below having refused to dismiss the case, the accused then testified substantially as the witness for the state, but admitted that he voted for Paynter. At the conclusion of the testimony the court instructed the jury that if the accused, in consideration of a bribe in money paid him by Strother, voted for Paynter, they must find the defendant guilty. The defendant then asked the court to say to the jury, in effect, that they must believe the money was given him by Strother for the purpose of influencing his vote, and that for said money the accused did vote for Paynter; that if the money was in good faith loaned the accused is not guilty. This is, in substance, the instruction asked by defendant and refused. What conclusion the jury reached as to the facts necessary to constitute bribery does not appear; but we see no reason for refusing an instruction based on testimony conducing to show, at least, that it was a loan of the money in good faith, and not for the purpose of influencing the vote for Paynter. The defense, in so far as it was sustained by the testimony, should have been presented to the jury, and the failure to do so may have led their minds to the conclusion that a case of bribery had been made out. The judgment below is reversed, and remanded for proceedings consistent with this opinion. A new trial will be granted

NOTE.— *Bribery—What constitutes.*— Bishop defines bribery as the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done. 2 Bishop, Cr., § 95. The offering to give or

receive the bribe perhaps will constitute the crime. *Dishon v. Smith*, 10 Ia., 212; *State v. Jackson*, 73 Me., 91; *Walsh v. People*, 65 Ill., 58. The gist of the offense seems to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative or judicial. *State v. Ellis*, 33 N. J. L., 102; 2 Bishop, Cr., § 96. But the offer must be a corrupt one, because an offer to render a public service would not be a corrupt offer. The offer to furnish lands, buildings, etc., for a public purpose, to build a bridge between two towns, to give a promissory note for the benefit of a county high school, in order to influence voters in the exercise of the suffrage, is not bribery. *Dishon v. Smith, supra.* The offense may be committed by a justice of the peace regarding a case which is not yet instituted and which is to be brought before him. *Barefield v. State*, 14 Ala., 603; *Wells v. Taylor*, 5 Mont., 202; *Hall v. Marshall*, 80 Ky., 552. If one pays money to an elector to simply vote it is bribery. *Rex v. Plympton*, 2 Ld. Raym., 1377. And also to forbear voting. *Rex v. Isherwood*, 2 Keny., 202. It is quite immaterial whether the giver of the bribe profited by the act sought to be influenced or not. *Glover v. State*, 109 Ind., 391. It is bribery to pay a witness to avoid the service of a subpœna. *Scroggins v. State*, 18 Tex. App., 298. No subsequent conduct of the person bribed can exculpate the defendant. *O'Brien v. State*, 7 Tex. App., 181. It has been held, however, that inasmuch as a note given to a public officer to influence his public action was void as against public policy, an indictment charging the officer with having received a promissory note in payment of a bribe does not charge the receiving of a thing of value. *State v. Walls*, 54 Ind., 561. An offer made by a candidate to the tax-payers to pay back into the treasury a portion of his salary if elected is not a bribe. *State v. Church*, 5 Oreg., 375. An offer by an alderman to accept a bribe is a solicitation to commit an offense and is indictable. *Walsh v. People*, 65 Ill., 68.

THE PEOPLE v. WM. M. McCORD.

(76 Mich., 200.)

BURGLARY: *Evidence of detectives.*

1. The offense of burglary cannot be made out without clear proof of the breaking.
2. It would be a disgrace to the law if a person who had taken active measures to persuade another to enter his premises and take his property can treat the taking as a crime. What is authorized to be done is no wrong in law to the instigator.
3. If a crime can be readily prevented without injuring the criminal, every wanton injury is a trespass and may become a crime.

Herbert M. Elliott, for the people.
Charles R. Henry, for defendant.

CAMPBELL, J. Respondent was charged with the offense of breaking and entering by night into the store of Richards, Hubbell & Co., of Baldwin township, Iosco county, with intent to commit larceny, and was convicted. There was testimony indicating without doubt that he entered the store in question with the intention of stealing. There was also testimony tending to deny the criminal quality of what he did, both on the ground of drunkenness and that of being led to enter the premises while more or less intoxicated by some one else, whose act would exonerate him. Some of the prominent facts require to be mentioned. It appears that four persons, provided with weapons, were at the store at the time in question, which was about 1 o'clock in the morning of October 21, 1888. One of these persons was Mr. Hubbell, a member of the firm. The others were there to help. Two, one of whom had also a sledge-handle, were armed with revolvers; one with a gun and another with a sledge-handle. They were expecting him, and on his entry in the store he was set upon and shot in the head, having one eye put out, and suffering very serious wounding and beating. He was accompanied by one Robert Flint, who had told the occupants when the act was to be done. Flint, although disguised, was recognized and not molested. Flint was not an officer or detective, but appears to have taken up under some arrangement the business or part of a detective for the time. He had been employed by certain persons to look up certain other persons supposed to have committed some crimes, and his pecuniary interest depended partly at least on his securing conviction. It is urged that respondent was led into what he did by Flint for the purpose of entrapping him,— advantage being taken of his intoxication, if that was not actually induced for the purpose; and it is claimed this went far enough to exonerate respondent. The building was entered by means of a standing ladder, not placed by respondent, reaching up to a window up-stairs in a tin-shop. This window, which was one sliding, and not lifting, and usually held in place by a nail, was on that night left unfastened. The record does not clearly indicate that the tin-shop was part of the store, but it was assumed, and perhaps was so. A door down-stairs, which opened into the store proper, was also left unfastened, and apparently

had nothing generally to hold it but a hook, which was not then in the staple. The two persons went into the store with no noise whatever to indicate their presence. As already indicated, Flint was not molested at all, while respondent was very badly maimed and hurt. Flint, when asked how he came to be there that night with McCord, says: "I went there with William McCord under the direction of Dr. Webster, and also Mr. Hubbell." When asked who was leading this arrangement in the store,— of going in,— he said: "Well, neither of us was leading it." But, when asked who organized or planned the job, he said it was McCord; and, in answer to further questions, testified to his previous interviews with respondent, and habitual frequenting saloons with him nearly every night. Coming down to the night in question, he said he and McCord, with a third person, were in a saloon together until after 9 o'clock, when they separated and McCord went towards home, and that they met by concert after midnight, and went to the store. On this evening Flint says he looked after respondent in several places before he found him in Henry's saloon, and gave respondent to understand he was ready for anything. Flint's story is not consistent as to their occupation between 9 and midnight; but when asked the particular question he always answered that McCord was the instigator. The only person sworn as a witness who was not in some way concerned in the transactions testified to seeing respondent drunk, on his way home, late in the evening, and Flint stopping him. Respondent himself, when on the stand, testified that a member of his family was sick, and he did not want to go through the store; but that Flint stuck to him through the evening and finally persuaded him, while drunk, to go and do what was done. One Fox, who was with Flint and McCord in a part of their evening's dissipation, corroborated McCord's story as to his desire to go home to his family, and their sickness alleged as the reason.

This is enough to indicate the nature of the contention. The court in charging the jury spent a little time in telling them about the various statutes concerning burglary in dwellings, and then informed them of the statutory elements of the crime charged, and what must be shown. Upon this no fault is found. But the court then mentioned as an important in-

quiry, whether the act was done by a "sane person, in his right mind." "That," he said, "must be proven to you beyond a doubt; because a man that has not got any mind cannot form an intent, whether he is intoxicated or whether he is crazy." He added, under exception: "I think the fact as to breaking and entering the building has been proven pretty fully to you by the people. Defendant admits that he went there, climbed up the ladder and went through the window, from the roof into the building, and that he was caught there. He says they were there for the purpose of stealing. Now, I don't care whether the window was nailed or it was not. If it was shut, and they went there from the roof up this ladder, it was a breaking such as this law contemplates. The only real question for you is whether this man was intoxicated so that he was not accountable for what he did." The court then, after some discussion of drunkenness in connection with the criminal purpose, which is objected to chiefly because claimed to have put the facts more strongly than was warranted, proceeded to argue very forcibly the reasons why respondent was not incapable of responsibility, and laid before the jury their duty in the premises, dwelling rather heavily on the duty of convicting guilty men. The charge concluded as follows: "Of course, there has been considerable said about the manner in which this matter has been worked up. As has been remarked, detectives are necessary. Crime is committed on the sly. Men don't commit crime in the day-time, in the open street. They do it in the back-alleys, and in the dark, and it takes detectives to find them out; and while detectives sometimes resort to means which are really reprehensible,—and I say right here, if a man should resort to intoxicating liquors, or intoxicate his subject, in order to lead him into these things, I say those acts are reprehensible, and they are not to be encouraged,—yet, if the crime was committed, it is nothing to us. We have a duty to perform and should perform it. You must find, as I have stated, all the ingredients of this offense established by evidence that you believe beyond a reasonable doubt, before you can convict of crime; but, if you should so find, then it is your duty to convict."

Having told the jury that respondent had admitted all that was necessary to convict him, if not so insane or intoxicated

as to be able to form no intent, and having pointed out to them that his conduct did not indicate any lack of reasoning power, this charge was neither more nor less than an instruction to convict, with the further instruction that, although Flint might have made respondent drunk and led him purposely to do what he did, the law took no account of this, and respondent should be convicted. The case is not one which seems to require any discussion of the question of intoxication, in the bearing dwelt on by the court. We shall not, therefore, discuss that branch of the case, further than to say that the court, by putting that as the only inquiry open to the jury, assumed to decide that the case was open to no dispute on any essential fact. This was unwarranted. There were not only questions of fact disputed and depending on the veracity of Flint, whom the jury were not bound to credit, but there were questions not cleared up at all. It was not sworn to by any one that the window, which was not held down by its own weight, and from which the only fastening had been removed, was in such a position that the entrance was procured by any such process as would constitute a breaking. Respondent swore that Flint told him he had removed the nail which fastened it. Some one had done so, and no noise was heard when it opened, if it was not already open. Respondent swore Flint went in first, and that respondent followed him. Without more definite proof, a breaking, which is the essential element in burglary, cannot be said to have been admitted, and cannot be said to have been so proved as to leave nothing for the jury. It is possible, if not probable, that there was no breaking, and from what appears on this record it is not really proved at all. There is no proof whatever that any door was broken open. Here, again, the proof is the other way. The statutory offense cannot be made out without clear proof of a breaking. Upon the lack of proof, respondent was, as the record stands, apparently entitled to acquittal of the charge.

But our duty to public justice and decency requires us to dispose of the other views of the case. In some of its features it is one of the most disgraceful instances of criminal contrivance to induce a man to commit a crime in order to get him convicted that has ever been before us. If the prisoner's state-

ment is believed, and the court in the latter part of the charge seems to have assumed it was probable, he was not the active agent in the crime, but guilty of aiding and abetting Flint, and therefore only guilty if Flint was guilty. It would be absurd to hold Flint guilty of burglary. He did what he was expected to do, and had no such intention as would hold him responsible. It may be true that a person does not lose the character of an injured party by merely waiting and watching for expected developments. Possibly,—but we do not care to decide this,—leaving temptation in the way without further inducement, will not destroy the guilt in law of the person tempted, although it is a diabolical business, which, if not punishable, probably ought to be. But it would be a disgrace to the law if a person who has taken active measures to persuade another to enter his premises and take his property can treat the taking as a crime, or qualify any of the acts done by invitation as criminal. What is authorized to be done is no wrong in law to the instigator. In this case Flint was active in the matter, as is shown by his own testimony; and the circumstances are clear that it was by such authority as would exonerate him and his victim from criminal responsibility. If the transaction which is the basis of the prosecution was actually designed, as it was actually expected by the persons in the store, they deserve something more than censure for such a scheme. But the cruel and brutal reception of the respondent is beyond palliation. Neither law nor morality can tolerate the use of needless violence, even upon the worst criminals. If crime can be readily prevented without injuring the criminal, every wanton injury is a trespass and may become a crime. The same is true of an arrest. In this case the crime could certainly have been prevented, even if it was not invited. The respondent was where he could have been arrested without injury to him or any one else. Under such circumstances his treatment was cowardly and atrocious, and, had his injuries proved fatal, the persons who were responsible for it would have found it a very serious matter. The record exemplifies the excesses which are frequently produced by private persons who undertake to assume the pursuit and detection of criminals. The annals of crime contain many instances of such lawlessness, and their results are not re-assuring. That

respondent is not a good member of society is hardly questioned. But it is not edifying when persons who would be horrified at being classed among criminals forget their legal duties, and imagine that any end can justify bad means. The conviction must be set aside, and upon the record as it stood when the case went to the jury we cannot see how they could have convicted the prisoner, under a correct view of the law. He must therefore be discharged, without delay. The other justices concurred.

NOTE.— *Decoys.*— How far one should go in allowing another to commit a crime, or to what extent an officer may connive at and permit the execution of an offense, is a question of much perplexity. The great Vidocq perhaps voiced the law as it stands when he said: "When we wish to overreach scoundrels who are at open war with society, every stratagem is allowable by which to effect their conviction except the commission of crime or endeavoring to provoke the commission of crime." Only an extreme purist will contend that after the criminal has deliberately formed his wicked intention and laid the plan for the criminal commission that it is the duty of another to apprise him of his danger, and save him from punishment. On the other hand no harsher language ever falls from a court than when, as in the foregoing case, a man, no matter how abandoned, is induced to commit a crime in order to subject him to punishment. As was well said in *Sanders v. The People*, 38 Mich., 218, "Human nature is frail enough at best and requires no encouragement in wrong doing. If we cannot assist another and prevent him from violating the laws of the land, we should abstain from any active efforts in the way of leading him into temptation." The rule may be broadly stated that if an owner by any overt act participates in the taking of his property, consents thereto, or induces the commission of the act which would otherwise be unlawful, there is no crime. Without these limitations the use of decoys or stratagems may be used for the detection or punishment of crime, and the offender not be excused. Mr. Wharton in a valuable note to the case of *Bates v. The United States*, 10 F. R., 97, argues that the use of decoys is allowable except in two classes of cases: First, in cases in which to the offense it is essential it should be against the will of the person injured. Then there must be an acquittal should it appear that such party invited the defendant to the commission of the offense. Citing *Reg. v. Fletcher*, 8 Cox, C. C., 131; *Com. v. McDonald*, 110 Mass., 405; *Brown v. People*, 36 Mich., 203; *State v. Burgdor*, 53 Mo., 65; *Walter v. State*, 40 Ala., 325; *Long v. The State*, 12 Ga., 293; *Rex v. Wallaston*, 12 Cox, C. C., 180. Second, in cases in which the offense consists in certain physical conditions which cannot exist if a trap be laid (as illustrated by cases of burglary hereinafter referred to).

A man may direct a servant to appear to encourage the design of the thieves and to lead them on until the offense is complete, so long as he did not induce the original intent but only provided for its discovery after it was formed. If a man is suspected of an intent to steal, and another, to try

him, leaves his property in his way, which he takes, he is guilty of larceny. But it would not be the case if the master had directed the servant to deliver the property to the thief instead of furnishing facilities for his arriving at the place where it was kept. *Dodge v. Brittan*, Meigs, 84; *Saunders v. State*, Tenn. (decided September, 1879). An act of spoliation of property cannot become a crime where the owner of the property is a participant in the transaction and consents to it. In Tennessee during slavery times a negro informed his master that a person desired to steal him. The master bade the negro carry out the agreement between the prisoner and himself, which was done, and the prisoner was arrested in the act. The court held that as the possession of the slave was obtained with consent of the master there was no larceny. *Kemp v. State*, 11 Humph., 320. This decision, however, seems to carry the doctrine over the verge, because the great weight of authority seems to hold that where the owner only furnishes facilities for the theft the crime is complete.

However, it has been held that if a man be robbed by his own consent even though the robbers did not know of his consent, there is no crime. *Reane's Case*, 2 East's P. C., 734; *McDaniel's Case*, Fost., 121.

Where the servant, under the direction of his master, acted as an accomplice and opened the door for a burglar, there was held to be no burglary. *Allen v. State*, 40 Ala., 344; 1 Bishop, Cr. L., §§ 262, 263; 2 Wharton's Cr. L., § 1540; Roscoe's Cr. Ev., 345. *Speiden v. State*, 3 Tex. Ct. App., 156, furnishes an interesting illustration of the rule. A gang of burglars infested a certain town and were perfecting there, plans for wholesale depredations. Some bank officials brought detectives to the place, who joined the burglars and participated in their plans. The detectives arranged for the burglary of a bank upon a certain night and informed the officers and bank officials. The former secreted themselves within the bank. The detectives opened the door and went in, and the burglar, at their request, followed them and was arrested. The court held that the detectives were the agents of the bankers and had legal control and occupancy of the bank, and the defendant's entrance did not constitute burglary. But in another case decided by the same court, where the burglars had already planned the crime and the specific act did not originate with the detective, it was held that the fact that the owner furnished the key and the detective opened the door did not affect the amenability of the defendants. The supreme court of Kansas decided, under somewhat similar circumstances, that whether or not the owner consented was a question of fact to be left to the jury. *State v. Jansen*, 22 Kan., 498. Where one, therefore, procures himself to be robbed that he may get the reward for the apprehension of the thieves, there is no crime. *Reg. v. McDaniel, supra. Cf. State v. Covington*, 2 Bailey, 569. While, as has been seen from the above cases, there is no larceny where the owner gives consent, yet, where the owner receives an intimation of the proposed theft, and simply allows it to be carried out in order to convict the thief, it cannot be said that he does consent. *Reg. v. Eggington*, 2 Leach, 913; *Dodge v. Brittan, supra; Alexander v. State*, 12 Tex., 540. Mr. Wharton says in his note *supra:* "Whether, when the offense is the special product of the trap, the defendant can be convicted, depends upon the exclusiveness of the casual relationship between the offense and the trap. When the defendant was the

passive tool of the entrapping party, then there should be an acquittal. On the other hand, the defendant ought not to escape conviction in any case (within the stated exceptions) in which he knowingly committed the offense."

In Missouri the question was reviewed by the supreme court of that state in the very recent case of *State v. Hays*, 16 S. W., 514. A detective, Hill, went with Hays, the defendant, to a store in the night-time, having previously informed the police of his intention. Defendant raised the window and the decoy entered and handed out some goods to the defendant. The court say that Hill did not enter with intent to steal. He did not enter the warehouse either actually or constructively, hence he did not commit the crime of burglary; no matter what his intent was, it clearly appears that Hill was guilty of no crime. Because, as Judge Brewer says in *State v. Jansen*, 22 Kan., 498, "The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of community of motive."

The question as to the use of decoys has come frequently before the courts in cases concerning violation of the postal laws. It was decided by Judge Dillon, in *Bates v. United States, supra*, that it was no defense to the sending of an obscene book through the mail that it was forwarded to a detective who wrote for it under an assumed name. And the same question practically was decided in *United States v. Bott*, 11 Blatch., 346. In the case of *United State v. Whittier*, 5 Dill., 35, Judge Dillon says, "Undoubtedly, decoy letters may be used for discovering a violation of the law. And if, in answer to the decoy, the prisoner deposits in the mail any written or printed card, circular, etc., which on its face gives information prohibited by the law," the offense is complete. Judge Treat, in the same case, however, says that it must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal) are most rigidly scrutinized by the courts even when the contrivances are lawful in themselves. See, also, the case of *United States v. Wright*, 38 Fed. R., 106. There are very many English cases upon this phase of the question in which the same doctrine is announced. Among them are *Rex v. Young*, 2 C. & K., 466; *Rex v. Rathbone*, C. & M., 220; *Rex v. Sheppard*, 1 Dears. C. C. R., 606.

Detectives.— In the machinery provided for the administration of the criminal law, the detective is an important and in large cities a necessary part. Experience has shown, however, that the testimony of these officers should, as Judge Treat observes concerning decoys, be scrutinized closely. Especially is this the case where it relates to confessions and admissions made by the accused. Because it often happens that a desire to obtain a conviction of one whom the officer believes to be guilty, and whom he has labored to entrap, colors his testimony, even though such officer be well intentioned. There is a feeling in society, and, indeed, inheres in our very natures, against detective methods in the discovery and punishment of crime. *State v. Hays, supra.* If the compensation of the detective depend upon a conviction of the accused, the testimony of the former should have little weight against that of other reliable witnesses. For, as said by Sir Creswell, and quoted by Justice Craig, in *Blake v. Blake*, 70 Ill., 618: "The employment of a private detective for the purpose of getting up evidence, though in some few cases they may afford useful assistance, is, as a rule, very objectionable. They are most dangerous agents, and the court looks upon

their evidence with much suspicion. When a man sets up as a hired discover of supposed delinquencies, when the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, then the man becomes a most dangerous instrument." There is no reason why the testimony, however, of an honest officer should not be given all the weight it would be entitled to, simply because he is a detective, if, after scrutiny, it appears without suspicion. The supreme court of Illinois, in an early case (*St. Charles v. O'Malley*, 18 Ill., 408), say: "We rejoice to know that the law finds no cover for its violations, nor will it defame those who ferret out crimes, and bring the criminals to light." And, again: "If men who voluntarily become acquainted with secret brothels, gambling or drinking hells are to lose their character for veracity, and are to be denounced as informers and spies, for seeking out and bringing these evil practices to light, then are our hopes of protection slight indeed."

Burglary — What constitutes.—See line of cases and notes reported in this series.

Boles v. State.

(86 Ga., 255.)

Carrying Concealed Weapons.

Carrying a pistol in a covered basket on one's arm, not for the purpose of transportation only, but for convenience of use and access and to evade the law, is carrying a concealed weapon within Code of Georgia, section 4527, making it a misdemeanor to carry a pistol about the person, unless in an open manner, and fully exposed to view.

Error from city court of Savannah; Harden, judge.

G. W. Owens, by *J. R. Saussy*, for plaintiff in error.

W. W. Fraser, solicitor-general, by *S. B. Adams*, for the state.

Simmons, J. Boles was indicted and tried for the offense of carrying concealed weapons, and was convicted. The proof was, in substance, that the constable heard a pistol fire, and went to see who had shot it. He met the defendant and asked who had shot the pistol. The defendant denied having done so, and said it was shot by parties further down the

road. The witness searched for the parties down the road, and could not find them. He then charged the defendant with having fired the pistol. He again denied it, and said the witness might search him. The witness did so, and found cartridges in his pocket, but did not find any pistol on his person. He had a basket on his arm, and, on opening it, Green found the pistol in it. The basket was about a foot wide and two feet long, and had a cover to it. Another witness swore he was present when the constable arrested the defendant and found the pistol. It was in his basket, and the basket was on his arm.

The only question to be decided in this case is whether, under the facts above given, the defendant was guilty of violating section 4527 of the code, which is as follows: "Any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol (except horseman's pistol), . . . shall be guilty of a misdemeanor," etc. The defendant, among other things, requested the court to charge that "unless the jury found that the defendant had the pistol concealed on his person, he was not guilty of the offense charged;" and that "carrying a pistol in a basket on one's arm is not carrying a concealed weapon about one's person within the meaning of the statute." These requests the court refused to give, and in lieu thereof charged as follows: "If the jury believe that the pistol was carried in the basket by the defendant for convenience of use and access, and to evade the law, he would be guilty as charged." "The question for the jury to determine is whether the pistol was carried in the basket for the purpose of transportation or not. If it was carried for transportation, the defendant is not guilty as charged; if not carried for transportation, he is guilty." This charge, and the refusal to charge as requested, is excepted to by the defendant. We do not think the court erred in his refusal to give in charge the defendant's request, nor in charging as complained of. The charge given was as favorable to the defendant as he had any right to demand. We do not think that, in order to violate the above section of the code, it is necessary for the weapon to be concealed in the clothing of the person. If carried in a basket or bag upon his arm, not for the purpose of transportation alone, it would be a viola-

tion of the statute. See *State v. McManus*, 89 N. C., 555; 3 Amer. & Eng. Enc. Law, 410; 2 Whart. Crim. Law, § 1557, subd. 12. Judgment affirmed.

NOTE.—*The right to bear arms.*— Amendment II to the Constitution of the United States provides: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This provision does not prohibit the state from regulating the manner in which arms shall be used, and it is held in Missouri that "the right to bear arms, secured by the federal constitution, is not infringed by a state statute prohibiting the carrying of concealed weapons, or carrying dangerous weapons when intoxicated." *State v. Shelby*, 90 Mo., 302. In doing both these things at one time the defendant is guilty of one offense only, not of two. *Id.*

In Arkansas, a broader view has been taken of the right of the state, for it is decided that the provision of the United States constitution (amend. 2) securing the right to bear arms is a restriction of the federal government only. It does not prevent a state legislature from prohibiting the wearing or carrying of such weapons as are not used in civilized warfare; such as pistols of size so small as to be appropriate to be carried concealed on the person, and not useful in the army. *Fife v. State*, 31 Ark., 455.

What constitutes concealment.— The purpose of statutes forbidding the carrying of concealed weapons is to protect individuals against sudden, unexpected, dangerous, and perhaps deadly violence inflicted with weapons which the assailant has concealed in some way about or conveniently near his person, and which he may use under sudden impulse, or deliberately or unfairly against one taken unawares; and to conserve the public peace and safety. *State v. McManus*, 89 N. C., 559.

On the trial of an indictment for carrying a concealed weapon, the fact of the concealment is material, and must be proved in order to support a conviction. *Ridenour v. State*, 65 Ind., 411. A weapon wilfully and knowingly covered or kept from sight is a concealed weapon. *Owen v. State*, 31 Ala., 389. The implement must be carried about the person accessible for use in fight, and so hidden from general view as to put others off their guard. If a pistol is worn concealed, the jury may presume it was loaded, and worn as a weapon; but the presumption is rebuttable. *Carr v. State*, 34 Ark., 448.

To constitute the offense of carrying concealed weapons, it is not necessary that the weapon shall be entirely concealed, but it is enough that it is hidden from ordinary observation. A charge, however, that, when one had a weapon which could be seen in his pocket or waist band, he came within the meaning of the act, and a refusal to charge explicitly that, in order to a conviction, it was necessary to prove that the weapon was concealed, *held* erroneous. *State v. Johnson*, 16 S. C., 187. A "concealed" weapon, within the prohibition, is one so carried that persons near enough otherwise to see cannot see it. *Street v. State*, 67 Ala., 87.

To constitute concealment, within the meaning of the Alabama statute against carrying concealed weapons (Rev. Code, § 3555), it is sufficient if the

weapon be hidden from ordinary observation although it may be seen upon closer examination; and this must be determined by the jury.

A pistol half stuck in a pocket, or about the clothes so that it is partly concealed, is a "concealed" weapon within the meaning of the law. *State v. Bias*, 37 La. Ann., 259.

Evidence that defendant carried a pistol concealed in a basket, which he carried in his hand, or on his arm, from his residence to a street railway station, a distance of three or four hundred yards, and that when he entered the car he put the basket on the seat beside him, is sufficient to convict of carrying a weapon "concealed about his person." *Diffey v. State*, 86 Ala., 66.

One who carries a pistol in an open manner, and so plainly and fully exposed to view that any person can see that it is a pistol, is not guilty of violating the statute against carrying concealed weapons. *Stockdale v. State*, 32 Ga., 225; *Killet v. State*, id., 292.

One who carries weapons partially concealed upon his person is held in Florida to have violated the law. *Sutten v. State*, 12 Fla., 135.

What constitutes "carrying." — The question whether the offense of carrying, concealed, a dangerous weapon, is proved, depends upon the character of the weapon and the intent with which it is carried; and these are ordinarily questions of fact. *State v. Larkin*, 24 Mo. App., 410.

In Louisiana on one's trial for carrying a pistol concealed on his person, evidence to show that the pistol belonged to another, that the owner placed it in the hands of the accused merely to get cartridges for it; and that the accused owned no pistol, and had never been known to carry one, was held not admissible. *State v. Martin*, 31 La. Ann., 849. This decision is perhaps against the general current of authority, because it has been decided that carrying a pair of pistols from the store where defendant purchased them, to another store, for the purpose of obtaining balls to fit them, and thence to his home, was not a violation of a statute prohibiting the carrying of concealed weapons, for want of any criminal intent. *Waddel v. State*, 37 Tex., 355; S. P., *Christian v. State*, id., 475. Compare *Hillard v. State*, id., 358. And also one who carries a pistol home from the place of purchase, or to a shop for repairs, is not "carrying" it within the purview of the law, even though he fires it off. *Pressler v. State*, 19 Tex. App., 52; *S. C.*, 53 Am. Rep., 383. So the weapon must be carried as arms to constitute the offense; as a mere casual transportation not for aggressive use is not within the statute. *Paige v. State*, 3 Heisk., 198; *Waddel v. State*, 37 Tex., 355; *Maxwell v. State*, 38 Tex., 170.

The Texas act prohibiting the carrying of deadly weapons was not intended to prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense, or even from carrying them from place to place for an innocent purpose. *Maxwell v. State*, 38 Tex., 112.

The carrying a pistol is not necessarily an offense; though it becomes one when the weapon is carried under the circumstances or in the manner prohibited. *Lewis v. State*, 2 Tex. App., 26. That one's life was in danger is, under the Texas statutes, no defense against the charge of carrying arms near an election poll. *Livingston v. State*, 3 Tex. App., 74.

The transportation of a pistol home from the place of purchase, whether loaded or unloaded, does not constitute the offense of unlawfully carrying a pistol, even although while it is being so transported it is discharged. *West v. State*, 21 Tex. App., 427.

The mere lifting of a pistol from defendant's wagon and holding it for a few seconds, *held* insufficient to support a conviction for carrying a pistol on or about the person. *Cathey v. State*, 26 Tex. App., 492.

One who finds a pistol in the road, picks it up and carries it home, cannot be convicted of the offense of unlawfully carrying a pistol. *Mangun v. State*, 15 Tex. App., 362.

If one goes hunting with a pistol about his person concealed, he is guilty of a violation of the statute against carrying concealed weapons, which provides that having the weapon about his person is *prima facie* evidence of concealment. *State v. Woodfin*, 87 N. C., 526. If, however, a merchant merely carries a pistol from one store to another, to be packed with other goods, he is not guilty. *State v. Gilbert*, 87 N. C., 527; *S. C.*, 42 Am. Rep., 518.

One who carries a pistol, not with criminal intent, but for the purpose of trading it off, violates no law. *State v. Harrison*, 93 N. C., 305.

In Kentucky no one can lawfully carry deadly weapons concealed about his person, even for a harmless purpose. *Cutsinger v. Commonwealth*, 7 Bush (Ky.), 392.

A man borrowed a pistol to chase a bear, and returned it after the chase. *Held*, that a conviction for unlawfully carrying a pistol could not be sustained. *Moorfield v. State*, 5 Lea (Tenn.), 348.

The fact that a party was engaged to play a part in which a pistol was to be used, at a school exhibition, on a different day from that on which he carried it concealed and drew it in a personal difficulty, will not entitle him to an acquittal when tried for carrying a pistol concealed about his person. *Preston v. State*, 63 Ala., 127.

So one who borrowed a pistol for the purpose of shooting a rabbit, and immediately handed it back, cannot be convicted of carrying a pistol. *Sanderson v. State*, 23 Tex. App., 520.

Weapon — What constitutes.— A razor is not a dangerous weapon within Louisiana Revised Statutes, section 832, prohibiting the carrying concealed weapons, "such as bowie knives, pistols, dirks or any other dangerous weapon." *State v. Nelson*, 38 La. Ann., 942; *S. C.*, 58 Am. Rep., 202.

A pistol that has no mainspring or other necessary parts of a lock, and can only be fired off by the use of a match, or in some other such way, is not a pistol within the meaning of the statute prohibiting the carrying of concealed weapons, and no person should be indicted and punished for carrying such a pistol. (1871) *Evins v. State*, 46 Ala., 88. But it is no excuse for one carrying concealed a pistol, contrary to Georgia Code, section 4527, that the mainspring of the lock is broken. *State v. Williams*, 61 Ga., 417. And it is held that a person who carries concealed about his person all the pieces of a pistol, which could readily be put together so as to make an effective weapon, is guilty of carrying concealed weapons, though, at the time he carried them concealed, the pieces were separate and incapable of use as a fire-arm until put together. *Hutchinson v. State*, 62 Ala., 3.

Until a pistol has lost so many of its parts as to cease to be a fire-arm, carrying it concealed without sufficient excuse is indictable. *Atwood v. State*, 53 Ala., 509; *Hutchinson v. State*, 62 id., 3; *Evins v. State*, 46 id., 88; *Williams v. State*, 61 Ga., 417; *Cook v. State*, 11 Tex. App., 19. It need not be complete in all its parts or capable of direct and immediate use. *Redes v. State*, 82 Ala., 53. And it is immaterial whether it was loaded or not, if it was the intention of the defendant to carry it concealed. *Ridenour v. State*, 65 Ind., 411; *State v. Dugan*, 6 Blackf., 31. A pistol which has no lock is not within the statute. *Evins v. State*, 46 Ala., 88.

A pistol with tubes imperfect and lock out of order so that it could not be discharged by the trigger is still a fire-arm. *Atwood v. State*, 53 Ala., 508. However, carrying a pistol with no cylinder is not an unlawful carrying of weapons. *Cook v. State*, 11 Tex. App., 19.

On the trial of one charged with carrying a pistol, it need not be proved that the pistol was loaded, the statute not so requiring. *State v. Wardlaw*, 43 Ark., 73.

From the above authorities and instances the rule may be adduced that if the instrument in question is one which is usually intended as a weapon, then, if it be still ordinarily capable of that use, it is a weapon within the prohibition of the statute, without regard to its completeness or general effectiveness as a weapon.

Evidence.— Upon a trial of one accused of carrying concealed weapons the defendant objected to evidence of the finding of the weapon upon his person, because his person, at the time, was searched and the pistol was therefore found by reason of the commission of a trespass, but the court held the testimony admissible. *Chastang v. State*, 7 Am. Cr. Rep., 135, and note.

STATE v. FURNEY ET AL.

(41 Kansas, 115.)

CONSPIRACY TO MURDER: *Dying declarations.*

1. IT IS LARGELY IN THE DISCRETION of the trial court to allow the preliminary proof to the introduction of death-bed statements of deceased to be given to the court in the presence of the jury, but good practice would suggest that such proofs be made in the absence of the jury, when properly insisted upon.
2. STATEMENTS NOT UNDER OATH can only be admitted in evidence as dying declarations when they are made *in extremis*, and where the death of the person who made the declaration is the subject of the charge, and where the circumstances of the death are the subject of the declarations, and the person making them is in the full belief that he is about to die; and this condition of mind must be made clearly to appear. *State v. Medlicott*, 9 Kan., 257.

3. WHERE PERSONS COMBINE TO COMMIT A CRIME, and while so engaged in such unlawful act murder is committed by one or more of the conspirators, without the knowledge or consent of the others, and the act is not the natural or probable outcome of the common design and purpose, but the independent act of one or more of the conspirators, *held*, those not participating in it are not guilty of murder.
4. WHERE CIRCUMSTANTIAL EVIDENCE constituting a single chain is relied upon by the state for a conviction, each essential fact in the chain of circumstances must be found to be true by the jury beyond a reasonable doubt, to warrant a conviction.

Commissioners' decision. Error to district court, Morris county; M. B. Nicholson, judge.

AN information was filed against the defendants, charging them with stabbing and killing one Calvin Cooper, on the 24th day of November, 1886, in Morris county, Kansas, and trial was had in the county at the November, 1887, term of the district court; and the defendants, being tried together, were convicted of murder in the second degree, and each was sentenced to ten years in the penitentiary. A motion to quash the information and for a new trial was overruled. Defendants now bring the case here on appeal.

A. H. Case and *Maloy & Kelley*, for appellants.

L. B. Kellogg, attorney-general, *J. M. Miller* and *J. K. Owens*, for appellee.

CLOGSTON, C. The first question raised is as to the sufficiency of the information. The motion to quash the same was overruled. We have carefully examined the information, and the objections urged against it, and are clearly of the opinion that the information contains a sufficient statement of facts to constitute the crime of murder. It is true the information contains much that might have been stricken out, and it is open to the objection that it does not in plain and concise language, without repetition, set forth the charge; but this is not such a defect as will warrant the court in quashing the information, as surplusage or redundant allegations will not render the information bad where there is specific matter alleged sufficient to clearly indicate the crime with such certainty that the court could pronounce judgment upon a conviction. The motion to quash was properly overruled.

The second allegation of error is that the court permitted the preliminary proof to the introduction of the death-bed statement of Calvin Cooper to be given to the court in the presence of the jury. The hearing of this evidence by the court in the presence of the jury was largely within the discretion of the court. Good practice would require that this evidence be heard not in the presence of the jury, but in this case no motion to exclude the matter or to request that the jury be sent out was made, and therefore no error is alleged in the record.

The third assignment of error is that it is not sufficiently shown by the testimony that Calvin Cooper realized that he was in a dying condition, or that death was certain as the result of the wound, at the time of making the written statement offered in evidence. Before the death-bed statement of the deceased could be used, it must be clearly shown that such statement was made with a full knowledge and belief that death was imminent, and that the deceased with this knowledge, without a hope or expectation of recovery, made the statement. See *State v. Medlicott*, 9 Kan., 257. The evidence offered and received by the court we think sufficient to entitle the statement of the deceased to be admitted in evidence. Four witnesses testified upon this question. Dr. D. H. Painter testified that on his second visit to the deceased he concluded that the wound was fatal, and he told Cooper so. This was on Sunday or Monday following the Thursday on which Cooper was injured. The doctor testified: "I told Cooper that I felt satisfied in my own mind that the injuries he had received were necessarily fatal, and that he would die as a result of them; that I could not do anything more for him." The doctor then testified that after this it was reduced to writing, and was signed by Cooper. The doctor also testified that Cooper told him that he knew he was going to die. The next witness called to establish this fact was Robert Cooper, who also testified that he was present at the time the doctor told Cooper he was going to die. This witness was the uncle of Calvin Cooper, at whose house Calvin Cooper was living before and at the time of his death. He stated that the doctor told him (Cooper) that the wound would be fatal, and that he would die, and asked Cooper to make a statement of what

took place at the time he received the injury. He said that at the time the doctor made this statement Cooper said he did not think hardly he was going to die, or something like that, or that he had not thought of dying at all. But after being informed by the doctor that he would die from the wound, and that if he had anything to fix up he had better fix it, the doctor asked him if he did not want to make a statement of what occurred at the school-house, and he said he did, and a short time afterwards made the statement that was offered in evidence. The third witness who testified was William Chitty, who said that he was present at the time Dr. Painter said to Cooper that if he had any worldly matters to fix up that he had better fix them up right away, because he was likely to die at any time, or something to that effect. Witness testified he had a conversation with Cooper in which Cooper told him he thought he was going to die, and that he was trying to keep it from the knowledge of his friends, and requested witness not to inform the family that he was going to die. Before making the statement he asked some one to come in and pray for him, and Mr. Simmons prayed for him; and Cooper then asked if there was any one else in the house that would pray for him, and Chris Anderson also prayed for him. He also stated, in response to a question asked by Mrs. Cooper, that he was prepared and ready to go at any time; speaking of his death. The fourth witness was Samuel Rouse, who testified that he was present at the time Dr. Painter made the statement to Calvin Cooper. This witness also testified that the deceased had prayers offered for him, and that Simmons and Chris Anderson, at his (Cooper's) request, prayed for him, and after these two had offered prayers Cooper asked if there was any one else in the house to pray for him, and after this statement of Dr. Painter's to him, and the prayers offered, this statement was made that was offered in evidence. Now, from this testimony it can clearly be said that Calvin Cooper made this statement under the belief that he was about to die, and that all hope of recovery had fled. The rule contended for by the defendants is that, before this statement can be offered, all the testimony must show that the deceased knew he was going to die, and the fact that his uncle testified that Cooper said he did not think he was going to die, or had not expected

to die, left the matter in doubt, and that if there was any doubt about it, it was the duty of the court to exclude the statement. In this we do not concur. It was a question of the admissibility of evidence, and was governed by the same rules that govern the admission of all other evidence. The question is, was there sufficient evidence to sustain the ruling of the court? The court passed upon this question, and there is abundant evidence to sustain the ruling.

The next allegation of error urged by the defendants is that the court permitted the statements of the defendants given at the coroner's inquest to be offered in evidence for the state, over the objections of the defendants. It is shown by the testimony of at least one of these defendants that they were duly subpœnaed to attend the inquest, and gave their testimony by reason of being subpœnaed as witnesses. At this time the defendants had not been arrested or accused of the crime, other than in the dying declarations of Calvin Cooper. To make this testimony competent as their declarations, they must have been made voluntarily. See *Kirby v. State*, 5 S. W. Rep., 165. The question whether or not this evidence was voluntary in this particular instance it is not necessary to determine. Whether it was or not, the evidence was made competent afterwards by the defendants. They went upon the stand as witnesses on their own behalf, and there gave substantially the same evidence as that given at the coroner's inquest. If the testimony was incompetent in the first instance, which we are inclined to believe, the defendants, on cross-examination, substantially stated that the evidence given at the coroner's inquest was correct. It was in substance the same as that given by them at the trial. It then becomes immaterial whether or not the testimony offered as their declarations before the coroner's inquest was properly admitted.

The main objections urged by the defendants in their brief are to the instructions given by the court to the jury. A large number of the instructions are complained of, but we will examine only two, for the reason that they contain the only error that we have discovered sufficient to reverse the case. The first instruction complained of, which upon examination is found to be erroneous, is as follows: "If you believe from the evidence in this case, beyond a reasonable doubt, that the

defendants, or any of them, conspired and agreed together or with others to assault Calvin Cooper by force, or to unlawfully beat or wound him, and if you further believe from the evidence, beyond a reasonable doubt, that in pursuance of such conspiracy, and in furtherance of such common design, a stab was inflicted on the body of the deceased by a member of such conspiracy at the time, and that Calvin Cooper was killed by such stab, then such of the defendants as the jury believe from the evidence, beyond a reasonable doubt, to have been the parties to such conspiracy are guilty of murder, whether the identity of the person inflicting such stab be established or not." The objection to this instruction is that the jury are told that if any of the defendants conspired together to assault Calvin Cooper by force, and in furtherance of that common design a stab was inflicted upon the body of the deceased by a member of the conspiracy, Calvin Cooper was killed by that stab, then all connected with that conspiracy were guilty of murder. This is not the law. If the court had added to this instruction that if the defendants or any of them conspired and agreed to assault and stab Calvin Cooper, and in furtherance of that common design a stab was given from which Cooper died, all who participated in the conspiracy were guilty of murder, the instruction would have been correct. The court in this instruction charges as to two kinds of conspiracy: *First*, a conspiracy to assault by force; and *second*, to unlawfully beat and wound. The first of these, to assault with force, would constitute a misdemeanor, and where an assault or an assault and battery is committed under an arrangement between defendants or with others, and death results from such assault, where there is no intention to kill, and such results could not have been anticipated, or likely to happen therefrom, under such circumstances the defendants would be liable for manslaughter and not for murder. *Brown v. State*, 28 Ga., 199; *Reg. v. Caton*, 12 Cox, Crim. Cas., 624; *United States v. Hibert*, 2 Sum., 19; *Frank v. State*, 27 Ala., 37; *Adams v. State*, 65 Ind., 574; *State v. Shelledy*, 8 Iowa, 477.

Again, where parties combine to commit a crime, and while engaged in such unlawful act murder is committed by one of such conspirators, without the knowledge or consent of the others, and the act is not the natural and probable outcome of

the common design, but the independent act of one conspirator alone, and outside of the common purpose, those not participating in it are not guilty of murder. See *Lusk v. State*, 2 South. Rep., 256; *Kirby v. State*, 5 id., 165; *Williams v. State*, 1 id., 179; *The Anarchists' Case*, 12 N. E. Rep., 865. While, on the other hand, if they conspire together or with others to assault, beat and stab, then all who participated in the conspiracy would be guilty of murder. The court ought to have made this matter clear to the jury, and they ought to have been instructed that it was necessary to show the conspiracy to wound or stab, and that the stab or wound from which Cooper died was the result of that conspiracy.

The second instruction complained of is as follows: "The rule requiring you to be satisfied, beyond a reasonable doubt, of the guilt of the defendants in order to warrant a conviction, does not require you to be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the guilt of the defendants. It is sufficient if, taking the testimony altogether, you are satisfied beyond reasonable doubt that the defendants are guilty." Before a defendant can be convicted, every fact essential to the conviction must be found by the jury beyond reasonable doubt to be true. Now, doubtless, what the court intended to charge in this instruction, was that, in the different facts that go to make up a chain of circumstances, each individual fact that constitutes or makes up the principal fact and link in such chain need not be found to be true beyond a reasonable doubt. If the court had so instructed, such instruction would have been proper. Whatever facts or circumstances may have entered into and formed a part of the link in the chain, each minute circumstance or fact that went to make up the sum total constituting a link need not be found by the jury to be true beyond a reasonable doubt; but the link itself, taking all the evidence together to establish that link, must be found to be true beyond a reasonable doubt. In other words, the chain can be no stronger than the weakest link in it. If one link in the chain is not found to be true beyond a reasonable doubt, then the chain is broken and the defendants must be acquitted. The court afterwards gave a proper instruction upon this question: "In law the defendants are presumed to be innocent of

the offense preferred against them, innocent of any guilty intent, and innocent of every fact necessary for the state to prove in order to establish their guilt, and this presumption of innocence continues to operate in their favor until their guilt is proven by the evidence, and until each and every fact necessary to constitute the offense charged against them is so proved beyond a reasonable doubt." In this the court gave the law to the jury as it ought to have been given. It is recommended that the judgment of the court below be reversed and a new trial ordered.

PER CURIAM. It is so ordered; all the justices concurring.

UNITED STATES v. LATE CORPORATION OF CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL.

(6 Utah, —; 21 Pac. Rep., 524.)

CONTEMPT — OFFENSIVE LANGUAGE TO COURT.

Where the language used in a paper filed in court plainly constitutes a contempt, the fact that the persons committing the offense "did not think nor believe, nor had they the slightest conception, that those statements were scurrilous, disrespectful, insolent or contemptuous in any particular; that nothing was further from their minds than the making of any insinuation or charge against the court, or of stating anything that would be considered contemptuous by the court,"— does not relieve them from responsibility for the language they actually used, and it is not for them, nor their counsel, to construe or state the effect of such language.

In the matter of the citation of certain school trustees to show cause why they should not be punished for contempt.

R. N. Baskin and *Zane & Zane*, for school trustees.

JUDD, J. Upon a former day of this court, T. C. Bailey, Rudolph Alff, J. F. Millspaugh and L. U. Colbath came into this court with a paper writing, which was read to the court by their counsel, and which at that time was taken under advisement by the court, said paper writing purporting upon their part to be a withdrawal from an investigation, which

they had instituted under a petition theretofore filed by them in this cause. After full consideration by the court, at a subsequent day, an opinion was delivered which held that the paper referred to was a contemptuous proceeding, and that the parties who signed the same were guilty of contempt in the face of the court. The opinion so rendered is now upon the files of this court in this case, and is referred to as showing the action of the court. An order was thereupon entered in pursuance of the opinion, as follows: "In this case it is ordered that the clerk of this court issue a written notice to each of the persons, Rudolph Alff, J. F. Millspaugh, L. U. Colbath and T. C. Bailey, requiring them to appear before this court on January 30, 1889, at 10 o'clock A. M., to show cause why they should not be punished for their contempt; and in case they fail to appear, the clerk will issue writs of attachment for their arrest, and to bring them forthwith before this court." In accordance with that judgment the order therein directed was issued, and the parties, on the 30th day of January, came into court, and filed their sworn answer, in which they set out much matter that is wholly irrelevant to the judgment they were called upon to answer, but, among other things, they say: "Your petitioners further represent that they have acted in the best of faith throughout this whole proceeding; that they have tried to the best of their ability to do their duty, and consciously have made no attempt to trifle with the court; that they believed the statements made by them to the court to be true; that they did not think nor believe, nor had the slightest conception, that those statements were scurrilous, disrespectful, insolent, or contemptuous in any particular; that nothing was further from their minds than the making of any insinuation or charge against the court, or of stating anything that would be considered contemptuous by the court." It then prayed that they might be discharged from such contempt proceeding.

Upon the request of the defendants that they might be heard in their behalf before the court, opportunity has been given to them, and their case has been ably, earnestly and respectfully submitted before this court by two able counsel. It will be seen, however, that, although the argument of counsel has taken a wide range, the direct question before the court is

the proper construction of the paper filed before this court, which is fully set out in the opinion heretofore referred to. The good faith of the defendants is asserted by their counsel with much energy and confidence. Still, however, notwithstanding their good faith, they are responsible for the language used by them in any proceeding which they may bring into this court, and it is not for them, nor their counsel, to construe or to say what effect such language will have. This direct question came before the supreme court of California in the case of *McCormick v. Sheridan*, 77 Cal., 253. In that case the court show that "a petition for rehearing stated that 'how or why the honorable commissioner should have so effectually and substantially ignored and disregarded the uncontradicted testimony, . . . we do not know. . . . It seems that neither the transcript nor our briefs could have fallen under' the commissioner's observation. 'There is not a *scintilla* of evidence to the contrary, and yet the honorable commissioner assumes,' etc., and 'in very euphuistic language says,' etc.: 'A more disingenuous and misleading statement of the evidence could not well be made.' 'It is substantially . . . untrue and unwarranted.' 'The decision . . . . seems to us to be a travesty of the evidence.'"

This is the exact language which the supreme court of California, in that opinion, found to have been contained in the brief and petition presented by the attorney to the court in that case for a rehearing, upon which it was held by the court that the counsel draughting the petition was guilty of contempt, committed in the face of the court, notwithstanding a disavowal of disrespectful intention. The court distinctly say: "These disclaimers by the respondent we accept as true, so far as it is possible to do so without giving a constrained construction to the language used by him in his petition for a rehearing. It may be that he acted in good faith, and without any design, wish or expectation of committing any contempt, and we accept his explanation in palliation of the offense; but the language we have quoted from his petition for a rehearing is too plain and direct in its imputation of negligence and bad faith to authorize us in taking the disavowal of the defendant as sufficient to purge him of contempt. As was said in *Re Woolley*, 11 Bush, 109: "We rec-

ognize to the utmost reasonable limit of its application the rule that a supposed contempt, consisting in mere words, which are apparently intended to be scandalous and offensive, but which are at all susceptible of a different construction, may be explained or construed by the speaker or writer, and that, upon his sworn disavowal of intention to commit a contempt, proceedings against him must at once be discontinued. But this rule does not control where the matter explained or written is of itself necessarily offensive and insulting. In such a case the disavowal of an intention to commit a contempt may tend to excuse, but it cannot and will not justify the act. *People v. Freer*, 1 Caines, 485. An intention to be offensive may be disavowed, and the particular language used to make the charges or imputations may be withdrawn, but the effect of the paper or publication, the ideas conveyed, the charges and imputations made, may remain.'" Notwithstanding, in that case, a disclaimer by the attorney who filed that paper, of the strongest character, the court proceeded to adjudge him guilty of contempt, and assessed a fine upon him of $250 as a judgment for his contumacy. In this case the court has adjudged that these parties are guilty of contempt by reason of the fact that the language of the paper brought into court by them, and read to the court, was of itself a contemptuous proceeding. It was one that this court could not pass by and maintain its dignity and standing as a court before the community. It has been truly said that the dignity of the court is its life, its vitality, and that the court, in the right of self-defense, is bound to protect itself from the assaults of persons who do not preserve that respect that the laws of the country require they should; nor, as supposed by counsel at the bar, is the right of this court to punish for contempt confined to the cases mentioned in the statutes of the territory, but it is a right which has at all times existed in courts by common law, both in England and America. It is a common-law right; it is a right which the court, independent of any statute upon the subject, must exercise, or it would be powerless to defend itself against the assaults of the malicious. These remarks are made, not so much to be applied to the defendants in this case, as to assert the doctrine once for all that courts established by the government have the right, and will exercise the right, to protect

themselves in the orderly and proper administration of the laws which they are called upon to administer in the exercise of their jurisdiction. As before stated, the judgment of this court, as found in its opinion of a former day, is entirely satisfactory, and a further examination of the authorities has tended to strengthen the court in the opinion there rendered. We are relieved, however, of the unpleasant duty of administering any severe punishment to these defendants, for the reason that their counsel have not only made for them an open, frank and manly disclaimer, but they have now, upon the hearing, come into court and asked that they be allowed to withdraw the paper containing the language which was found to be offensive, and by this to express their good faith when they say that they did not intend any contempt by the paper. We are glad to say that this proceeding has ended in a manner much more agreeable to the court that if we had been compelled, as we should have been had the case taken a different turn, to assess upon these defendants a severe penalty in vindication of the law. Their disclaimer and motion for withdrawal of the paper are accepted by the court, as before said, as made by them in good faith, and they are allowed to withdraw from the records in this cause the paper which they have read to the court, and on account of which they were adjudged to be in contempt. We feel, however, that under all the circumstances, it is but right and proper that they should pay the cost of this proceeding in contempt against them, and a decree will be entered directing that they pay such costs, and that execution isssue therefor.

SANDFORD, C. J., and HENDERSON and BOREMAN, JJ., concur.

NOTE.— The power to punish for contempt is necessarily implied in the establishment of a judicial tribunal. *United States v. New Bedford Bridge*, 1 Woodb. & M., 401; 2 Bishop, Crim. Law, sec. 234 and note.

A contempt may be either in the presence of the court or beyond its presence. It would be dangerous to attempt any definition of this offense, but it may be said generally that any disorderly proceeding, calculated to interrupt the administration of justice, show disrespect or insolence towards the judge presiding, or any wilful act intended to lessen the dignity of the court, if done in the presence of the court, is a contempt. And any act calculated to defeat the execution of its process or to defy the exercise of its authority, done beyond the presence of the court, is also a contempt.

The following cases will serve to illustrate the general doctrine:

In presence of the court by witnesses.— It is a contempt for one to refuse to be sworn as a witness, even though privileged. His privilege cannot be urged until after he is sworn. *Ex parte Stice*, 70 Cal., 51. It is no excuse that his testimony would tend to subject him to punishment for a felony. *Id.*

A witness remaining in the court-room during the examination of another witness, after he has been excluded by an order of the court, may be punished for contempt. *People v. Boscovitch*, 20 Cal., 436. An attachment for not performing an award will be granted of course, unless good cause or excuse is shown why it should not. *McClure v. Gulick*, 17 N. J. L. (2 Harr.), 340.

A defendant may refuse to answer an illegal or improper question upon an examination under an order of reference; but if he refuses to answer a proper question he may be punished by the court for a contempt in refusing to answer. *Gihon v. Albert*, 7 Paige (N. Y.), 278.

A witness refusing to answer before a grand jury may be committed for contempt under Revised Statutes, 534, section 1, subdivision 5. *People v. Kelley*, 24 N. Y., 74.

The witness and the grand jury being present in open court, he repeated his refusal in the face of the court. *Held*, that this was a contempt "committed in the immediate view and presence of the court," and warranted his committal. *Id.*

The question whether one committed for contempt of court really committed the act charged will be conclusively determined by the order of that court. *Id.*

But if a witness' refusal to answer a question is innocent and justifiable, or only an assertion of a constitutional right, commitment for contempt is illegal, and the error in so doing may be reached by *certiorari* from the supreme court, if not examinable upon the return to a *habeas corpus* sued out by the committed party. *Id.*

The refusal of a witness to produce papers acknowledged to be in his possession, for the reason that it would be a breach of his privilege as attorney, is a contempt. *Mitchell's Case*, 12 Abb. (N. Y.) Pr., 249.

A Jew who refused to be sworn as a witness in a cause tried on a Saturday, because it was his Sabbath, was fined by the court. *Stansbury v. Marks*, 2 Dall., 213.

One who was not a Quaker, refusing to be sworn on the ground of conscientious scruples produced by a vow that he never would take an oath, was committed for contempt, the liberty of affirming being at that time confined to Quakers by the laws of Massachusetts. *United States v. Coolidge*, 2 Gal., 364.

A party who permits his witness to leave the court cannot afterwards have him attached for contempt. *State v. Nixon*, Wright (Ohio), 763. It was decided in Louisiana, with one judge dissenting, that perjury was not a contempt of court. *State v. Lazerous*, 37 La. Ann., 314.

By others in the presence of the court.— To perform military evolutions, with music and firing, near the court-house, while the court is in session. *State v. Coulter*, Wright (Ohio), 421; *State v. Goff*, id., 78.

To call another a liar in the presence of the court and in the hearing of its officers. *United States v. Emerson*, 4 Cranch, C. Ct., 188.

A fictitious case, brought for the purpose of obtaining the opinion of the court on the matters presented by it. *Smith v. Brown*, 3 Tex., 360.

And the act need not be done during the actual session of the court in order to constitute the offense. Unbecoming or insolent conduct during the recess may be punishable, and even insisting upon talking with the judge about the case.

The office of judge would be intolerable to the holder and degrading to the state were the incumbent subjected by law to personal and private approach, questioning and harassment at the will of anxious and discontented suitors. The only place for intercourse with a judge touching business pending in court is the place where the court sits, and the only time for it is during the sitting. And we think that whenever a judge of the city court is in the court-room during term, and a suitor there calls upon him to deal in any manner with or answer questions concerning a pending case, the court is in session respecting that case, to the extent at least of keeping the suitor in order in discussing it or making remarks about it, and that any misbehavior of the party then and there occurring takes place in the presence of the court, within the spirit and meaning of the statute above recited. Moreover, it is a matter of necessity that the court shall be deemed in session throughout the term for the purpose of keeping order and maintaining decorum in the halls of justice. The orderly assembling of the court for the transaction of business after each temporary recess would otherwise be impracticable. If the judge had to scramble with a mob of suitors or others to reach the bench every morning, and then could punish none of them for the indignity which they had offered the law and the public authority, because he had not succeeded in formally opening the court for the day's business before he was insulted, he would soon become powerless to administer justice. Of what avail would be the power of protecting the court against contempt after the judge actually seated himself on the bench, if, while attending in the court-room for the purpose of so seating himself, he could not command order and enforce it by summary punishment? To the end that there may be a court held at all, it is necessary that the judge shall have the sanctity of the law's majesty about him while he waits officially in the temple of justice, both before and after each daily session. The court is not dissolved by a mere recess; and misbehavior affecting public justice in the court-house, and in the immediate presence of the judge, especially by a suitor, is misbehavior in presence of the court, and may be punished summarily as a contempt of court. In *State v. Garland*, 25 La. Ann., 532, an attorney who read abusive language towards a member of the court, and committed an assault upon his person during a recess, and in the court-room, under the pretext of resenting what he had said or done when on the bench, was adjudged guilty of a contempt of court, and punished accordingly. The report in that case states that the court had not adjourned, and in the present case it is not expressly declared in the record that the court had adjourned the previous evening or afternoon, but we take it for granted that it had done so, as that is the usual course of business. We think, however, that necessary adjournments from day to day are but recesses in the

sittings, and that when the judge returns to the court-room to resume business the court at once has 'a presence,' and that disorder then and there committed affecting the public justice or business of the court is misbehavior in presence of the court. This precise case is not distinctly determined in the authorities which we have examined, and we have looked into very many referred to by Rapalje on Contempts; 3 Am. & Eng. Cy. L., 777; 15 Cent. L. J., 42; 12 Am. Dec., 178, notes to *Clark v. People*." *Baker v. State*, 82 Ga., 776.

Contempt, by disrespectful language spoken in court is not excused by the fact that the judge was ill-tempered and discourteous. *Holman v. State*, 105 Ind., 513.

After the court has ruled against a particular mode of examination of witnesses, if counsel still insist in pursuing it he is guilty of contempt. *State v. District Court*, 41 Minn., 42.

It is a contempt to strike an attorney in a court-room, although the judge be not on the bench and the court be in recess, and although the cause of the assault have no relation to the proceeding in which the attorney is engaged. *United States v. Patterson*, 26 Fed. Rep., 509.

Plaintiff, his sureties and attorney are guilty of contempt where they have imposed upon the court in procuring the acceptance of worthless sureties. *Foley v. Stone*, 3 N. Y. S., 288. So one who knows himself insolvent and becomes surety upon an appeal bond is guilty. *Timon v. Aldine Co.*, 14 Daly, 279.

By a juror.— It is contempt for a juror to separate himself from his associates and mingle with the community at large. *State v. Helvenston*, R. M. Charlt. (Ga.), 48. Also for the jurors, after they have retired to decide on a case, to hold communication with persons other than officers of the court. *Id.*

To solicit a juror to give a signal, after the jury have retired, to indicate whether or not they are likely to agree, and thereby to enable an outside party to make a bet on the question of their agreement to better advantage, although nothing is said by the person making the solicitation as to how he wishes the jury to decide. *State v. Doty*, 32 N. J. L., 403.

During the progress of the trial of an indictment for an assault a juror viewed the locality where it was committed. *Held*, not a contempt. *People v. Oyer and Terminer Court*, 101 N. Y., 245; *S. C.*, 54 Am. Rep., 691.

By an officer.— A sheriff is liable to attachment for the failure of his deputy to pay over money collected by him. *Matter v. Stephens*, 1 Ga., 584.

Where a deputy-marshal receives money on a judgment after he has returned the execution, he may be attached on a neglect to pay over the amount in pursuance of the order of the court. *Bagley v. Yates*, 3 McLean, 465.

The marshal of the United States may have an attachment to enforce payment of fees against an attorney who indorses the writ, and who is liable, by the *lex loci*, to respond to the costs. *Anon.*, 2 Gall., 101.

A sheriff who pertinaciously refuses to obey, or culpably neglects, the instructions of the plaintiff in execution to collect his debt in gold and silver, may be attached for contempt. *Rice v. McClintock*, Dudley (S. C.), 354.

A jailor is an officer of the court, and if he maltreats the prisoners under his charge, he is guilty of contempt. *In re Birdsong*, 39 Fed. Rep., 599.

By others without the presence of the court.— A publication, pending a suit, reflecting on the court, the parties to the suit, the witnesses, the jurors or the counsel, is a contempt of court. *Hollingsworth v. Duane*. Wall. C. Ct., 77, 102, 141; *Bronson's Case*, 12 Johns. (N. Y.), 460; S. P., *Respublica v. Passmore*, 3 Yeates (Pa.), 441. So it is to publish remarks in a newspaper, which have a tendency to prejudice the public with respect to the merits of a cause pending in court, and to corrupt the administration of justice, and the judge who was libeled is competent to try the complaint. *Myers v. State* (Ohio), 22 N. E. R., 43; *Respublica v. Oswald*, 1 Dall., 319.

The attempt of a master to remove his slave beyond the jurisdiction of the court, pending a petition for freedom, is a contempt. *Richard v. Van Meter*, 3 Cranch, C. Ct., 214. And see *Thornton v. Davis*, 4 id., 500.

Where books are, by order of the court, subjected to the examination of the adverse party, those parts which do not relate to the subject of the litigation may be sealed up, and it is a contempt of the court for the adverse party to break open the parts so sealed up. *Deas v. Merle*, 2 Paige (N. Y.), 494. So, also, is the act of clandestinely abstracting from the files of the court a subpœna for witnesses, and substituting another subpœna in its place, and procuring a false return to be made upon the latter, all with intent to defraud a party litigant in said court, and in whose case such subpœna issued. *Baldwin v. State*, 11 Ohio St., 681. And to dispose of property contrary to the terms of an injunction with notice thereof, though before it has been served. *Hull v. Thomas*, 3 Edw. (N. Y.), 236; *Ewing v. Johnson*, 34 How. (N. Y.) Pr., 202.

If, while engaged in a strike, and in an unlawful interference with the cars and engines of a railroad company, the strikers, although not intending a contempt, also interfere with cars and engines in charge of a receiver of the court, they are liable as for a contempt. *In re Doolittle*, 23 Fed. Rep., 544.

If they overawe the employees of the receiver by a simple request to leave work, backed by an array of armed men, they are guilty of a contempt although no threats are made. *Id.; United States v. Kane*, id., 748.

If they notify men not to work, qualifying the notification with the statement that the notification is not to be considered an intimidation, they interfere unlawfully with the receiver's management, and are guilty of a contempt. *Re Wabash R. R. Co.*, 24 Fed. Rep., 217.

A party who intentionally violates an interlocutory judgment is guilty of contempt, although he may have acted in good faith upon professional advice honestly given. *Green v. Griffin*, 95 N. C., 50.

Where disobedience to an order of the court is plainly not wilful, a disavowal of any intent to disobey will purge the contempt. *Kron v. Smith*, 96 N. C., 386.

It is not a contempt to serve a party, while attending at the court as a party in the cause, or as a witness, with a summons. The privilege extends to exemption from arrest, but no farther. *Blight v. Fisher*, Pet. C. Ct., 41.

A client cannot be punished as for a contempt of court for an act done

by his attorney without his direction, knowledge, privity or procurement. *Satterlee v. Comeau*, 7 Robt. (N. Y.), 666.

Hasty expressions of counsel under excitement will be overlooked when no contempt was intended. *St. Clair v. Piatt*, Wright (Ohio), 532.

A newspaper reporter concealed himself in the jury room before the retirement of the jury, and after they came in took notes of their deliberations. Court had remained in session during the deliberation of the jury. The reporter was discovered, and, despite the admonition of the court, published a report of what had transpired in the jury room. It was held that he was guilty of a contempt committed in the presence of the court. *People v. Barrett*, 56 Hun, 351; 8 N. Y. Cr. R., 1.

For a discussion of other phases of the law upon this subject, see note to *People ex rel., etc., v. The Court, etc.*, 6 Am. Cr. R., 163.

PEOPLE v. McDONNELL.

(80 Cal., 285.)

COUNTERFEITING.

1. Penal Code of California, section 480, providing that "every person who makes, or knowingly has in his possession," anything employed "in counterfeiting bank notes or bills, is punishable," applies to foreign as well as domestic bank notes.
2. Under Penal Code of California, section 959, subdivision 6, section 960, providing that an information is sufficient if the offense charged is set forth in such clear and distinct manner as to enable a person of common understanding to know what it is, and defendant is not prejudiced in any substantial right by the defect, an information for having possession of tools for counterfeiting notes of the "Bank of England" need not allege the incorporation of such bank.
3. Proof that the bank is known and acting as a corporate company, and as such issues bills which come within the statute, identifies the notes set out sufficiently to show that they were "bank notes."
4. The state courts have jurisdiction of such offense, under the statute which is an exercise of the general police power of the state, though it is also punishable under a federal statute.
5. A charge in substance that to constitute the crime a mere possession and intention to use, though without ability to use, is sufficient, is proper.

For the appellant, *C. B. Darwin* (*Crittenden Thornton* and *F. H. Merzbach*, of counsel).

For the people, *George A. Johnson*, attorney-general, and *Davis Louderback*.

FOOTE, C. The defendant was charged by information, under section 480 of the Penal Code, with having knowingly, wilfully, unlawfully and feloniously in his possession a certain stamp, block and plate, made use of in counterfeiting bank notes, designed and engraved for the purpose of striking and printing counterfeit bank notes, in the likeness and similitude of the genuine "five pound" notes of the "Bank of England;" such possession being had by him for the purpose of knowingly and feloniously counterfeiting such "bank notes." His demurrer to the information on various grounds was overruled. He then pleaded not guilty, was tried, and convicted as charged. A motion for a new trial was made and refused, as also a motion in arrest of judgment. From the two orders made upon the motions mentioned, and the judgment of conviction, the defendant has appealed.

The jurisdiction of the trial court is assailed, on the ground that the information did not present any offense against the laws of this state, and that the note set out, and which the plate was said to be intended to print, was not sufficiently averred to be a "bank note;" that if it was a "bank note," it was a foreign one, and not within the "bank note" protected by the Penal Code of this state, in section 480 thereof; that if the note set out in the information, to quote the language of his brief, "did fall within the bank note named in our state code, yet the state had no jurisdiction herein, because the congress of the nation, by virtue of its international power, and in discharge of its international duty, had enacted a law for the protection of the very same bank note, and denounced the very same plate in the same terms, and with the same intent, and had therein submitted the jurisdiction to its own tribunals, and had made no reservation in favor of state courts; that, therefore, under the laws regulating judicial cognizance, the state court had no jurisdiction of the offense, even though she had denounced the same transaction in her code." Section 480 of the Penal Code under discussion is as follows: "Every person who makes, or knowingly has in his possession, any die, plate or any apparatus, paper, metal, machine or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces or nuggets, or in coun-

terfeiting bank notes or bills, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and all such dies, plates, apparatus, paper, metal or machine, intended for the purpose aforesaid, must be destroyed." The suggestion is made that the legislature, when it used the words "bank notes or bills," did not mean to include any foreign bank notes or bills; and in support of this it is ingeniously and strenuously argued that such intention could not have existed on the part of the law-making body, or else it would have used more apt and certain language upon the subject, such as had been formerly employed in prior laws, and in the New York Code, upon which our Penal Code is modeled. However plausible the argument may be, we cannot suppose that the legislature intended by the comprehensive words "bank notes and bills" to mean less than all bank notes and bills, both foreign and domestic, current in this state or otherwise. To say to the contrary would be to declare, without proper foundation, that the legislative assembly of our state had deliberately made California an asylum for all those evil-disposed persons who might desire to injure the currency of foreign nations, or to defraud our own citizens by passing off upon or selling to them counterfeit bills of such nations. Without some more direct and positive declaration of legislative intent to that end than has been shown in the argument of appellant, we should be very much averse to the belief which he so much desires us to entertain in his behalf. Nor was it necessary that the information should have alleged the incorporation of the Bank of England. The fact of incorporation was not an element of the crime. *People v. Ah Sam*, 41 Cal., 652; *People v. Henry*, 19 Pac. Rep., 832; Penal Code, § 959, subd. 6, § 960. "So, too, as a matter of identity, we think the description is satisfied by proof that the company is known as a corporate company, and is acting as such, and as such issues bills which come within the statute." *People v. Ah Sam*, *supra*.

A painstaking and lengthy argument is made that the federal courts have exclusive jurisdiction of this crime since the enactment of section 711 of the Revised Statutes of the United States, which reads as follows: "The jurisdiction vested in the courts of the United States in the cases and proceedings here-

inafter mentioned shall be exclusive of the courts of the several states: 1. Of all crimes and offenses cognizable under the authority of the United States." That provision of law was in existence when the supreme court of the United States, through Mr. Chief Justice Waite, delivered its opinion in the case of *United States v. Arjona*, 120 U. S., 479–488. This was a case where the defendant had been indicted for the violation of sections 3 and 6 of the act of congress of May 16, 1884, chapter 52 (26 Stat., 22), "to prevent and punish the counterfeiting within the United States of notes, bonds and other securities of foreign governments." The statute, among others, makes the following things criminal: Section 6. Having in possession "any plate, or any part thereof, from which has been printed, or may be printed, any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank or corporation, except by lawful authority," etc. After holding that the law in question was constitutional, and that the offense is one which the United States government may denounce in the performance of a duty towards other nations, that tribunal observed: "A right secured by the law of nations to a nation or its people is one the United States, as the representative of this nation, are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that congress may enact, because it is one that is needed to carry into execution a power conferred by the constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States." Although the point did not arise, and was not made in that case, that the federal jurisdiction was supreme and exclusive, and a state could not provide for the punishment of the same thing as did

the United States, yet the language of that court is directly decisive of and against the objection made here; and we should respect it as the opinion of the tribunal of last resort as to such matters, which must be the final and supreme arbiter as to the jurisdiction of federal courts. The language of the chief justice was evidently used for a purpose, to the end that a principle relative to the police powers of a state, which had been settled by the supreme court of the United States, over which he then most ably presided, in prior adjudications, should be still more firmly established — that is, that for violation of the federal laws the federal courts alone have jurisdiction; but that such acts, although denounced by federal laws, and punishable under such laws in federal courts alone, may, nevertheless, be punished by state laws in state courts, where the punishment of such acts pertain to the police power of a state; that for such an act as here alleged to have been committed the federal law may punish, for the protection of foreign nations and their people, and the state law for the act as one which may result in a fraud upon its citizens, by passing upon them counterfeit bills of a foreign bank or corporation.

In *Priggs v. Pennsylvania*, 16 Pet. (U. S.), 625, in asserting the exclusive power of congress over the subject of fugitive slaves, Justice Story observes: "To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

In *Eells v. People*, 4 Scam. (Ill.), 512, Eells had been indicted under a statute of Illinois making it an offense to harbor and secrete a negro slave. The court said, by Mr. Justice Shields: "This (the state law) prescribes a rule of conduct for our own citizens. If the state can do this, and I hardly think the power questionable, it can punish those who violate the rule. If a state has power to regulate its own affairs, it has the power to define offenses and punish offenders." "It is also said that this law may punish a man twice for the same offense. There is no force whatsoever in this objection. The offenses are sep-

arate and distinct — violations of distinct and different laws — and the punishment inflicted by different sovereignties." *Id.*, 512. This case was afterwards affirmed in *Moore v. People*, 14 How. (U. S.), 19, by the supreme court of the United States, where it was said: "But, admitting that the plaintiff in error may be liable to an action under the act of congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. . . . The same act may be an offense or transgression of the laws of both" (state and United States), for which, as afterwards said, the offender may be justly punishable. It was there, in addition, said: "The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens and of the public peace, has never been surrendered by the state or restrained by the constitution of the United States." *Moore v. People*, 14 How., 18.

In the case of *United States v. Marigold*, 9 How. (U. S.), 569, Mr. Justice Daniel, speaking for the court, says: "This court, in the case of *Fox v. Ohio*, 5 How. (U. S.), 432, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

In the case of *United States v. Cruikshank*, 92 U. S., 542, Mr. Chief Justice Waite, in discussing the subject of citizenship of the state and of the United States, disposes of the question in a statement, as we think, clear to demonstration: "The people of the United States resident within any state are subject to two governments, one state and the other national; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights, at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the pro-

cess of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state; the United States, because it discredits the coin, and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction."

The defendant here is not sought to be punished under any federal statute, as such. He has been tried and convicted in a state court, under a state law, having for its object the prevention of the passing to her citizens fraudulently, and to their damage, of counterfeit bank notes of a foreign bank. The state is not inhibited from passing laws to punish an act which may result in fraudulent imposition upon its citizens, because the federal government has the exclusive right to punish for an infraction of its laws made in consequence of a duty it owes under the law of nations. The act is the same for which the person is punished, but the laws are different and for a different purpose. The state could not punish for an infraction of the federal statute, but can do so as to its own statutes, when the object is to exercise the police power which appertains to it under the constitution of the United States. This is not an attempted nullification of a federal statute, or an effort to enforce it in a state court; it is a law to prevent frauds upon the citizens of the state, and has nothing to do with the purpose or enforcement of the federal law.

It is also pressed upon our consideration that the charge of the court in reference to what constituted possession of the plate or block, in order to bring the defendant's act within the denunciation of the statute, was erroneous. It is claimed

that the decision of the appellate court in the case of *Ah Sam*, *supra*, which was given to the jury by the court as part of its charge upon the question of possession, was not applicable to the case in hand; that it went only to the point of declaring that an intention to use such a block was enough without a potential intention, and that it was not a decision on the meaning of the word "possession," as used in section 480 of the Penal Code. There is no clearer or better way that occurs to us by which this argument may be successfully refuted than to quote here the language of Justice Temple in that case (41 Cal., 654), in which the facts relating to the guilty possession were in all essential features similar to those in the case at bar, all italicized words being our own: "There is but one other question in this case which we think it worth while to notice. That arises upon this state of facts, as appears from the bill of exceptions: The blanks, the possession of which is charged in the indictment, were printed by one Baker, who, before printing them, revealed the matter to the city police, and had an arrangement with them by which the police should be in ambush, ready to seize the defendants and the blanks immediately after they had been handed to them by Baker. Baker had from the police assurances that the blanks would be paid for, and without such assurances he would not have printed them. The ambush was laid according to the arrangement, and upon a signal being given by Baker, according to an understanding between him and the police, the latter appeared and seized Ah Sam and Ah Tuck, and took from them the impressions soon after they had come into their hands. *It is claimed that the defendants never had such a possession of the blanks as is contemplated by the statute;* that they were printed for the police, under a contract with them, and were really delivered to them according to contract, and were the property of the police; that the mere handing of them to the defendants, to be immediately taken away by the real owners, was no more than laying them upon a counter for them to take; they were given to the defendants at the request of the police, and remained, during all the time they were in defendants' hands, completely under the control of the police; *that the defendants did not have them as their property*, and, during the time they held them, could not have intended to pass them; *that they must have had the ability to commit the offense,*

as well as the intention, *and that ability they never had any more than they would have when immured in a dungeon;* that the intention meant by the statute is potential, and not a mere desire which there are no means to effectuate, and which does not and cannot result in any act; that *Baker and the police never parted with the possession of the blanks, but determined not to do so, and all the time supervised the handling of them by the defendants.* The police laws cannot be tested by any such metaphysical niceties as these. The problem proposed is similar, if not the same, as that which has baffled the best intellects of the world of all ages, in attempting to reconcile the foreknowledge and providence of divinity with the freedom and the moral responsibility of man. The law adopts the theory of responsibility of man, notwithstanding the controlling supervision of Providence. The defendants were not under duress, nor compelled by the police, *prior to the arrest, to do anything whatever.* They contracted with Baker for the blanks as freely and as completely as though the authorities had not permitted them to do so. They had absolute control of their own actions when *they received the blanks*, and up to the very time they were arrested. The knowledge or intention of the police did not interfere with their freedom prior to that time. They had *the ability to commit the crime as fully as they would have had if the police had arrested them at the same time*, without any understanding with Baker, and upon mere suspicion. . . . To constitute the crime, the law only requires the guilty possession. . . . Although Ah Sam was a mere *messenger*, he was properly convicted if he knew the purposes for which the blanks were designed."

We conclude that the possession of the defendant, under the facts of this case, was a guilty possession, and the instructions of the court were in accordance with law. Perceiving no prejudicial error in the record, we advise that the judgment and orders be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders are affirmed.

NOTE.— *Counterfeiting, what constitutes.*— A counterfeit coin is one made in imitation of a genuine coin. The resemblance need not be exact. It is

enough if it would be likely to deceive one not an expert but using ordinary caution. *United States v. Hopkins*, 27 Fed. Rep., 443.

There is a distinction between counterfeiting and uttering false coin. Counterfeiting applies to the act of making, as distinguished from the act of circulating. *Campbell v. United States*, 10 Law R., 400.

Counterfeiting silver coin of the United States may be made an offense against state law as well as against federal law. *Martin v. State*, 18 Tex. App., 224. So a state may punish for a cheat, though the instrument be a base coin in the similitude of a dollar of the United States coinage. *Fox v. Ohio*, 5 How., 410; *Moore v. People*, 14 id., 20. So it may punish for the counterfeiting of a national bank note. *State v. Randall*, 2 Aik., 89.

The state may punish the offense of keeping counterfeit coin with intent to pass the same (*Sizemore v. State*, 3 Head, 26) as coin in the similitude of Mexican dollars. *Com. v. Stearns*, 10 Met., 256.

California gold coin not being lawful currency, the passing thereof is not an offense under the statute. *Com. v. Bond*, 1 Gray, 564. It must be for coin made current by law. *United States v. Gardner*, 10 Pet., 618.

The offense of passing counterfeiting coin is complete, even though uttered as base coin. *United States v. Nelson*, 1 Abb. (U. S.), 137; *State v. Wilkins*, 17 Vt., 151; *Rex v. Franklin*, 2 Leach, 644. And even if passed at a gambling table. *Com. v. Woodbury*, Thach. C. C., 47.

Counterfeiting notes of a foreign bank, or having in one's possession plates therefor, is an offense against the law of nations, and, therefore, properly made an offense by an act of congress. And it is not necessary that the act should aver that the offense is against the law of nations. *United States v. Arjona*, 120 U. S., 479.

A person who passes pieces of metal, apparently gold, octagonal in form, on one side of which is the device of an Indian, and on the other the inscription "¼ dollar, Cal.," cannot be convicted of a crime, under United States Revised Statutes, section 5461. *United States v. Bogart*, 9 Ben., 314. That section does not extend to the uttering of a token which does not purport to be an imitation or in substitution of any coin known to the law. *Id.*

Counterfeiting smooth worn coin is sufficient. *Reg. v. Wilson*, 1 Leach, 285; *Reg. v. Welsh*, id., 364.

Under United States Revised Statutes, section 5430, making it an offense to have in one's possession an obligation engraved and printed after the similitude of an obligation issued under authority of the United States, with intent to sell or otherwise use the same, defendant was indicted for attempting to use an obligation of a silver-mining company resembling a United States bond, except that it was not signed. *Held*, that it being an unexecuted instrument, a conviction could not be had. *United States v. Williams*, 14 Fed. Rep., 550.

One who has made false coins with intent to circulate them, and has carried the manufacture so far as to produce coins capable of being uttered as genuine, may be convicted under United States Revised Statutes, section 5457, although he intended to coat such coins with silver before putting them into circulation. *United States v. Abrams*, 18 Fed. Rep., 823; *S. C.*, 21 Blatchf. C. C., 553.

Brightening up base pieces of coin, so as to render them capable of circulation, is counterfeiting. *Rasnick v. Com.*, 2 Va. Cas., 356.

Evidence.— In a prosecution for passing counterfeit money, it is relevant to the question of guilty knowledge to show that on the same evening and in the same town, there were other instances of the same offense, even though the person guilty of it could only be identified with the respondent in general appearance. *People v. Clarkson*, 56 Mich., 164.

Evidence of a fraudulent sale of counterfeit coin is competent to support a charge of fraudulent possession. *United States v. Biebusch*, 1 McCrary, C. Ct., 42.

Proof of passing by an agent is sufficient. *United States v. Morrow*, 4 Wash. C. C., 733.

STEPHENS v. STATE.

(65 Miss., 329.)

CRUELTY TO ANIMALS: *Killing hogs, injuring crops.*

Under Code of Mississippi, section 2918, forbidding cruelty to animals, defendant was indicted for killing hogs trespassing on his land after he had vainly tried to drive them away. *Held* error to refuse to charge the jury that if defendant killed the hogs while they were ravaging his crop, in order to protect the crops, and not from a spirit of cruelty, they should find him not guilty. His guilt or innocence is determinable by the intent and purpose which prompted his act.

Appeal from circuit court, Yalobusha county; W. S. Featherston, judge.

Dave Stephens was indicted for cruelty to animals. The testimony shows that a neighbor's hogs got into Stephens' crop; that Stephens went to the owner of the hogs, who assisted him in getting them out of his field; that the hogs broke into his field again, when he again went to their owner and asked his assistance in getting them out, but the owner refused to do so. Stephens then tried to get the hogs out; but, after running them for some time and failing to get them out, he got his gun and killed several of the hogs. On the trial he offered to prove that he had a lawful fence around his field, which the court refused. He then asked the court to instruct the jury that if the evidence showed that he killed the hogs to protect his crop, etc., and not out of a spirit of cruelty to the hogs, they should acquit him. The court refused this instruction, judgment was rendered against him, and he appeals.

W. S. Chapman and *J. T. Lowe*, for appellant.
T. M. Miller, attorney-general, for the state.

ARNOLD, J. Section 2918 of the code, under which appellant was indicted, renders it a criminal offense for any person to cruelly beat, abuse, starve, torture or purposely injure certain animals, whether they belong to himself or another. This statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property or to the damages which might thereby be occasioned to their owners. It was error for the court below to refuse to instruct the jury for appellant, to the effect that they should find him not guilty, if they believed from the evidence that he killed the hogs while they were depredating on his crop, and to protect it from destruction, and not out of a spirit of cruelty to the animals. Such instruction was applicable to the evidence, and expounded the law correctly. It was immaterial whether appellant had a lawful fence or not. The motive with which the act was done is the test as to whether it was criminal or not. Unless appellant was actuated by a spirit of cruelty, or a disposition to inflict unnecessary pain and suffering on the animals, he was not guilty of the offense charged. He may have committed a trespass for which he is liable in a civil suit, but if his purpose and intent was to protect his crop from depredation, he did not violate the statute under which he was indicted. 1 Bish. St. Crimes, §§ 594, 597; *Wright v. State*, 30 Ga., 325; *State v. Waters*, 6 Jones L., 276; *Thomas v. State*, 30 Ark., 433; *Lott v. State*, 9 Tex. App., 206.

This disposes of the case at bar; but, speaking for myself, I wish to say that laws, and the enforcement or observance of laws, for the protection of dumb brutes from cruelty, are, in my judgment, among the best evidences of the justice and benevolence of men. Such statutes were not intended to interfere, and do not interfere, with the necessary discipline and government of such animals, or place any unreasonable restriction on their use or the enjoyment to be derived from their possession. The common law recognized no rights in such animals, and punished no cruelty to them, except in so far as it affected the rights of individuals to such property.

Such statutes remedy this defect, and exhibit the spirit of that divine law which is so mindful of dumb brutes as to teach and command not to muzzle the ox when he treadeth out the corn; not to plow with an ox and an ass together; not to take the bird that sitteth on its young or its eggs; and not to seethe a kid in its mother's milk. To disregard the rights and feelings of equals is unjust and ungenerous, but to wilfully or wantonly injure or oppress the weak and helpless is mean and cowardly. Human beings have at least some means of protecting themselves against the inhumanity of man,—that inhumanity which "makes countless thousands mourn," — but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable, perhaps, of feeling as great physical pain or pleasure as ourselves, deserve, for these considerations alone, kindly treatment. The dominion of man over them, if not a moral trust, has a better significance than the development of malignant passions and cruel instincts. Often their beauty, gentleness and fidelity suggest the reflection that it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better feelings of our race. But, however this may be, human beings should be kind and just to dumb brutes; if for no other reason than to learn how to be kind and just to each other.

The judgment is reversed and the cause remanded.

NOTE.— *What constitutes.*— A doctrine exactly contrary to that announced in the foregoing case has been adopted in North Carolina, where it is maintained that a man may kill an animal to prevent its trespassing and destroying his crops. *State v. Butts*, 92 N. C., 784. But the decision in *Stephens v. The State* is undoubtedly sustained by the weight of authority. *Com. v. Lufkin*, 7 Allen (Mass.), 579; *Grise v. The State*, 37 Ark., 456; *State v. Bogardus*, 4 Mo. App., 215. A very able opinion upon this question was given by Yerkes, P. J. for the seventh judicial district of Pennsylvania, in which he criticises with great show of reason *State v. Bogardus, supra*, and reviews the authorities. We give an extract from this discussion:

"It has been said of a statute, similar to ours, that it does not define an offense against the right of property in animals, nor against the rights of the animals that are, in a sense, protected by it. The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt. *Commonwealth v. Turner*, 145 Mass., 296.

"To make out the offense the commonwealth must show, first, that the pigeon was ill-treated or abused; second, that the manner of the treatment was wanton or cruel.

"One of the pigeons was wounded and alighted upon a tree, and as soon as its wounded condition was discovered it was killed.

"Is it ill-treatment or abuse to wound a living creature so that it lingers in that condition for a period, long or short?

"In the case of *Commonwealth v. Turner*, it is intimated that holding a fox in captivity, in the presence of dogs seeking to destroy it, was a circumstance from which suffering by the animal might be inferred.

"The circumstance that all animals, whether domesticated or not, make violent efforts to escape from their natural enemies, or those who apparently would injure them, shows that they are deeply susceptible to the sense of fear, and that they suffer from injuries to their bodies.

"Whoever has observed at a shooting, amidst the heap of sportsman's victims, the winged and wounded birds, causing the whole mass of dead and dying to quiver and move, by their writhing and efforts to crawl away, will not doubt that pain, suffering and torture follow as the result of wounding them.

"The natural instinct either for freedom or of fear would have impelled the bird, which the defendant wounded, to continue its flight, had not the pain or exhaustion from the injury prevented. We are clear that this result amounted to ill-treatment and abuse in the meaning of the statute. We cannot undertake to measure the degree of this pain and abuse.

"Was the act wanton or cruel? As I regard the statute, the meaning of these two words, as used in it, is substantially the same.

"A licentious act by one towards another, without regard to his rights, or whatever is done sportively, loosely, without regularity or restraint, is wanton. Any act unjustifiable by the circumstances is wanton.

"The word 'cruelly,' as applicable to similar statutes, has repeatedly received judicial definition.

"In the case of *Commonwealth v. Turner* it is said the cruelty exists where the animal is subjected to unnecessary suffering.

"Following are other definitions: 'Unnecessary abuse of the animal.' *Budge v. Parsons*, 3 Best & S., 385. 'Unnecessary ill-usage by which the animal substantially suffers.' *Swan v. Saunders*, 50 L. J., M. C., 67. And in *Ford v. Wiley*, 23 Q. B. Div., 203, Lord Chief Justice Coleridge says: '"Abuse" of the animal means substantial pain inflicted upon it, and "unnecessary" means that it is inflicted without necessity, and under the word "necessity" I should include adequate and reasonable object.'

"Webster defines cruelty as 'any act of a human being which inflicts unnecessary pain.'

"Our conclusion is, that wanton or cruel ill-treatment or abuse of an animal occurs where pain is inflicted without necessity or good reason to justify the act. That, while a reason may exist for the infliction of pain because of necessity, so as not to bring the case within the statute, yet the necessity must be such as warrants the act; the object to be attained must be in proportion to the means used; must justify it, must be adequate.

. . . . . .

"In the case of *Murphy v. Manning*, 2 Exch. Div., 312, the charge was, cutting the combs of cocks in order to fit the birds for one or other of two purposes — cock-fighting, or winning prizes at exhibitions. *Held*, to be cruelty, abuse and ill-treatment, Kelly, C. B., saying: 'As it does not better fit the animal for the use of man, or for any other lawful or proper purpose, it is wholly unjustifiable, and is a criminal act which comes within the statute.'

"We are now brought to the question, whether the object to be attained created an adequate reason or necessity for subjecting the pigeon to the pain and punishment inflicted upon it.

"According to the finding of the jury, it was, primarily, for test of skill in marksmanship; secondarily, to prepare the bird for sale for food.

"In favor of the first, it is urged that this exercise should be encouraged as tending to promote strength and courage, and to render the citizen more efficient for those services which he may be called upon to render the state in time of war. See *State v. Bogardus*, 4 Mo. App., 215.

"Conceding that these recreations which serve as manly exercises and do not necessarily lead to protracted pain should be encouraged to develop soldierly qualities, is shooting pigeons from traps the recreation calculated to best promote those qualities? Courage, endurance and steady marksmanship are amongst the most necessary acquirements of the good soldier.

"It would be offensive to any citizen possessed of a spark of manhood to assert that his courage had fallen to so low an ebb as to require the exercise of shooting at helpless, tame pigeons, to qualify him to meet a foe in mortal combat, unless, indeed, he is lacking in that brutish instinct which inclines men to shed blood, notwithstanding the nobler impulse which impels mortals to shrink from the infliction of pain. But we have progressed too far in civilization to now wish to develop the brutish instincts of men that in time of war they may possibly make better soldiers.

"Neither can it be said that shooting at birds, as they are liberated from a trap, calls for such active exertion as would augment the citizen's capacity for endurance. The open chase, rowing and gymnastics are far better calculated to develop muscular action and strength. As for marksmanship, shooting at the clay pigeon or glass balls is quite as good a means of testing quickness of the eye in following moving objects. The sportsman who would enter the modern battle-field with the expectation that his agility in using a shot-gun at short range would be regarded of value, would be equally disappointed with the small boy with his pop-gun.

"The army regulations do not provide for tests of marksmanship with shot-guns, but with the rifle and ball. All the states use the rifle range, and target practice with fixed ammunition, as the best adapted to train men as soldiers. We are therefore bound to conclude that test of skill at marksmanship is not such a necessary or adequate object as will compensate for the infliction of pain, by wounding pigeons at trap-shooting.

"We cannot agree that the demands of fashionable sport warrant the practice. In *Ford v. Wiley*, Hawkins, J., said, that while docking horses might be justified, he held a very strong opinion against allowing fashion, or the whim of an individual, or any number of individuals, to afford a justification for such painful mutilation and disfigurement.

"Was it necessary to shoot or attempt to shoot the birds to prepare them for food?

"The learned counsel for the commonwealth admitted that the defendant is not answerable for shooting the bird that was instantly killed, because, as the right to kill existed, and as no unnecessary or lingering suffering was inflicted, there was no cruelty under the act.

"Here is where an important distinction arises, as affecting the manner of killing captive or free animals. The right in man to kill, in order to render the animal more serviceable for his use, is undisputed. Therefore one may inflict such pain and suffering as may be necessary to kill the animal for his use, as for food, without being chargeable with cruelty. He may shoot or otherwise take animals in their wild state, although it may result in lingering pain, because, the animals not being within his control, it is the only practicable way to obtain their use. In such case necessity justifies the probable infliction of pain. But when the animal is in captivity, man, in the exercise of his right to kill, is required to use such methods, having them in his power, as will avoid unnecessarily-prolonged pain. All the cases cited agree to this proposition.

"In the *Bogardus Case*, the charge was killing, not wounding, pigeons. Hayden, J., carefully qualified his observations and confined his judgment to a case of killing outright, saying: 'In the present case there was no mutilation, or anything approaching it.'

"We presume it will be conceded there are methods of killing captive fowls or birds, known to every farmer and poultry raiser, without subjecting them to lingering suffering or the chances thereof, and which will make them more valuable in the market for food, than by shooting. The mutilation from the shot seriously affects their value as food."

These questions have of late been very fully discussed by the English courts. In the case of *Lewis v. Fermor*, 26 Cox, C. C., 176, Day, J., says: "In this case a prosecution was instituted against John Fermor, who was said to be a veterinary surgeon carrying on his business in the county of Sussex, for performing an operation called 'spaying' on certain sows. It was instituted under section 2 of the Prevention of Cruelty to Animals Act, 1849 (12 and 13 Vict., ch. 92); and it is said that the defendant did cruelly abuse and torture three sows within the meaning of that section. There is no doubt whatever that he did inflict pain, and may be torture, on these sows, but the question is whether he cruelly did so within that section. The meaning of 'cruelty,' like that of many other words, is uncertain; and it is for the court to ascertain what was the meaning which the legislature intended to attribute to it. It cannot be used merely in the sense of inflicting pain, or even torture, for there are operations which could well be defined as torture, and which are performed even on human beings, such as cauterizing wounds, and firing in the case of horses, which are attended with beneficial results; such are torture in one sense — they are cruel torture while they last. Cruel torture within the statute must be taken to be that which is inflicted for no legitimate purpose, and which cannot be justified. The word 'wanton,' it is true, has been omitted in the later statute. I do not profess to know the reason for its omission, but that word has a double meaning and was perhaps left out for that very reason. I would define

cruel torture to be the infliction of grievous pain without some legitimate object existing in truth, or honestly believed in. I do not believe that a person who inflicts pain in the honest belief that it is conferring a benefit upon man can be punished under this section on the motion of those who do not agree with him that his acts are beneficial."

In *Ford v. Wiley*, id., 688, a man was arrested for dehorning cattle. Lord Coleridge, C. J., says: "The charge is one under 12 and 13 Vict., chapter 92, section 2, the important words of which are 'cruelly abuse or torture, or cause or procure to be cruelly abused or tortured,' and the question is whether the evidence in this case does not make out to demonstration that an offense against the act has been committed, and that the magistrate should have convicted instead of acquitted the respondent. The question submitted to the court — and to this I call particular attention — is whether the operation of dehorning cattle, as proved to have been performed in this case, is justifiable under section 2 of 12 and 13 Vict., chapter 92. Now, it is important to settle in one's mind, so far as can be settled clearly, what is cruelty, and what is cruelly to abuse or torture an animal within the meaning of the statute. The mere infliction of pain, even of extreme pain, is manifestly not by itself sufficient. Men constantly inflict great pain to one another and upon the brute creation, either for reasons of beneficence, as in surgery or medicine, or under sanctions which warrant its infliction, as in war or in punishment. It is further lawful to inflict it if it is necessary; a phrase vague, no doubt, but one with which, in many branches of the law, every lawyer is familiar. This involves the consideration of what 'necessary' and 'necessity' mean in this regard. It is difficult to define these words from the positive side, but we may perhaps approach a definition from the negative. There is no necessity, and it is not necessary, to sell beasts for forty shillings more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm-yard or railway truck than can otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary. That without which an animal cannot attain its full development, or be fitted for its ordinary use, may fairly come within the term necessary, and if it is something to be done to the animal it may fairly and properly be done. What is necessary, therefore, within these limits, I should be of opinion, may be done, even though it causes pain, but only such pain as is reasonably necessary to effect the result. Necessary pain, therefore, thus limited, we may fairly inflict on those animals over which we have secured or have assumed dominion. But I adopt the language of Wightman, J., in *Budge v. Parsons* (7 L. T. Rep., N. S., 784; 3 B. & S., 382), as, for the purpose of interpreting the statute, complete and satisfactory, and his language is that 'the cruelty intended by the statute is the unnecessary abuse of the animal.' His language is approved of by the court of exchequer in *Murphy v. Manning* (*ubi sup.*). I do not think that the definition given by Grove, J., in *Swan v. Saunders* (*ubi sup.*), 'unnecessary ill-usage by which the animal substantially suffers,' though longer, adds anything to the terse language of Wightman, J. 'Abuse' of the animal means substantial pain inflicted upon it, and 'unnecessary'

means that it is inflicted without necessity, under which word, as I have already said, I should include adequate and reasonable object. In applying these observations to the evidence in this case, there can be no difficulty in arriving at a determination."

Justice Hawkins in the same case gives also a valuable discussion of the law and criticism of the English cases. He says: "In construing this section, I am of opinion that the word 'cruel' runs through and governs the whole sentence, and that, to bring a person within the operation of that section, he must be proved to have cruelly committed the act charged against him. Now, what is the meaning of the expression 'cruelly?' In *Budge v. Parsons*, 3 B. & S., 385; 7 L. T. Rep. (N. S.), 784, Wightman, J., said: 'The cruelty intended by the statute is the unnecessary abuse of the animal.' In *Swan v. Saunders*, 14 Cox, C. C., 570; 50 L. J., 67 (M. C.), Grove, J., says it means 'unnecessary ill-usage, by which the animal substantially suffers.' In Webster's Dictionary it is defined to be, 'an act which causes extreme suffering without good reason. To my mind, it is immaterial for the purpose of the present case which of these definitions is adopted — either is sufficient to dispose of it. To support a conviction, then, two things must be proved: First, that pain or suffering has been inflicted in fact; secondly, that it was inflicted cruelly, that is, without necessity; or, in other words, without good reason.' That the operation of dehorning, as described in the case, is accompanied by excruciating torture, is beyond all question. Any one who could read that description, and reflect for a moment upon the agony of the poor mutilated creatures without being painfully touched with commiseration, must be devoid of all pity for the miseries and distresses of God's creatures; and he who would willingly inflict such suffering, unless under direct necessity, must indeed be cruel in heart and insensible to every dictate of humanity. What amounts to a necessity or good reason for inflicting suffering upon animals protected by the statute is hardly capable of satisfactory definition; each case in which the question arises must depend upon a variety of circumstances; the amount of pain caused; the intensity and duration of the suffering, and the object sought to be obtained, must, however, always be essential elements for consideration. To attain one object the infliction of more pain may be justified than would be ever tolerated to secure another. It would be unreasonable to claim for domestic animals designed for man's use absolute immunity from all suffering at the hand of man; and it would not be contended by the strongest advocates of the cause of humanity that pain to some extent may be reasonably inflicted with a view to save an animal's life, to cure it from sickness or injury, or to fit it to fulfill the part for which by common consent it is designed. In each case, however, the beneficial or useful end sought to be attained must be reasonably proportionate to the extent of the suffering; and in no case can substantial suffering be inflicted unless necessity for its infliction can reasonably be said to exist. To save the life of an animal, to restore it to health when suffering from a painful disorder, violent measures causing much misery to it may oftentimes be matter of necessity; a wounded or diseased limb or an injured eye may require surgical treatment inseparable from pain. These are illustrations of cases in which the pain caused is for the direct benefit of the animal itself. As an illustra-

tion of a class of cases in which some degree of apparent ill-treatment may be justified in fitting an animal for its legitimate use, I may point to a horse which, though designed for draught and riding purposes, is not in its natural untutored state so fitted. To prevent from being unruly and unsafe, it requires to be broken, sometimes with a degree of severity occasioning pain which, without such necessity, would be utterly unjustifiable. But even in these cases the good to be attained must be reasonably proportionate to the suffering caused. Castration of young horses, and of the male young of other animals intended for use or for food, is, we all know, largely practiced for the purpose of rendering them more docile and less dangerous to use, and more adapted to food than uncastrated males commonly are; but I am far from saying that, in my opinion, castration, which is a painful operation, though not of long duration, is in all cases justifiable. I could, were it necessary to do so, suggest many circumstances in which, in my judgment, it would be utterly unreasonable because unnecessary. Docking is another painful operation which no doubt may be occasionally justified; but I hold a very strong opinion against allowing fashions, or the whim of an individual or any number of individuals, to afford a justification for such painful mutilation and disfigurement. I have said enough to indicate my views, namely, that the legality of a painful operation must be governed by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable that the object should be abandoned rather than that disproportionate suffering should be inflicted."

STATE v. BROWN.

(38 Kan., 390.)

DRUNKENNESS: *Mistake as a defense.*

1. Chapter 104, Laws 1883, punishing drunkenness in certain cases, is constitutional and valid, and the information in the present case charges an offense under it.
2. Where a person is charged with the offense of being drunk in a public place, the defendant may show, as a part of his defense, that he became intoxicated through an honest mistake of fact.

Appeal from district court, Chase county; Frank Doster, judge.

John V. Sanders and *Theo. W. Grisham*, for appellant.
John Madden, for appellee.

VALENTINE, J. This was a criminal prosecution brought in the district court of Chase county, wherein the defendant, John Brown, is charged with a violation of the provisions of chapter 104, Laws 1883 (Comp. Laws 1885, ch. 31, par. 2223). The statute reads as follows: "Section 1. If any person shall be drunk in any highway, street, or in any public place or building, or if any person shall be drunk in his own house or any private building or place, disturbing his family or others, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding twenty-five dollars, or by imprisonment in the county jail for a period not exceeding thirty days." The information contains two counts, in the first of which the defendant is charged with the offense of being drunk in a street in the city of Cottonwood Falls; in the second he is charged with the offense of being drunk in the court-house in said city. A trial was had before the court and a jury, and the defendant was found guilty "as charged in the information," and was sentenced to pay a fine of $10 and the costs of suit, and to stand committed to the county jail until such fine and costs were paid. From this sentence he now appeals to this court.

Before the trial in the court below the defendant filed a motion to quash the information upon the ground that it did not set forth facts sufficient to constitute a public offense, which motion was overruled by the court, and this ruling is alleged for error. It is claimed that the information is insufficient and should have been quashed for the following reasons: (1) It does not state that the defendant was at any time disturbing his family or others; (2) it does not describe or give the name of the street in which the defendant was drunk; (3) the act itself under which the defendant is prosecuted is void, for the reason that it contravenes section 16, article 2, Constitution; (4) the act is also void if construed as the prosecution construes it, for the reason that with such a construction it would inflict a cruel and unusual punishment; (5) both the act and information are void because of the indefiniteness of the word "drunk." We think the act is valid and the information sufficient.

The next question is a more difficult one. It is whether a person may be guilty of the offense forbidden by the statute,

where he innocently drinks the liquor which intoxicates him, without having any knowledge of its intoxicating qualities and without having any idea that it would make him drunk. The court below, over his objections and exceptions, excluded nearly all the evidence offered by him to show his ignorance of the intoxicating character of the liquor and its possible power to produce drunkenness; and the court also gave, among others, the following instruction to the jury, to wit: "The defendant's ignorance of the intoxicating character of liquors drank by him, if he did drink any such, is no excuse for any drunkenness resulting therefrom, if any did so result." It has always been a rule of law that ignorance or mistake of law never excuses, and this, with a kindred rule that all men are conclusively presumed to know the law, is founded upon public policy and grounded in necessity; but no such rule is invoked in this case. The question in this case is simply whether ignorance or mistake of *fact* will excuse. It is claimed by the prosecution that it will not; and this on account of the express terms of the statute. The statute provides in express terms, and without any exception, that "if any person shall be drunk," etc., he shall be punished. And it would seem to be contended that there can be no exceptions. But are idiots, insane persons, children under seven years of age, babes, and persons who have been made drunk by force or fraud and carried into a public place, to be punished under the statute? And if not, why not? And if these are not to be punished, then no sufficient reason can be given for punishing those who have become drunk through unavoidable accident, or through an honest mistake. Of course the legislature has the power to provide for the punishment of "any person" who may be found drunk in a public place, whatever may be his age or mental condition, or in whatever manner he may have become drunk; and it is also for the legislature to determine whether the public exigencies are such as to require that injustice shall be done to innocent individuals by inflicting upon them unmerited punishment. But we should never suppose that the legislature intended to punish the innocent, unless particular words are used that will bear no other construction. General terms inflicting punishment upon "any person" who might do any particular act should be construed to mean only such persons as act vol-

untarily and intelligently in the performance of the interdicted act. We should not suppose, in the absence of specific words saying so, that the legislature intended to make accidents and mistakes crimes. Human actions can hardly be considered as culpable, either in law or in morals, unless an intelligent consent of the mind goes with the actions; and to punish where there is no culpability would be the most reprehensible tyranny. The legislature usually, in enacting criminal statutes, enact them in general terms so as to make them by their terms include all persons; and yet it is always understood that some persons, as idiots, insane persons, young children, etc., are not to be considered as coming within the provisions of the statute. It is always understood that the courts will construe the statute in accordance with the general rules of statutory construction, and apply the act only to such persons as the legislature really intended to apply it; that is, to apply the act to such persons only as should intelligently and voluntarily commit the acts prohibited by the legislature. And it is generally better that the exceptions to the operation of the statute should not be stated in the statute itself, for, if they are, then it becomes necessary for the public prosecutor to also state them in the complaint. If idiots, insane persons, children, etc., are in terms excepted from the provisions of the statute, then it would be necessary for the public prosecutor to see that all informations or indictments charging the particular offense should substantially follow the language of the statute, and should also state the exceptions as a part of the description of the offense. He should allege that the case did not come within any of the exceptions, and he would also have to prove the same. But where the exceptions are not stated in the statute, the complaint may charge the offense substantially in the language of the statute, and without mentioning any of the exceptions, and then, if the defendant claims that the case comes within any of the exceptions, he must prove the same as a part of his defense.

With respect to punishment notwithstanding ignorance or honest mistake of fact, Mr. Joel Prentiss Bishop, one of the ablest and most philosophical law writers of this country, uses the following language: "A statute, general in its terms, is always to be taken as subject to any exceptions which the

common law requires. Thus, if it creates an offense, it includes neither infants under the age of legal capacity; nor insane persons; nor, ordinarily, married women, acting in the presence and by the command of their husbands. If it creates a forfeiture, it does not apply to women under coverture." Bish. St. Cr., § 131. "In the law of crime, the maxim is *ignorantia facti excusat.* As expressed by Gould, J.: 'Ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse.' To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because, misled while he was cautious, he honestly supposed the facts to be the reverse of what they were, would restrain neither him nor any other man from doing a wrong in the future; it could inflict on him a grievous injustice, would shock the moral sense of the community, would harden men's hearts and promote vice instead of virtue." 1 Bish. Crim. Law, § 301. "What is absolute truth no man ordinarily knows. All act from what appears; not from what it is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move; and stagnation, death and universal decay would follow. All, therefore, must, and constantly do, perform what else they would not, through mistake of facts. If their minds are pure, if they carefully inquire after the truth, but are misled, no just law will punish them, however criminal their acts would have been if promoted by an evil motive, and executed with the real facts in view. In the law, therefore, the wrongful intent being the essence of every crime, it necessarily follows that, whenever one is misled, without fault or carelessness, concerning facts, and, while so misled, acts as he would be justified in doing were they what he believes them to be, he is legally innocent, the same as he is innocent morally. The rule in morals is stated by Wayland to be that if a man 'know not the relations in which he stands to others, and have not the means of knowing them, he is guiltless. If he know them, or have the means of knowing them, and have not improved these means, he is guilty.' The legal rule is neatly enunciated by Baron Parke thus: 'The guilt of the accused must depend on the circumstances as they appear to him.'

This doctrine prevails likewise in the Scotch law, as it necessarily must in every system of christian and cultivated law." 1 Bish. Crim. Law, § 303. See, also, the able and exhaustive note appended to section 303*a*. The following, among other, cases tend to support the views expressed by Mr. Bishop: *Farrell v. State*, 32 Ohio St., 456; 30 Amer. Rep., 614; *Miller v. State*, 3 Ohio St., 475; *Brown v. State*, 24 Ind., 113; *Faulks v. People*, 39 Mich., 200; 33 Amer. Rep., 374; *People v. Parks*, 49 Mich., 333; 13 N. W. Rep., 618; *Com. v. Presby*, 14 Gray, 65; *Duncan v. State*, 7 Humph., 148; *Dotson v. State*, 6 Cold., 545; *Birney v. State*, 8 Ohio, 230; *Price v. Thornton*, 10 Mo., 135; *Com. v. Stout*, 7 B. Mon., 247; *Stern v. State*, 53 Ga., 229; *State v. Hause*, 71 N. C., 518; *Cutter v. State*, 36 N. J. Law, 125. See, also, the case of *Wagstaff v. Schippel*, 27 Kan., 450. There are also many cases in opposition to the views expressed by Mr. Bishop, nearly all of which are cited in a note to the case of *Halstead v. State*, 10 Cent. Law J., 290, 294. The decisions in Massachusetts and also in Michigan are to some extent contradictory and conflicting. There are cases in each of these states which support, and others which oppose, the views expressed by Mr. Bishop. In Massachusetts and in Michigan is found the greatest departure from the doctrine enunciated by Mr. Bishop. In Massachusetts, where a man and a woman were married, and afterwards lived together in the utmost good faith as husband and wife, it was held that the man was guilty of adultery, because the woman at the time of the marriage had a husband living, although she did not know it, although, from evidence satisfactory to her, she believed him to be dead, and although she had not seen him or heard from him for more than eleven years. *Com. v. Thompson*, 11 Allen, 23. And in Michigan it has been held that an hotel-keeper, who also kept a bar for the sale of spirituous liquors, might be convicted and punished for keeping an open saloon on Sunday because his clerk, who was employed only for legal purposes, opened the bar-room and sold a single drink of whisky on Sunday without the knowledge or consent of the hotel-keeper. *People v. Roby*, 52 Mich., 577; 18 N. W. Rep., 365. Mr. Greenleaf, in his work on Evidence, uses the following language: "*Ignorance or mistake of fact* may in some cases be

admitted as an excuse; as where a man, intending to do a lawful act, does that which is unlawful. Thus, where one, being alarmed in the night by the cry that thieves had broken into his house, and searching for them, with his sword, in the dark, by mistake killed an inmate of his house, he was held innocent. So, if the sheep of A. stray into the flock of B., who drives and shears them, supposing them to be his own, it is not larceny in B. This rule would seem to hold good in all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse the violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts, and to obey the law at his peril." 3 Greenl. Ev., § 21. To sustain the latter portion of this section, Mr. Greenleaf cites only Massachusetts cases, which undoubtedly sustain the proposition. But has not the supreme court of Massachusetts gone astray? The first part of the foregoing section, we think, is unquestionably correct, and the present case falls within it. Voluntary drunkenness in a public place was always a misdemeanor at common law, and it was always wrong, morally and legally. It is *malum in se*. Therefore, under either the rule enunciated by Mr. Bishop, or the one enunciated by Mr. Greenleaf, this case was erroneously tried in the court below. Whether the latter portion of said section of Mr. Greenleaf's Evidence is correct or not it is not necessary for us now to decide. Whether a party, who, through an honest ignorance or mistake of fact, commits an act which is only *malum prohibitum*, may be punished for the act or not, it is not necessary now to determine. Mr. Bishop would say not; Mr. Greenleaf, following the Massa-

chusetts supreme court decisions, would say he should be. Mr. Bishop's views are more in consonance with justice.

Before closing this opinion, it might be well to state that the fact that the defendant became intoxicated through an honest mistake might not constitute a complete defense to the action. If, after becoming drunk, he was still sufficiently in the possession of his faculties to know what he was doing, and to know the character of his acts, and went voluntarily into a public place, he would be guilty.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

NOTE.— *What constitutes.*— The supreme court of Indiana evidently take a different view of the defense discussed in the foregoing case from that of the Kansas court. An instruction given by the trial judge was as follows: "If you find from the evidence that the defendant was advised by a reputable and practicing physician to take intoxicating liquors as a means preparatory to having his teeth extracted, and in pursuance of such advice, and in good faith, he took stimulants according to the direction of his family physician; that he accordingly did have his teeth extracted, and the stimulants thus taken for that purpose caused him in good faith to become in a state of intoxication in a public place, such would not be a crime within the spirit or meaning of the law publishing public intoxication. Hence, if you find from the evidence that at the time and place alleged mentioned in the affidavit the defendant was intoxicated, and you further find that it was produced in the manner above stated, you should find the defendant not guilty." The court then says: "This instruction was erroneous. The offense does not consist in being found in a state of intoxication, but in being found in a public place in a state of intoxication. It is therefore wholly immaterial as to the circumstances which lead to the condition of intoxication. It may be the result of appetite, or it may be the result of mistake, or it may come from following too closely the prescription of a physician. But, be that as it may, so long as the person so intoxicated is not found in a public place there is no violation of the law. Upon the other hand, if, while in a state of intoxication, a person is found voluntarily in a public place, the offense against the law is complete. The purpose of the law is to protect the public from the annoyance and deleterious effects which may and do occur because of the presence of persons who are in an intoxicated condition." *State v. Sevier*, 117 Ind. 338.

An inn-keeper is not indictable for being drunk in his own inn unless it becomes a common nuisance. *State v. Locker*, 50 N. J. L., 512. Under a statute imposing a penalty on one "found" intoxicated, that intoxication alone is a crime which is witnessed by another. *State v. Austin*, 62 Vermont, ——; 19 A., 117. Under a similar statute the complaint was held insufficient because it did not allege that the defendant was "found" intoxicated. *State v. Bromley*, 25 Conn., 6. Evidence of habitual intoxication from the use of

chloroform will not sustain a complaint charging a person with being a "common drunkard." *Com. v. Boon*, 2 Gray (Mass.), 74. Drunkenness in another person's room in the house in which the defendant resides is punishable without proof that the drunkenness was made public. *Com. v. Miller*, 8 Gray (Mass.), 484.

BEARD v. STATE.

(71 Md., 274.)

DISORDERLY HOUSE — EVIDENCE — CONSTITUTIONAL LAW.

1. Upon trial for maintaining a disorderly house by permitting lewd persons to frequent it, evidence not only of the bad reputation of the women resorting there, but of specific acts of unchastity committed by them elsewhere than on the premises in question, is admissible.
2. A bar-room and dance-hall, with music, kept with intent to bring together and entertaining prostitutes, and men desirous of their company, if such persons habitually assemble there to drink and dance together, may be a disorderly house, though the house is quietly kept, and no conspicuous improprieties are permitted within it.
3. Constitution of Maryland, article 15, section 5, declaring that the jury shall be judges as well of law as of fact in criminal cases, does not prohibit the court from instructing the jury on the law, when they unanimously request it.

Appeal from criminal court of Baltimore city; C. E. Phelps, judge.

Argued before Alvey, C. J., Miller, Irvin, Stone, Bryan and McSherry, JJ.

R. Stockett Matthews, for appellant.

Wm. Pinckney Whyte, attorney-general, and *Chas. G. Kerr*, state's attorney, for the state.

ALVEY, C. J. The traverser in this case was indicted for keeping a disorderly house, and, upon trial by a jury, was convicted of the offense. The indictment consists of a single count. It charges that the traverser unlawfully and wilfully did keep and maintain "a certain common, ill-governed and disorderly house there situate; and in the said house, for his own lucre and gain, certain persons of evil name and fame, and of dishonest conversation, to frequent and come together,"

etc., "unlawfully and wilfully did cause and procure; and the said persons in the said house, at unlawful times, as well in the night as in the day, then," etc., "to be and remain, drinking, tippling, cursing, swearing, quarreling, and otherwise misbehaving themselves, unlawfully and wilfully did permit," etc.,— "to the great damage and common nuisance of all the liege inhabitants of the state there inhabiting," etc. The indictment is in the ordinary common-law form, and accurately describes the offense with some unnecessary degree of particularity. *Rex v. Higginson*, 2 Burrows, 1232; 2 Chit. Crim. Law, 673. The offense is that of a common nuisance, and it is necessary that the indictment should contain facts to show that a common nuisance has been created or permitted. This is done by allegation of such facts as show that the traverser maintains, promotes or continues what is noisome and offensive, or annoying and vexatious, or plainly hurtful to the public, or is a public outrage against common decency or common morality, or which tends plainly and directly to the corruption of the morals, honesty and good habits of the people; the same being without authority or justification of law. 3 Greenl. Ev. § 184, and the authorities there cited. Such being the general principles upon the subject, it is in the light of and with reference to those principles that the questions raised in this case must be decided.

There were three bills of exceptions taken by the traverser. The first and second exceptions present questions as to the admissibility of evidence. These questions are whether it was competent to the prosecution to prove by witnesses the general reputation or character of the women for lewdness who frequented the house kept by the traverser, and to prove that such women frequented the house in company with men; and whether it was competent to the prosecution to prove by witnesses specific acts of lewdness by some of the women who resorted to the traverser's house, as showing what their habit and vocation really was, though such acts of lewdness did not occur on the premises of the traverser. We can perceive no possible objection to the admissibility of such evidence. Evidence of the general reputation of the house was inadmissible, but the general reputation of those who frequented it was admissible for the purpose of characterizing the house and

showing the object of their visit. *Henson v. State*, 62 Md., 233, 235; *Herzinger v. State*, 70 Md., 278. And as the object of the inquiry was to show the disreputable and degraded character of the women who found admission to the house of the traverser, it was unquestionably competent to show it either by proof of general reputation, or by proof of particular acts of lewdness, to the knowledge of witnesses, and it could make no difference where such acts occurred. We are therefore of opinion that the court below was clearly right in allowing all the facts and circumstances stated in these exceptions to go to the jury to be considered by them. But all possible objection to the evidence excepted to, if there could have been a question in regard to it, would seem to have been entirely removed by the testimony introduced by the traverser himself in the subsequent progress of the trial. He proved by his own witnesses that the women who frequented his house were street-walkers; that their general reputation was bad; and that some of them the witness had met in houses of prostitution. With this evidence before the jury, introduced by the traverser himself, it is not perceived upon what ground he could ask the reversal of the rulings upon the evidence offered by the state, to which he excepted.

We come now to the third exception, and the questions presented by that exception are whether it would be competent to the judge presiding at the trial of a criminal case to give an advisory instruction to the jury, when requested so to do, and, if it be competent so to instruct, whether the instruction given in this case was correct or not. These questions have been argued by counsel with much zeal and ability, and doubtless they are of great importance in the correct and faithful administration of the criminal law of the state. It appears that, after the case had been fully argued to the jury by counsel, the jury retired to consider of their verdict, and, after being out many hours, they were brought into court and questioned as to whether they had agreed. They stated, through their foreman, that they had not agreed upon a verdict, and there was no likelihood of their being able to agree. Whereupon one of the jurors suggested that he thought it probable that a verdict could be had if the jury were instructed as to the law governing the case. To this the judge replied that he

would instruct the jury if they unanimously requested him to do so; and directed the foreman to ascertain whether it was the wish of all the jurors that they should be instructed. The foreman, after consulting the panel, announced that the jury were unanimous in their desire to be instructed as to the law. But the counsel for the traverser objected, and earnestly protested against such instruction being given, and insisted that the jury were the exclusive judges of the law as well as of the fact in criminal cases, and therefore the court ought not to interfere. However, the court, notwithstanding the protest of the counsel, reduced to writing and read to the jury the following instruction: "If you find from the evidence that the traverser kept a bar-room and dance-hall, with music, for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of their company, and that such persons habitually assembled there to drink and dance together, then you may find said establishment a disorderly house, within the meaning of the indictment, even although you may also believe that the house was quietly kept, and no conspicuous improprieties were permitted inside. The jury being the judges of the law as well as fact, this charge is to be understood as advisory only of what the law is." In the first place, it is argued that the judge had no right to give the instruction against the protest of the traverser; and, in the second place, that the instruction was erroneous in principle, and not within the terms of the indictment, and therefore misleading in its effect upon the jury.

1. The constitution of the state (art. 15, § 5) is very explicit in declaring that "in the trial of all criminal cases the jury shall be the judges of law as well as of fact." But it has been held by our predecessors that this provision of the constitution is merely declaratory, and did not alter the pre-existing law regulating the powers of the court and jury in the trial of criminal cases. *Franklin v. State*, 12 Md., 236. Both before and since the constitutional declaration upon the subject, it was and has been the practice of judges in some parts of the state to decline to give instructions to the jury in criminal cases under any circumstances, while in other parts of the state it has been the practice for the judges to give advisory instructions, when requested so to do. It seems to have been

regarded as entirely a matter of discretion with the judge, there being no positive duty requiring him to pursue the one course or the other. Whenever, however, the judge has thought it proper to instruct, it has always been deemed necessary that he should be careful to put the instruction in an advisory form, so that the jury be left entirely free to find their verdict in accordance with their own judgment of the law as well as the facts. The instruction, when given, goes to the jury simply as a means of enlightment, and not as a binding and positive rule for their government, as it does in civil cases. The judge, therefore, cannot, by any instruction given in a criminal case, bind the jury as to the definition of the crime, or as to the legal effect of the evidence before them. He can only bind and conclude the jury as to what evidence shall be considered by them, he being the exclusive judge of what facts or circumstances are admissible for consideration. The practice of instructing the jury, within the limitations and under the restrictions just stated, has received the sanction of this court upon more than one occasion, and such practice must now be regarded as fully authorized. *Wheeler v. State*, 42 Md., 563, 569; *Broll v. State*, 45 Md., 356; *Bloomer v. State*, 48 Md., 521, 538; *Forwood v. State*, 49 Md., 537; *Swann v. State*, 64 Md., 425. And such practice is founded in the soundest practical reason and good sense; for though the juries are made judges of the law, they are unlearned, and are not infrequently composed, in part at least, of persons wholly uninstructed as to the laws under which they live. When sworn upon the panel, it becomes their duty to decide the case according to the established rules of law of the state, and not according to any capricious rules of their own; and it must be supposed that they are always desirous of performing their duty and making their verdicts conform to law. To enable them to accomplish that object, no proper light should be withheld from them. In the argument of the case before them by counsel, text-books, no matter of what authority, or whether of any authority at all, reported decisions of all grades of courts, from the highest to the lowest, and no matter where made, are read to the jury, with the glossary of counsel, to enforce certain theories; and the jury are required to discriminate and decide, upon the authorities cited, as to what is the

law in their own state which they are sworn to administer. In such state of doubt and perplexity, is it not reasonable and proper that they should have the advisory aid of the judge, who is supposed to know what the law of the state really is, and who has the ultimate power of revising and setting aside their verdict, if they should mistake and misapply the law to the injury of the accused? It would seem that there could be no room for a diversity of opinion upon this question, and no case could more fully illustrate the propriety of the practice than the present. If the instruction given be erroneous, though in a mere advisory form, it may be made the subject of an exception, to be corrected on appeal. *Swann v. State, supra.*

2. The remaining question is whether there was error in the instruction given. As we have seen, it was advisory only, and in no way binding on the jury, and we perceive nothing in its terms to make it erroneous. If in fact the place was kept by the traverser "for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of their company, and that such persons habitually assembled there to drink and dance together," the jury might well find the house to be disorderly, within the meaning of the indictment, and according to settled principles of law. It does not require, in a case like the present, that there should be acts violative of the peace of the neighborhood, or boisterous disturbances, or open acts of lewdness shown, in order to constitute the place a disorderly house. The habitual assembling there of lewd women, and men desirous of their company, to drink and dance together, must necessarily be hurtful to the public, and tend to scandalize the neighborhood. It is an outrage against common decency and common morality, and could have no other effect than the corruption of the morals, honesty and good habits of the people, and that constitutes the place a nuisance. 3 Greenl. Ev., § 184. The common-law form of an indictment specially adapted to a case like this simply charges that the party accused did keep and maintain a certain common, ill-governed and disorderly house for public dancing and music; and in said house, for his own lucre and gain, did cause and procure divers persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together, to the great damage and common

nuisance of the public, etc. 2 Chit. Crim. Law, 673. The crime consists in the keeping of the house as a place of habitual or common resort of people of evil name and fame, and of dishonest conversation, there to consort together, thus affording opportunities for and temptations to the indulgence of their bad habits and passions, to the evil example and scandal of the neighborhood. The indictment in this case fully embraces the facts which were required to be found by the jury under the instruction given by the court, and therefore there is no ground for the contention that the instruction is not supported by the indictment. *Cheek v. Com.*, 79 Ky., 359, 362; *Thatcher v. State*, 48 Ark., 60; *Com. v. Cardoze*, 119 Mass., 210. Finding no error in the rulings of the court below, those rulings will be affirmed and the cause remanded.

NOTE.—*What constitutes.*—To sustain a prosecution for keeping a "disorderly house," it is not necessary that the building should be a dwelling. Any building kept and used as a shelter for the disorderly persons and conduct prohibited by the statute may be a disorderly house. *State v. Powers*, 36 Conn., 77.

The offense of keeping a disorderly house may be committed by maintaining a canvas tent for the purpose of public prostitution and as a common resort for prostitutes, vagabonds, etc. *Kilmann v. State*, 2 Tex. App., 222.

The words "house of ill-fame," as used in the Iowa statute punishing the keeper thereof as a nuisance, will properly include a boat on the river, when used as a habitation for such purposes. *State v. Mullen*, 35 Iowa, 199.

A house of ill-fame is defined in Utah to be a house kept for the shelter and convenience of persons desiring unlawful sexual intercourse, and in which such intercourse is practiced. *People v. Hampton*, 9 P., 508; 4 Utah, 258.

A combined retail grocery store and beer saloon, frequented by prostitutes and vagabonds for the purpose of drinking beer, does not constitute a disorderly house, within the meaning of the Penal Code of Texas, article 339, defining a disorderly house as one kept for purposes of public prostitution. *Harmes v. State*, 26 Tex. App., 190.

The common nuisance charged in an indictment for keeping a disorderly house may consist in drawing together dissolute persons engaged in unlawful practices, thereby endangering the public peace and corrupting good morals. *Com. v. Cobb*, 120 Mass., 356.

A person is guilty of keeping a disorderly house, under the statute, whether the fighting, quarreling, etc., occurs in it or on the sidewalk in front of it, if it was the character of the house which attracted the disorderly persons there, and which caused the disturbance in it or around it. *State v. Webb*, 25 Ia., 235.

Every person who voluntarily aids in establishing a bawdy-house is guilty of a misdemeanor; and whether a person so aided or not is a question for the jury. *Ross v. Commonwealth*, 2 B. Mon. (Ky.), 417.

The habitual sale of rum on Sunday on the vendor's premises makes them a nuisance, and the vendee may be indicted for keeping a disorderly house; though he may also be indicted for each specific act of selling. *State v. Williams*, 30 N. J. L., 102.

It is not an essential element of the offense of keeping a disorderly house that the public should be disturbed by noise; the keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house. *King v. People*, 83 N. Y., 587.

On the trial of an indictment for keeping a disorderly house, it is sufficient to warrant a conviction to prove that defendant kept a shop on a public highway, at which were seen drinking and disorderly crowds, in the morning and at night, participated in and encouraged by the defendant himself, whether few or many are proved to have been there, in fact, disturbed. *State v. Robertson*, 86 N. C., 628.

A house is disorderly which tends to public annoyance, although only one person may actually have been disturbed. *Com. v. Hopkins*, 133 Mass., 381; *S. C.*, 43 Am. Rep., 527.

Proof that the defendant kept a dance hall resorted to by women of bad repute, and that some of them had solicited men to retire from the building for the purpose of prostitution, *held*, to warrant his conviction of keeping a disorderly house. *Com. v. Cardoze*, 119 Mass., 210.

In order to show that a house is kept as a disorderly house, it need not be proved that it is so conducted as to disturb the peace of the public generally, or of the neighborhood in particular. If it is shown that it is a house of prostitution, open promiscuously, and to which large numbers of people resort for the purpose of prostitution, it is enough. *Barensciotta v. People*, 17 N. Y. Sup. Ct., 137.

Where the building alleged to have been kept as a house of ill-fame consists of two stories connected with each other on the outside by a covered stairway, and on the inside by an elevator, by which drinks are sent from the lower to the upper story, both stories being used by defendant, the lower one for a saloon, and the upper for a card-room and bed-room, both stories may be treated as one building. *State v. Lee*, 80 Iowa, 75.

In New Jersey, a place of public resort, kept for the sale of pools upon horse races, is a disorderly house. *State v. Lovell*, 39 N. J. L., 463; *Haring v. State*, 17 A., 1079.

An indictment for keeping a house of ill-fame, to which defendant permitted persons to resort for purposes of prostitution, also averred that prostitution and lewdness were practiced in said house at defendant's solicitation and request. *Held*, that defendant might be found guilty, though there was no evidence to show that the unlawful practices were carried on at his solicitation and request. *State v. Schafer*, 74 Iowa, 704.

Evidence that a man was seen in defendant's house at night, in bed with one of her daughters, defendant at the time being in a room below; that on another night witness saw defendant and daughter in bed with men; that at another time witness saw defendant having sexual intercourse near her barn, beside the road; and that one of defendant's daughter had a bastard child, will not justify a conviction for keeping a bawdy-house. *State v. Calley*, 104 N. C., 858.

Evidence that defendant kept a house to which men resorted for purposes

of prostitution, that frequent acts of prostitution were there committed with her, and that the house is reputed to be a house of ill-fame, though it is not shown that any women other than defendant have been there, is sufficient to constitute the offense of keeping a house of ill-fame. *People v. Mallette*, 79 Mich., 600.

It is not necessary that the state should prove that the house was kept for the purpose of gain, if the statute does not make that a necessary element of the crime. *State v. Lee*, 80 Ia., 75; *State v. Smith*, 29 Minn., 193.

What is not.— A house so kept that no person other than its inmates are liable to be disturbed by it, or corrupted in their morals, or anything of the sort, is not in law a disorderly house. To be in law disorderly, it must be what is termed a common nuisance; therefore a verdict simply finding "that the defendant kept a disorderly house, and disturbed his neighbors," has been held to be sufficient. The difficulty within must reach beyond the mere inmates, and affect the public. 1 Bishop, Cr. Law, § 1051.

Upon a charge for keeping a disorderly house, where it appeared that the defendant lived in the country, remote from any public road, and that loud noises and uproar were often kept up by his five sons, when drunk, whom he did not encourage (save by getting drunk himself), but which he would sometimes endeavor to quiet, by which disorder only two families, in a thickly settled neighborhood, were disturbed, *held*, not to amount to a common nuisance. *State v. Wright*, 6 Jones (N. C.) L., 25.

In a prosecution under the code of Iowa, section 4013, for wilfully keeping a house of ill-fame, resorted to for purposes of prostitution, the crime is sufficiently defined in a charge to the effect that, to convict defendant, the jury must find that he kept a house of ill-fame which was resorted to for purposes of prostitution with his knowledge and consent, and that one or more acts of prostitution do not constitute the crime. *State v. Clark*, 78 Ia., 492.

An indictment for keeping a disorderly house must show, not only the fact that the house was disorderly, but also that the public were affected by it; otherwise such house is not a nuisance. *Mains v. State*, 42 Ind., 327.

A single act of illicit intercourse in a house will not make it a house of ill-fame. *State v. Garing*, 74 Me., 152.

A ten-pin alley, kept for gain in a populous village, and open to public use, is not *per se* a disorderly house or public nuisance. Nor does the fact of its being kept in connection with a lager-beer saloon make it such. *State v. Hall*, 32 N. J. L., 158.

Defendant kept a house which he was licensed to do for the purpose of selling beer, cigars, etc., and for a variety theatre. He had disreputable women in his employment, and such women visited his house for the purpose of seeing theatrical performances and buying beer, but not for the purpose of prostitution. Under this proof the Texas court held that a conviction for keeping a disorderly house could not be sustained. *Johnson v. The State*, 28 Tex. App., 562.

The keeping of a disorderly house is a continuing offense, and a conviction is a bar to another prosecution for the same offense prior to the time of conviction, unless the indictment and proof limit the time. *Huffman v. State*, 23 Tex. App., 491.

Evidence of the offense.— Upon trial for maintaining a disorderly house by permitting lewd persons to frequent it, evidence not only of the bad reputation of the women resorting there, but of specific acts of unchastity committed by them elsewhere than on the premises in question, is admissible. *Beard v. State* (Md.), 17 A., 1044.

The knowledge necessary to the conviction of one who permits his house to be used for purposes of prostitution may be proved by evidence of facts and circumstances fairly justifying the inference of knowledge. Defendant need not be shown to have witnessed acts of prostitution, or to have had notice from others who had witnessed such acts. *Graeter v. State*, 105 Ind., 271.

The jury may find the defendant guilty of keeping a disorderly house from evidence that he suffered idle, disorderly, suspicious and drunken persons to meet together in and frequent his house, there to drink, play games, and conduct themselves in a disorderly manner, by day and night. *United States v. Elder*, 4 Cranch, C. Ct., 507; *United States v. Columbus*, 5 id., 304.

And in a prosecution for such an offense, all that was done and that which was said by two persons who went there for an improper purpose, even though the defendant was not present, is admissible. *Hertzinger v. State*, 70 Md., 278.

It is competent for the prosecution to prove the lewd and indecent conduct of the defendant herself. *State v. Smith*, 29 Minn., 193.

In an indictment for keeping a bawdy-house, testimony that a few days before his arrest defendant was traveling on a railroad; that he had with him two women whom he admitted to be prostitutes, and that he said he was taking them to the house in question,— is admissible, as it tended to show that the house was a bawdy-house and he its keeper. *Sullivan v. State* (Wis.), 44 N. W., 647; 75 Wis., 650.

It is not sufficiently shown that a house was resorted to for the purpose of prostitution where the only person identified as having been there for such purpose was a witness who was employed by the officers as a detective. *People v. Pinkerton*, 79 Mich., 110.

Where, in a prosecution for keeping a house of ill-fame resorted to for the purpose of prostitution, there is evidence of only a single instance of a man being found in defendant's house, and no evidence that men were seen resorting there, it is error to refuse to charge that "a single act of illicit intercourse is not sufficient to convict." *People v. Gastro* (Mich.), 42 N. W., 937.

Testimony of an omnibus driver that he took women to the house, and that a woman told him if he "saw any boys who wanted to come over, to fetch them," is competent, though the conversation was not had in the defendant's presence, since it tended to show the character of the women who frequented the house, and their purposes in going there. *State v. Toombs* (Iowa), 45 N. W., 300.

The continued receipt of rent, and a persistence in enlarging the term of a disorderly tenant who earns the means of paying rent by misconduct visible to the landlord, may amount to very satisfactory evidence that the latter procures and sanctions the disorderly conduct. *State v. Williams*, 30 N. J. L., 102.

On the trial of an indictment for keeping a house of ill-fame, evidence of frequent arrests of females therein, and their conviction as prostitutes, that

defendant secured bail for them, and that notorious prostitutes were frequently found in the house, is admissible to show the character of the house. *Harwood v. People*, 26 N. Y., 190.

On the trial of an indictment for keeping "a disorderly house," the testimony of a policeman that he went to the house to arrest a criminal, and that the defendant, who was then keeping the house, secreted the person he was seeking in a closet, is admissible. Such an act, standing alone, is not sufficient to convict, but may be one act, among others, going to show that the house was a disorderly one. *Maholvitch v. State*, 54 Ga., 217.

Evidence of reputation.— How far evidence of reputation is admissible in a case of this kind depends very much upon the statutes under which the charge is made, although upon the general principle the authorities are not in exact accord. It is held in Indiana, for instance, that if, on the trial of a person indicted for keeping a bawdy-house, it is proven that the house is frequented by persons of dissolute habits, and its inmates are reputed to be lewd, it is permissible to show that the character of the defendant for chastity is bad. But the opinion of witnesses that the house is a bawdy-house, or a nuisance, is not admissible as evidence. *Sparks v. State*, 59 Ind., 82. And in New York it is held that upon the trial of one for keeping a disorderly house "the character of the house cannot be proved by general reputation. No one should be convicted of any criminal offense upon mere reputation" or rumor. *People v. Mauch*, 24 How. (N. Y.) Pr., 276. The nuisance must be shown as an existing fact, and not by evidence of reputation. *State v. Foley*, 45 N. H., 466. So it is decided in New Hampshire that under an indictment for keeping a bawdy-house, evidence of the general reputation of the house is not admissible. *Henson v. State*, 62 Md., 231; *S. C.*, 50 Am. Rep., 204. Such is the rule in Mississippi. *Handy v. The State*, 63 Miss., 207. And the Texas court says: "That a certain person is the keeper of a disorderly house cannot be proved by general reputation and rumor. Such testimony is not only insufficient, but inadmissible." *Burton v. State*, 16 Tex. App., 156; *Allen v. The State*, 15 Tex. App., 320. And in Iowa, that one is the keeper cannot be established by common reputation. *State v. Hand*, 7 Ia., 411.

It may be shown that one on trial for keeping a disorderly house bears the common reputation of being a prostitute or devoid of chastity. *Gamel v. State*, 21 Tex. App., 357.

On an indictment for keeping a disorderly house, the opinion of witnesses that the house as kept is a nuisance is not competent evidence. *Smith v. Commissioner*, 6 B. Mon. (Ky.), 21.

But the weight of authority maintains that not only the reputation of the inmates but also of the house itself may be established by general repute. *Territory v. Bowen* (Idaho), 23 P., 82; *Hogan v. State*, 76 Ga., 82; *State v. Mack*, 41 La. An., 1079; *State v. Lee, supra; Territory v. Chatrand*, 1 Dak. Ter., 379; *King v. State*, 17 Fla., 183; *Morris v. State*, 38 Tex., 603; *Sylvester v. Same*, 42 id., 496; *People v. Gastra*, 75 Mich., 127; *United States v. Rollinson*, 2 Cranch, C. Ct., 13 and cases cited.

Who is liable.—The keeping of a bawdy-house being a public offense, every person who voluntarily aids in establishing and maintaining it is guilty of a misdemeanor. *Harlow v. Commissioner*, 11 Bush (Ky.), 610.

The agent of the owner who rents a house, knowing that it is to be used for the purpose of a brothel, may be indicted as the keeper of such house. *Troutman v. State*, 6 A., 618; 49 N. J. L., 33; *People v. Irwin*, 4 Den. (N. Y.), 129; *State v. Lewis*, 5 Mo. App., 465 and cases cited.

One who lets rooms in her house to prostitutes for purposes of prostitution, or knowingly permits them to be used for that purpose, is guilty of keeping a house of ill-fame, though the occupants of the rooms are merely lodgers or boarders. *State v. Smith*, 15 R. I., 24.

One who has control of a building, and rents it with knowledge that it is to be used as a house of prostitution, cannot screen himself from punishment as keeper of a bawdy-house by showing that he is not the owner of the premises, but merely collects the rents as agent for the owner. *Lowenstein v. People*, 54 Barb. (N. Y.), 299.

But the state must show such acts or circumstances as shall satisfy the jury that the lessor, having knowledge that the house was being used for the illegal purpose, after the execution of the lease, not only remained inactive, but assented or consented to such use; and it is not for him to show that he took some step to manifest his dissent or disapprobation. *Id.*

Under the Dakota code, which provides that one who permits his building to be used as a bawdy-house shall be guilty of a misdemeanor, the owner of a house may be convicted who, having control thereof and knowing of the illegal use, fails to interfere; and he cannot escape liability by showing a written agreement which, in fact, though not in form, was a mere contrivance to evade the appearance of control. *Territory v. Stone*, 2 Dak., 155.

But it was held in Iowa that where it appeared that the owner of a house leased and knew it was kept as a house of ill-fame, and also lived there a part of the time himself, *held*, that these facts would not render him liable to indictment for keeping a house of ill-fame. To render him guilty of the offense, he must either have participated in or been authorized to participate in its management. *State v. Pearsall*, 43 Iowa, 630.

Where the offense on the part of those keeping the house of prostitution or lewdness could only be prohibited by a legal prosecution; and where the occupants could in no sense be said to be so far under the control of the lessor as that his mere dissent or order would amount to a prohibition, his failure to act, or to prohibit, would not amount to a permission. *Abrahams v. State*, 4 Ia., 541.

To make the lessor liable under section 2612 of the Iowa code, there must be on his part a consent to such use, either expressly given, or given by his silent acquiescence; and a mere failure to interfere, or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent affirmative acquiescence in such use. *Id.*

It is no defense for a married woman who is indicted under the Massachusetts General Statutes, chapter 87, section 7, for keeping a house of ill-fame, that her husband resided in the house, and hired, furnished and provided for it. *Com. v. Cheney*, 114 Mass. 281.

To sustain an indictment for keeping a lewd house, it is only necessary to establish that the defendant contributed to and aided, directly or indirectly, in maintaining and keeping it. *Clifton v. State*, 53 Ga., 241.

A woman cannot be indicted for keeping a bawdy-house merely because she is unchaste, lives by herself, and habitually admits one or many to an illicit intercourse with her. *State v. Evans*, 5 Ired. (N. C.) L., 603. The converse doctrine is, however, held in Idaho. *People v. Buchanan*, 1 Idaho, 681.

But an inmate of a house of ill-fame is not guilty, within the meaning of the statute making it an offense to patronize a house of ill-fame. *Raymond v. People*, 9 Ill. App., 344.

PEOPLE v. DE LAY.

(80 Cal., 52.)

EMBEZZLEMENT BY ASSIGNEE.

1. On trial of an information for embezzlement, it appeared that defendant was the assignee of an insolvent debtor, and that the assignment named the order in which creditors should be paid. A firm, of which defendant was a member, was second in the list of creditors, but defendant paid the debt of his own firm first, leaving little for payment of other debts. He also received $737 from sales of milk, and only accounted for $427. *Held*, that the evidence justified the verdict of guilty, as it was for the jury to say whether defendant intended fraudulently to appropriate the property.
2. In such case, under the Penal Code of California, section 513, providing that if, prior to information laid charging embezzlement, the accused restore, or offer to restore, the property alleged to have been embezzled, such fact is not ground of defense, but goes only towards mitigation of the punishment, it could not avail that defendant offered to return the balance due from him as assignee.
3. Nor is it a defense that defendant has given an indemnity bond for the amount of property coming into his hands as assignee.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Murphy, judge.

John D. Whaley, for appellant.
Geo. A. Johnson, attorney-general, for the people.

PATERSON, J. The defendant was charged with embezzlement, and convicted. The chief contention of the counsel for appellant is that the evidence is insufficient to justify the verdict. He obtained possession of the personal property of Mary Furlong under an assignment thereof to him, for the benefit of her creditors. By the terms of the assignment, defendant was required to apply the proceeds of all sales of

property, and the revenue received from the dairy and milk route, to the payment of Mrs. Furlong's debts, which were classified in the written assignment, and payments thereof required as follows: "(1) In payment of any judgment that may be recovered by John Reis, plaintiff in an action instituted on the 14th day of July, A. D. 1886, wherein the said Reis is plaintiff, and I, the said Furlong, am defendant," etc. "(2) To pay to the said firm of De Lay Bros. whatever amount may be due to them from me, or that may hereafter become due to them during the running of this agreement. (3) To pay to R. B. Mitchell such moneys as may be now due to the late firm of Mitchell & Ricketts, for fees and costs," etc. "(4) To pay all other unsecured debts that I may now owe, or which may become due from me during the running of this agreement; . . . so much of said book-accounts as may remain uncollected; and whatever personal property or book-accounts, notes, demands, . . . shall be turned over to the said Furlong at the termination thereof; . . . the attachment heretofore issued in the case of *Reis v. Furlong* to be released, the said De Lay indemnifying Mathew Nunan and Jeremiah Lowney, securities on the undertaking, for release of attachment this day executed against any loss by reason of their signing said undertaking as sureties."

The contract of assignment was executed by both parties on July 21, 1886. The defendant thereupon accepted the trust, took possession of all the property that could be found, and began to collect the book-accounts, sell the cows and other stock, and wind up the business. On November 15, 1886, nothing remained to be sold except a few heifers and calves and a grain wagon. At that time defendant had received about $3,000, and paid out about $2,900. Instead of applying the proceeds of the sales and of the business to the payment of the Reis judgment, which had been entered in the meantime against Mrs. Furlong for $1,600 and costs, he appropriated the whole thereof, except about $85, which he offered to pay over, to the payment of the debt due himself and partner and a few small claims. In a statement rendered November 15th he gave as the total amount received from sales of milk the sum of $427.15. At the trial it was admitted by his counsel that he had received up to November 5th, from sales of milk,

at least $737.40. The balance ($310.25), not accounted for by him, is the amount charged in the indictment as having been embezzled. The driver of the milk wagon testified that there had been collected $120 for which no receipts could be found, in addition to the above-named sum of $737.40. Defendant testified that he did not understand from the agreement that he was to pay the Reis judgment first, and that he acted on the advice of his attorney in appropriating the proceeds to the payment of his own and other claims. But there is evidence that he knew the terms of the contract required him to pay the judgment first. If he acted on the advice of his attorney, Mr. Wood, it is a singular fact that he did not call the latter to testify in his behalf; although, of course, if the jury believed the testimony of the defendant, his evidence on that subject was sufficient to establish the fact in his favor. Evidently, however, the jury did not believe that he so understood the contract. At the time the contract of assignment was made defendant gave Nunan and Lowney a written indemnity, in which he recites that "whereas, said Mary Furlong has this day made an assignment to me of all her personal property, for the purpose of selling so much of the same as may be necessary to pay such judgment as may be recovered in the above-entitled action, as well as to pay off other indebtedness," and in which he promises to hold so much of the property assigned to him "by Mrs. Furlong, or the proceeds thereof, as may be necessary to satisfy any judgment that may be recovered by said Reis in said action, including all costs and interest." There is other evidence in the record tending to show that the defendant fully understood the obligation imposed upon him by the contract to pay the Reis judgment first out of the funds received from the sales and collections. The explanation given by the defendant as to the difference between the amount actually received from sales of milk and that reported is not very satisfactory. The court fully and fairly instructed the jury upon the law of embezzlement. They were told that "a person may receive property belonging to another, and appropriate it, and divert it from its true channel, and from the purpose for which he received it, but still he might not be guilty of embezzlement, and would not be, unless such diversion or such appropriation or conversion by him was of a

fraudulent character and nature; that it is the fraudulent misappropriation of the property that constitutes the gist of the offense.".

The question of the guilt or innocence of defendant does not depend upon the construction of the contract as to the order of payments to creditors. If it be conceded that he might lawfully have appropriated the proceeds to the payment of his own and other claims before any payment was made upon the judgment referred to, the fact still remains that, when called upon for an account, he reported that he had received only $427.15, when, in fact, he had received at least $737.40. The balance ($310.25) is the amount which he is charged to have embezzled. Under the contract he was bound to appropriate all the proceeds of sales and collections to the payment of Mrs. Furlong's debts, and return the balance, if any, to her. It was for the jury to say whether or not he intended fraudulently to appropriate the $310.25 retained by him. The fact that he afterwards offered to return or pay over this amount is no defense herein. Sec. 513, Penal Code.

The error of the court in admitting the testimony of the witness Nunan was not prejudicial. The testimony elicited was simply a repetition of what had already been given. It was not contrary to the written instrument, nor did it in any manner add to its terms, but was in entire accord with the provisions thereof. The fact that Nunan and Lowney took a written indemnity from the defendant in no way affects the guilt or innocence of the defendant, who is charged with embezzling the property intrusted to him for certain purposes by Mrs. Furlong. Defendant claims that Mrs. Furlong did not turn over to him all the property called for by the assignment. Upon this question there is a conflict of testimony. Defendant, however, was not called upon to account for anything he did not receive. Mrs. Furlong testified that she gave him all the property that could be found, and that he might have had the heifers and calves if he had called for them. The defendant is not charged with embezzling money collected by Mrs. Furlong, or property retained by her. If he was dissatisfied with his agreement on the ground that she had retained a portion of the property, or had collected some of the book-accounts, he should have declined to proceed fur-

ther with his trust until the whole of the property was turned over to him. So long as he retained any property under the contract, he was bound to use it as required by the provisions thereof. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; WORKS, J.; MCFARLAND, J.

NOTE.— For a full discussion as to what constitutes embezzlement see note to *State v. Coster*, 4 Am. Cr. R., 169.

Parsons says — and this is perhaps the test as to whether there has has been an embezzlement — "If a servant does with the property under his control what one intends to do with property taken to commit larceny of it, he embezzles it, while nothing short of this is sufficient." 2 Bish. Cr. L., § 357. And the following late decisions illustrate this rule:

To constitute the offense of embezzlement it must distinctly appear that the respondent has acted with a felonious intent and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. *People v. Hurst*, 28 N. W., 838; 62 Mich., 276.

An attorney at law is guilty of embezzlement if, after collecting money for his client, he appropriates it to his own use without informing his client of the collection. *People v. Treadwell*, 69 Cal., 226.

A fraudulent conversation of a bailee for hire is not embezzlement. *Reed v. State*, 16 Tex. App., 586.

If the servant or agent has merely the custody of the goods which he feloniously appropriates, the offense is larceny; if he has the possession, it is embezzlement. *Warmoth v. Commonwealth*, 81 Ky., 133.

One who sells pools and runs off with the money embezzles the money of the purchaser of the pools. The fact that the money was put in the pool-seller's hands for purposes of gaming has nothing to do with it. *State v. Shadd*, 80 Mo., 358.

A town treasurer who obtains money from a bank on the town's note and uses the money in paying proper town charges is not guilty of embezzlement, although he does not account to the town for the money, and although its use is contrived as part of a scheme to defraud the town, to cover up an embezzlement made or to be made. *Commonwealth v. Este*, 140 Mass., 279.

Where money was deposited with a married woman by a third person to keep for him, and the husband, knowing the facts, converted it to his own use, *held*, that it was not embezzlement. *Pulmann v. State*, 78 Ala., 31; *S. C.*, 56 Am. Rep., 21.

The use by the guardian of his ward's money in his own business, and its loss thereby, to constitute embezzlement must be with a fraudulent purpose, although the statute is silent as to the intent. *State v. Meyer*, 23 Weekly Law Bul., 251.

Embezzlement cannot be charged with reference to funds acquired and spent before the party assumed the fiduciary capacity. *Lee v. Commonwealth* (Ky.), 1 S. W., 4.

An arrangement was made between the city treasurer and defendant, a banker, by which all city taxes were to be paid to, and disbursed by, the defendant, who also agreed to pay to the treasurer his lawful fees, and to refund to the city or to the treasurer, when called for, any balance that might be due, in the funds of the bank. The taxes received by the defendant were mingled with other funds of the bank, and paid in the usual course of business. *Held*, that the taxes were received as an ordinary deposit, and the defendant, having failed, could not be held guilty of embezzlement. *People v. Wadsworth*, 30 N. W., 99; 63 Mich., 500.

In a prosecution for embezzlement of public moneys, evidence of similar acts is admissible to prove a guilty knowledge and a criminat intent in the appropriation of the moneys alleged to have been embezzled. *People v. Gray*, 66 Cal., 271.

Moneys collected as wharfage and tolls become the property of the state as soon as collected, and are capable of being embezzled before being paid into the state treasury. *Id.*

An attorney who collects money for a client acts as agent as well as attorney, and may be convicted of embezzlement for appropriating the money to his own use, with intent to deprive the owner thereof. Campbell, J., dissenting. *People v. Converse* (Mich.), 42 N. W., 70.

The offense of embezzlement of a public officer is not the less punishable because the sureties upon his official bond have responded to the state for his default, and he has reimbursed them for so doing, though he be not indicted until afterwards. *Robson v. State* (Ga.), 9 S. E., 610.

The offer or intent of the accused to restore the money taken does not relieve the act of its criminal nature. *State v. Pratt* (Mo.), 11 S. W., 977; 98 Mo., 482.

Embezzlement cannot be charged with reference to funds acquired and spent before the party assumed a fiduciary capacity. *Lee v. Commonwealth*, 83 Ky., 450; 1 S. W., 4. But under a statute which provided that any clerk, etc., who shall embezzle any money, etc., which shall come into his possession *by virtue of his employment*, etc., the court says: "Looking at section 1320 [the statute in question], it will be observed that section does not confine its penalties to the time while any clerk, etc., shall be in the actual employment for which his services were engaged; but its denunciations are equally leveled against one who, by virtue of his employment or office, obtains the possession of goods, or has them under his care or control. Now, this may very well occur after a clerk, etc., has been dismissed from his place. If, 'by virtue of his employment,' *i. e.*, in consequence thereof, he obtains possession of the money, etc., of his employer, as, for instance, the cashier of a bank, or a collector, the section is certainly comprehensive enough to embrace his case; otherwise such an one would go unwhipped of justice, because he could not be held for larceny for obvious reasons, nor for embezzlement either, according to the theory advanced. The section is penal, it is true, but it is also remedial, in that it was designed to catch a class of criminals who before its enactment frequently slipped through the meshes of the law, and its force should not be frittered away by niceties and refinements at war with the practical administration of justice. We hold, therefore, that the seventh instruction was properly refused."

STATE v. FINDLEY.

(101 Mo., 217.)

EMBEZZLEMENT: *Public officers.*

1. Where on prosecution of a county collector for embezzlement it is shown that defendant never made a settlement, and that his books, when taken from him by the sheriff, showed a deficit, which he attempted to account for by swearing that the money was destroyed when his house was burned, the evidence is sufficient to sustain a conviction.
2. When it is shown that defendant received the tax-books and acted as collector, it is not necessary to produce his commission.
3. When defendant was *de facto* collector, it is no defense that he failed to take the oath of office.
4. Evidence by an expert of the result of his examination of defendant's books and papers, which are in evidence, is competent to show the standing of the accounts.
5. It is immaterial whether defendant conceived the design of converting the money at the time he collected it or subsequently.
6. That the tax-books were not duly authenticated by the official seal of the county clerk when delivered to defendant constitutes no defense.
7. An exception to the remarks of the court in the hearing of the jury, which does not show in what connection they were made, will not be regarded when the remarks themselves do not appear prejudicial to defendant.

Appeal from circuit court, Howell county; J. F. Hale, judge.

For the appellant, *Olden & Green.*
For the state, *Attorney-General Wood.*

BLACK, J. The indictment in this case is based upon section 1326, Revised Statutes of 1879. The substance of the charge is that defendant, on the 15th of January, 1884, being then the duly elected and qualified collector of Howell county, and having in his charge public moneys which he had received and collected by virtue of his office to the amount of $7,000, embezzled and converted the said moneys to his own use. The trial resulted in a verdict of guilty, with a sentence of five years' imprisonment. The errors assigned are: (1) want of evidence to support the verdict; (2) introduction of improper evidence; (3) improper remarks by the court and of counsel assisting the prosecuting attorney; and (4) giving and refusing to give instructions. The evidence is, in substance, as follows: "Henry

Dryer: I was one of the county judges of Howell county in 1884 and 1885. The defendant was collector of that county in 1884. He went out of office March 1, 1885, and was succeeded by W. C. Gum. The defendant never did make any settlement, and the sheriff was appointed to take the books from him. He said if we would give him further time, so that he could get his money out of those tax receipts he had given out, and never received the money on, he could make settlement. This was in April, 1885. After this Smith and Van Wormer were appointed to make settlement. I told him what it was, and he said 'that was too much;' that he could beat that count. This was the last of May, 1885." Smith testified that defendant was not present at the time he and Van Wormer made the settlement, and did not co-operate with them; that at one time he brought some books, but was not present more than an hour during the three days and nights they were making the settlement; that they found a deficit of over $7,000. The witness then gives the amount collected and paid over to the treasurer, and the amount collected and not paid over, aggregating $19,419.50. The state called the treasurer, who testified to payments made to him by defendant aggregating over $26,000. The witness Smith, being recalled, stated that the settlement spoken of by him did not include the delinquent lists; that all he and Van Wormer knew about taxes having been paid was from finding the mark "paid" opposite the name of the tax-payers; that those marks were made by defendant or his deputies. The tax-books of 1884, and the defendant's bank-account, were put in evidence. The defendant, testifying in his own behalf, stated that his dwelling-house was destroyed by fire in December, 1884, or 1st January, 1885. He says: "At the time it was burned I had in it $1,400 of registered warrants taken as taxes by me. I had others, which had not been listed, amounting to $1,000 or $1,400. I had in the house over $300 in school warrants; I had about $6,600 worth of tax receipts, which had been made out for the parties who owed the tax, and the tax-book had been marked paid when in fact I had not received one cent of the money. I had in my safe $300 or $400 made out for citizens and tax-payers, which had been made out, the books marked paid, and the parties had not then,

and have not yet, paid any of it, and I have here with me those receipts. I also had in my house as much as $3,000 — money which I had collected belonging to the county. All of the county warrants, the school warrants, and the money, and the unpaid tax receipts I had, were destroyed by the burning of my house." The state then offered evidence to the effect that defendant said to different persons he lost about $300, and also evidence to the effect that all county warrants issued in 1884 had been paid.

1. If the evidence for the state was competent, and properly received, then the state made out a case. The proof is positive that defendant was in default nearly $7,000. It is true this fact is testified to alone by the expert witness Smith, who examined the books with Van Wormer; but he got his information for the basis of the calculation from the taxes marked "paid" on the tax-books. These books were thus marked by defendant and his deputies, and the books were original, and the very best of evidence against the defendant. A point is made on the fact that the treasurer's books show payments made by the collector in excess of the amount which Smith says the defendant collected; but Smith is speaking only of the tax-books of 1884, and it appears that the prior delinquent tax-lists were also in the hands of the defendant. Smith's evidence is clear that there was a deficit of nearly $7,000 on the taxes of 1884. But this is not all. The clear admission of the defendant is that he had in his hands money of the county to the amount of $3,000. It is by the loss of this money in the conflagration of his dwelling, and the loss of warrants and tax receipts, that he attempts to account for something over $7,000. His statements to others tend to show that the loss of money by the fire did not exceed $300. There is good ground for believing that the alleged loss by fire was a pure fabrication, contrived and sworn to by the defendant to cover up his well-known defalcation.

2. It was not necessary to produce the defendant's commission to show that he was collector. The fact that he received the tax-books as collector, and proceeded to perform the duties of collector, was evidence of his official character. Whart. Cr. Ev. (9th ed.), §§ 164, 833. There was no error, therefore, in allowing the county judge to testify to the fact that de-

fendant received the tax-books, and acted as collector for 1884. Besides this, the defendant's commission was put in evidence at a subsequent stage of the trial. Nor is it any defense in this case that the defendant failed to take the oath of office, or give bond for the performance of his duties. Being an officer *de facto* he cannot object that he is not an officer *de jure*. 1 Bish. Cr. L. (6th ed.), 464; *State v. Dierberger*, 90 Mo., 371. It was not therefore incumbent upon the state to show that defendant took the oath of office, or gave an approved bond, and defendant's tenth instruction was properly refused.

3. It appears the expert witness Smith was, with Van Wormer, engaged three days and nights in the examination of the tax-books, receipts, stubs and other papers. These books and papers were present on the trial, and the books were in evidence. The witness was allowed to give the result of his examination, and there was no error in this ruling. It was but giving the result of a mass of books and papers too voluminous to be conveniently examined in court, and in such cases it is competent for the witness to speak as to the result of the accounts. *Society v. Lackland*, 97 Mo., 138; 1 Greenl. Ev., § 93; Whart. Cr. Ev. (9th ed.), § 166.

4. The defendant's ninth refused instruction asserts the proposition that to authorize a conviction the jury must find that the defendant received the money with the intent, at the time of receiving the same, to convert and appropriate it to his own use. The instruction was properly refused. It is wholly immaterial whether the defendant formed the intent to convert money to his own use at or after he collected the same. The eleventh refused instruction contains the proposition that to convict it must appear that the tax-books of 1884 were duly authenticated by the official seal of the clerk of the county court. It can make no difference in this proceeding whether the tax-books were properly certified or not. The defendant received and receipted for them, and the moneys collected in payment of taxes extended thereon were public moneys. They were none the less public moneys because the tax-books may not have been duly certified.

5. The attorney for the defendant, in making an objection to parol evidence that defendant performed the duties of col-

lector, suggested that if defendant was charged with murder it would be necessary to show that some one had been killed; and thereupon the court said, in the hearing of the jury: "This crime does not lie around like a dead man." During the cross-examination of the defendant he said: "I said, when talking to my friends about the burning, that I was ruined." Then follows this statement in the bill of exceptions: "At this juncture the court, in ruling on the defendant's answers to questions propounded by the attorneys for the state, remarked, in the presence of the jury, 'that the defendant's memory does not seem to be very good about the county warrants he had at the time of the burning;' to which remarks by the court the defendant objected and excepted at the time." As to the remark of the judge concerning the memory of the defendant, it does not appear in what connection it was made. The questions propounded by the prosecuting attorney are not preserved, nor are the rulings of the court. There is nothing to show that this remark was intended to be or could have been a reflection upon the evidence of the witness. Trial courts should abstain from comments upon the evidence; but there is nothing in any of these remarks of the judge which could have in the least prejudiced the defendant.

6. Mr. Skinner had been called as a witness by the state, but, on the objection of the defendant, his evidence was excluded. On the argument of the cause an attorney assisting the prosecuting officer alluded to the purpose for which the witness had been called, and then said defendant objected to proof by the state of what Skinner heard the defendant swear in a case wherein one of the defendant's deputies was charged with a criminal offense. A statement of this objection is sufficient to dispose of it. The objection is too trivial to demand serious consideration.

No specific objection is made to any of the instructions given by the court. They are full and fair. The defendant has violated a plain statute by converting to his own use public moneys, and he must suffer the consequences.

The judgment is affirmed.

(All concur.)

THE PROPERTY OF
THE LAW SOCIETY

State v. Palmer.

(65 N. H., 216.)

Evidence: *Other offense — Escape.*

1. On a murder trial, evidence that defendant had been suspected of larceny from his employers; that deceased, a fellow-employee, had been active in conducting a search of defendant's house for the missing articles; and that defendant had lost his position, and had threatened to "fix" deceased,— is admissible on the question of motive, though it may also show defendant guilty of a crime other than that for which he was being tried.
2. Evidence that the wire netting on defendant's cell window had been cut, and that a razor and a gun wrench were subsequently found in his possession, is admissible, as consciousness of guilt may be inferred from an attempted escape.

Exceptions from Rockingham county.

Indictment of James Palmer for the murder of Henry T. Whitehouse, who was assistant engineer at the electric light station in Portsmouth, and was murdered May 27, 1888. The defendant was engineer at the same station until some time in February, 1888. Walter Raitt testified: "About the 1st of last May, I met the defendant, and asked him if he was at the light station now. He said, 'No;' he had had some trouble about things being stole. Them fellows had blowed on him, and he would fix them for it. I had been at the light station six or eight times at night. Reagan, Whitehouse and the defendant used to be there." The following testimony was received, subject to the defendant's exception: Fred S. Palmer: "Am superintendent of the Electric Light Co. The defendant was engineer. Whitehouse was his assistant, and Reagan was fireman. Before the defendant left, I had a talk with him about a change of hours, so that Whitehouse would begin work at 8 o'clock in the evening instead of 6. He thought he ought to have Whitehouse to help him from 6 to 8. I thought he showed some feeling about the change. He left Saturday morning at 1 o'clock, about the 5th of February, 1888. He left of his own free will, as a result of a notice I gave him. He was discharged to leave in two weeks or before. He had the option. I intended to discharge both him and Whitehouse. Thought I could get one man to do what they were

both doing for less wages than I was paying the defendant, and told him so; and he said he wouldn't stay for less pay than he was receiving. The morning after he left, the key to one of the engines had been struck and driven in, so that the wheel couldn't turn over. I saw the defendant, and told him to fix the engine, or I should put him behind the bars before two hours. He went and fixed it. After he left I got a search-warrant, and got the defendant and Sheriff Coffin at my office, and accused the defendant of taking articles from the station. I told Coffin we must go and search the defendant's house. Then the defendant acknowledged taking them, and didn't want his house searched. Think this was about February 11th. I therefore went with the defendant, without Coffin, to the defendant's house. He presented his tool-box, and I examined it. I had no mark to identify things, but laid out what I thought were ours, but came to a pair of pliers I had marked. I proved them to him by the mark. Told him to bring the rubber hose he had taken, and he brought it. May 23d — the Wednesday before Whitehouse was killed — I went to the defendant's house again with Coffin and Whitehouse, and searched for stolen articles. Whitehouse was active in the search, and identified some things. We took some things away. The defendant's mother was there. The defendant was not there." Dennis Reagan: "I was fireman at the light station. The morning after the defendant left there was trouble with the machinery. It was Whitehouse's business to take the engine apart and clean it. At this time he could not turn it over. Fred S. Palmer was informed of it." Edward D. Coffin: "Am sheriff, and keeper of the jail. When the defendant was put in jail, I searched him, and took everything he had. Afterwards I searched, and found a razor and a gun wrench in his pocket. A hole, perhaps eight inches by ten, had been broken in the wire netting of his outside cell window since he had been there. There was another prisoner in the same cell." He also testified: "About the 23d of May — the Wednesday before the murder — I went to the defendant's house with Fred S. Palmer and Whitehouse, and searched it. Whitehouse seemed to do the most. He was the most prominent in searching. The defendant's mother went round with us. Fred S. Palmer gave me a schedule of the articles the de-

fendant was accused of stealing. I took it, and gave it to the defendant's mother, and told her to give it to James, and to tell him to bring the things to me. I saw the defendant the next Friday night at the depot at half-past seven, May 25th. He came to me, and said he had been to the jail and my office to see me, that he never took any of the things in the schedule, and never took anything, but that Palmer (Fred S.) and Whitehouse got this thing up to ruin his reputation. Said I: 'Jim, it looks well for you to come down and see me, and I am going to give you some advice; that is, that you leave this town, and go away somewhere,' and go to work at his trade; that I had a warrant for his arrest, and if he would go away I would not use it. He thanked me. Spoke earnestly about Palmer and Whitehouse getting it up, etc. . . . The netting on the window of the cell was put there to prevent things being passed in to the prisoners by their friends outside." Mrs. Frances Rutter, the defendant's mother, a witness called by him, testified that on the day the house was searched by Coffin she gave the defendant the memorandum which Coffin left there for him, and told him Coffin and Palmer had been there, and described the other man, and the defendant said it was Whitehouse. The stenographer's notes of all the testimony may be used by the defendant as part of the case. Judgment having been rendered on the verdict against the defendant, he filed the foregoing bill of exceptions, which was allowed.

D. Barnard, attorney-general, and *S. W. Emery*, for the state.

G. Marsten and *C. Page*, for the defendant.

Smith, J. The testimony of F. S. Palmer, Reagan and Coffin, as to the conversations with the defendant, and as to matters occurring before the murder, was relevant, if it tended to show a motive for the commission of the crime with which he was charged; and the question is, did it tend to show motive? Their testimony was inadmissible for the purpose of discrediting the defendant. His character could not be attacked by showing that he had been guilty of other crimes or offenses. It was not competent to prove that he committed the crime

of larceny or malicious mischief for the purpose of showing that he was guilty of the crime for which he was on trial. *State v. Lapage*, 57 N. H., 245. But, upon well-settled principles, the state was entitled to introduce any evidence having a legal tendency to prove any material fact in issue, notwithstanding it might tend to prove the commission of another and separate offense. It is not a valid objection to evidence, otherwise competent, that it tends to prove the prisoner guilty of a distinct and different felony. *Com. v. Choate*, 105 Mass., 451, 458. Thus evidence of other offenses is admissible for the purpose of proving malice, guilty knowledge, intent, motive, and the like. *State v. Lapage, supra*, 288, 293–295; Rosc. Crim. Ev., 81–84; 1 Whart. Crim. Law, §§ 640, 693. Upon an indictment for murder, evidence of former grudges and antecedent threats is received, because it tends to show malice in the defendant against the deceased. 1 Phil. Ev., 169; Rosc. Crim. Ev., 71. Such evidence is admissible because it supplies a motive for the act. The absence or presence of motive renders the alleged fact less or more probable. *State v. Dearborn*, 59 N. H., 348; Steph. Crim. Law, 88; Best, Ev., 571, 572; Steph. Dig. Ev., art. 7. Motive does not of itself prove guilt. It is a unit contributing to make up the sum total of proof, and proof of the guilty act need not be established by evidence *aliunde* before the question of motive is considered. *State v. Cohn*, 9 Nev., 179. The natural and logical course of human thought, when a crime has been committed, is to inquire, what motive could have influenced a sane person to do such an act?

The testimony of Raitt, not objected to and unobjectionable, if credited by the jury, proved that the defendant believed he had lost his position at the electric light station in consequence of a charge of theft made against him by the deceased, or of the exposure by the deceased of theft actually committed by the defendant. The defendant's threat that "he would fix them for it" showed that he harbored feelings of enmity against the deceased, and intended to do him some bodily harm. The evidence tended to show a motive stimulated by revenge for the commission of the crime with which he was charged. The evidence objected to was competent for the same purpose. The absence of any apparent motive is always a fact in favor of the accused. Hence any fact which supplies

a motive for the crime charged is relevant. Best, Ev. (Chamberlayne's ed.), § 453; *State v. Dearborn*, 59 N. H., 348. On the question of motive, the mutual relations of the prisoner and the deceased, including their mutual temper and their feelings towards each other, are important. "Any motive rendering the killing probable, or explaining it against inherent probabilities, or otherwise helpful to the jury as a circumstance in the case, may be shown against the defendant." 2 Bish. Crim. Proc. (3d ed.), §§ 629, 630. The testimony of those witnesses tended to show the grounds of the defendant's animosity; that he had been exposed by the deceased, or believed he had, in regard to his thefts from the company, and his tampering with the engine, or that he had been wrongfully accused by the deceased of misconduct in these particulars. It was competent for the state not only to show threats and hostile feelings, but the grounds the defendant had or believed he had for his hostility. *Murphy v. People*, 63 N. Y., 590. How much weight the evidence might have with the jury was quite another consideration. The question of remoteness was to be settled at the trial. If the court could see it might have any, it was competent. If the evidence tended to show that the deceased was, or the defendant had reason to suspect he was, the person who had caused him the loss of his situation with the company, and had brought upon him the suspicion and charge of larceny, it was admissible, not as evidence of another offense or offenses, but of other transactions in which the defendant was engaged, and which showed that he had a motive to do the deceased bodily harm. Whether the ill feeling shown by the defendant in regard to the change of hours for beginning work, as testified to by F. S. Palmer, was entertained against the witness, or against the deceased, was for the jury to determine, upon consideration of all the evidence in regard to their mutual relations. If it was against the former, the evidence was not harmful, and its admission affords no reason for setting aside the verdict. But it was competent to be considered with other evidence of the mutual relations of the deceased and the defendant. The participation of the deceased in the search for stolen property, brought home to the knowledge of the defendant by his mother, was calculated to arouse in him feelings of animosity. The case finds that

his mother gave him the memorandum left by Coffin for him, and told him Coffin and Palmer had been there, and described the other man, and the defendant said it must be Whitehouse. It was claimed at the argument that the stenographer's notes show that he said "he thought it was Whitehouse, but didn't know." If the fact is assumed to be as claimed, it did not render the evidence incompetent. Evidence that he believed the deceased had been instrumental in losing him his position at the light station, and in involving him, either rightly or wrongly, in the charge of larceny and malicious mischief, was equally admissible, as evidence would be that the fact was so. In either case the grounds of the defendant's hostility would appear. The declarations of the deceased communicated to the defendant would have been admissible if they were such as to influence his conduct. His acts, so far as they might influence the conduct of the defendant, were admissible for the same reason. The fact that the defendant had in his possession, after he was committed to the jail, a razor and gun wrench, may have had some tendency to show his guilt. The razor, if not the wrench, could be used in aiding his escape. It is claimed that the wrench was a thing so insignificant, no use could be made of it in effecting an escape. If this was so, the evidence as to the wrench was immaterial, and could not confuse or embarrass the defendant in his defense. *State v. Clark*, 23 N. H., 429, 434. Evidence that the wire netting of the outside window of the defendant's cell had been broken, in connection with the evidence as to the razor and wrench, tended to show that the prisoner, with or without the help of persons outside, was planning an escape. Flight or an attempt at an escape is the usual concomitant of crime. The guilty naturally flee; an innocent person ordinarily has no reason to flee. Evidence of an escape, or an attempt at an escape, is therefore admissible, because it tends to prove guilt, or is a fact from which consciousness of guilt may be inferred. But it may be entitled to little or no weight, according to the circumstances under which it was attempted. What weight should be given to this testimony from Coffin was for the jury to determine, under proper instructions from the court, which, it must be assumed, were given. *State v. Rand*, 33 N. H., 216, 224; *People v. Stanley*, 47 Cal., 114;

Rosc. Crim. Ev., 17; 1 Bish. Crim. Proc., § 1250. If the razor and wrench came properly into his possession, and if he was innocent of the breaking of the netting, it does not appear that he made any disclosure of the same to the officers of the jail, as he naturally would have done. The evidence was open to explanation, and, if the explanation was satisfactory to the jury, no injustice was done by the admission. If not explained, the jury would give it such weight as it deserved. That the evidence might not be entitled to very much consideration does not affect the question of its admissibility. Exceptions overruled.

DOE, C. J., and CARPENTER, J., did not sit. The others concurred.

NOTE.—*Evidence of the commission of another and different crime.*—Upon this question Judge Peckham, in his opinion delivered in the celebrated case of *People v. Sharpe*, 107 N. Y., —, says: "The general rule is that, when a man is put upon trial for an offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his life-time is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose, where that is important, of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted, although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor. Whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question to solve, and not as to what the rule itself really is. Thus, there is a class of cases in which evidence is admitted where it is material to show guilty knowledge of the character of the act committed by the prisoner. A good illustration of this class of cases is in the trial of an indictment for passing counterfeit money. Evidence of the passage of like money within a reasonable time before or after the commission of the offense for which the prisoner is on trial is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character. A man might think the money he passes was good, and he might be mistaken once, or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit. Hence, evidence of such repetition bears directly and materially upon the issue before the jury. To this same class would belong the case of an indictment for shooting an individual. For the purpose of proving that the shooting was not accidental, where such a fact is claimed, evidence may be given of efforts, or even threats, made by the defendant to shoot the same individual on prior occasions. Thus the probability of the shooting being accidental is lessened by showing prior efforts

or threats to accomplish the same act for which the prisoner is on trial. Cases of embezzlement and of obtaining money or other property by false pretenses come under the same general rule. A man indicted for the embezzlement of funds by false entries might claim, with some degree of plausibility perhaps, that the entry was a mistake, but the probability of such mistake would be greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person.

"Then there is another class of cases in which the facts show the commission of two crimes, and that the individual who committed the other crime also committed the one for which the defendant is on trial. Evidence is then permitted to show that the defendant was the person who committed the other crime, because in so doing, under the circumstances and from the connection of the defendant with the other crime, the evidence of his guilt of such other crime is direct evidence of his guilt of the crime for which he is on trial. Another class in which evidence of this nature is admissible is where it is proper for the purpose of showing a motive for a commission of the main crime.

"As it is well said by Mr. Justice Agnew in *The State v. Lapage*, 57 N. H., 245–295, 'it should also be remarked that this, being a matter of judgment, it is quite likely that courts would not all agree, and that some courts might see a logical connection where others could not. But, however extreme the case may be, I think it will be found that the courts have always professed to put the admissibility of the testimony on the ground that there was some logical connection between the crime proposed to be proved, other than the tendency to commit one crime as manifested by the tendency to commit the other.'

"John Earl, in the case of *The People v. Shulman*, reported in a note to *Mayer v. People*, 80 N. Y., 364, at 376 states as follows: 'But there is one general rule which must apply to all such cases. There must be in the transaction thus sought to be proved some relation to or connection with the main transaction. That is, they must show a common motive or intent running through all the transactions, or they must be such as in their nature to show guilty knowledge at the time of the main transaction.' And in the case of *Mayer v. People, supra*, which was the case of an indictment for obtaining goods by false pretenses, Rapallo, J., in speaking of the admissibility of testimony of this nature upon the question of intent, said: 'That when the representations, their falsity, and the knowledge of the accused that they were false, is established by competent testimony, the allegation that they were made with intent to defraud may be supported by proof of dealings by the accused with parties other than the complainant, which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the purchase from the complainant was made in pursuance of the same general transaction.'"

STATE v. REDDICK.

(1 S. D., —; 48 N. W. Rep., 846.)

EMBEZZLEMENT: *Misappropriation of funds by partner.*

1. Under the general criminal code defining embezzlement as a criminal offense, the misappropriation of partnership funds by one of the general partners, with felonious intent, does not constitute embezzlement.
2. Under such general statute the subject of embezzlement must be the property of another, and partnership property cannot be said, with reference to either partner, to be the property of another.
3. Section 4036, Compiled Laws, declares that partners are trustees for each other. Section 3195 further defines who are trustees. Section 6799 provides when a trustee is guilty of embezzlement, but these sections do not have the effect to change the rule first announced.
4. The partnership is the owner of the property alleged to be embezzled, and these sections do not assume to make the partners trustees for the partnership, but for each other.

(*Syllabus by the Court.*)

Error to circuit court, Hamlin county.

H. W. Lakin and *W. S. Glass*, for the state.
C. X. Seward, for defendant in error.

KELLAM, P. J. The indictment in this case and the demurrer thereto present the question whether, in this state, a general partner who fraudulently and with felonious intent misappropriates the funds of the partnership of which he is a member is thereby guilty of the statutory crime of embezzlement, the indictment setting out the facts fully. The state, being plaintiff in error, maintains the affirmative, and presents the following argument: Section 4036, Compiled Laws, declares: "The relations of partners are confidential. They are trustees for each other within the meaning of chapter 1 of the title on Trusts." Section 3915 of said chapter 1 provides that "every person who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information, which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control." Section 6799, id., so far as applicable to

this question, is as follows: "If any person, being a trustee, . . . or being otherwise intrusted with or having in his control property for the use of any other person, . . . fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement." Upon these provisions of law the contention is made that defendant in error was a trustee of his copartner; that as such partner and consequent trustee he had in his control property for the use of another, and that a fraudulent appropriation of such property to a use or purpose not in the due and lawful execution of his trust, as charged in the indictment, rendered him guilty of embezzlement.

It need hardly be stated that, under the general statute defining embezzlement as a criminal offense, the rule is that the fraudulent misappropriation of partnership funds by one of the partners does not constitute embezzlement, for each partner is the ultimate owner of an undivided interest in all the partnership property, and none of such property can be said, with reference to either partner, to be the property of another, and as no one can be guilty of stealing or embezzling what belongs to him, and of which he is legally entitled to the possession, the courts have uniformly held that a general partner cannot be convicted of embezzling partnership property which comes into his possession or under his control by virtue of his being such partner and joint owner. Whart. Crim. Law (9th ed.), §§ 935, 1015, 1054; *State v. Kent*, 22 Minn., 41; *State v. Butman*, 61 N. H., 511; *Van Etten v. State*, 24 Neb., 734, 40 N. W. Rep., 289; *Napoleon v. State*, 3 Tex. App., 522. The sections above cited by plaintiff in error do not assume to define the relations of the partners to the firm or partnership, but to each other. Under these provisions each partner is a trustee for his fellow-partner, not for the partnership. The partners' relation to the partnership is untouched by these sections; and, if the taking by a partner as such, with a felonious intent, of partnership property, is neither larceny nor embezzlement under the general criminal code, because the property of the firm is not, as to either partner, the property of another, it is not made so by these provisions of the statute, for

they only make each partner a trustee for his copartner, and not for the partnership, which is the owner of the property charged to be embezzled. In *State v. Kusnick*, 45 Ohio St., 535, the supreme court held that the holder of shares of stock in a joint-stock banking company, who was also the cashier of such company, might be convicted of embezzling the funds of the company, notwithstanding his interest as a partner, for the reason and upon the theory that the funds so embezzled came into his possession and under his control not by virtue of his partial ownership, but solely by his independent employment as agent or cashier. As a stockholder, though interested in the general assets of the company, he had no control over them, and was not charged with any duty or responsibility concerning them. It was his employment as cashier that imposed the duty and trust upon him, and at the same time afforded him the opportunity for their violation and abuse. And even then the court seems to have regarded it as important to demonstrate that the statute under which the conviction was had deliberately eliminated as an element of the offense the condition that the subject of the embezzlement should be the property of another. In its opinion the court says: "It is true that the statutes of nearly all the states which undertake to define embezzlement require that the subject of the offense shall be shown to be the 'property of another,' and this has almost universally been construed to mean that it must be wholly the property of another. It has resulted that, as a rule, a member of an ordinary partnership could not be convicted of embezzlement of partnership property. . . . This peculiar element of this offense seems, however, to have been eliminated from our law by the enactment under which the present indictment was framed. It simply provides that an agent, etc., who embezzles or converts to his own use 'anything of value which shall come into his possession by virtue of his employment,' shall be punished as for larceny of the thing embezzled. The words 'property of another' are omitted." But by our said section 6799, defining embezzlement by a trustee, and under which this indictment is sought to be sustained, the condition that the subject of the embezzlement must be the property or for the use of

some person other than the embezzler is specifically recognized and declared. We are of the opinion, therefore, that the demurrer to the indictment was rightfully sustained, and the judgment of the court below is affirmed. All the judges concurring.

STATE v. WARD.

(61 Vt., 153.)

EVIDENCE, CIRCUMSTANTIAL: *Motive — Admissions — Tracks in snow — Alibi.*

1. On a trial for arson, evidence of a previous attempt to burn the same building is admissible, where there is evidence that defendant, at the time of the previous attempt, took a horse, and went to the place to which he went at the time of the fire, but by a different route, and also evidence of a motive for the crime; as such evidence sufficiently connects defendant with the attempt.
2. Where the evidence tended to connect defendant with the arson, and tended to show that the one who set the fire had with him a sleigh which made certain peculiar tracks, evidence that the sleigh which defendant had on the night of the fire fitted into the tracks is admissible, without evidence that defendant was actually seen with the sleigh upon the road.
3. Evidence that defendant desired to marry a certain woman, and that her foster parents, the owners of the buildings burned, influenced her against him, is admissible, as tending to show that defendant committed the crime in revenge.
4. Testimony of the woman tending to show an admission by defendant that on the night of the attempt, and also on the night of the fire, he used the team which the evidence associated with the perpetrator of the crime, was admissible.
5. Certain witnesses having testified that they had seen a sleigh pass along the street on the night of the fire, and standing in front of defendant's house, they were properly allowed to testify that they had afterwards identified the sleigh as the one let to defendant; also one present at the time of the identification was properly allowed to testify of the fact.
6. The size of the tracks made around the buildings on the night of the fire having been proved, it was proper to allow an overshoe to be shown by one who testified that he had sold defendant a pair of the same size and width as the one shown.
7. An instruction that the introduction of false evidence of an *alibi* constituted a circumstance against defendant, and was an inferential admission of guilt, but not conclusive; that the fact that he had been guilty of introducing it should be established beyond all question; and that, if the evidence of such fact was doubted, no weight should be given it,— was correct.

Exceptions from Caledonia county court; Veazey, judge.

Thomas Ward, convicted of arson, appeals. The state produced one Sherrah, who testified that on the night of the fire a team passed him, going in the direction of Foster's, who owned the burned buildings, and from the direction of St. Johnsbury, at about the time of night when it was claimed by the prosecution that the respondent would have been at that place. Two or three days afterwards the team which the respondent had on that night was shown to the witness, and he was allowed to testify on the trial that the team then shown him was the one which passed him on the night of the fire, as he thought. Mr. Montgomery was the person who took the team from the stable in St. Johnsbury, and exhibited it to Sherrah, and he was allowed to state that, on the occasion of so exhibiting it, he caused it to be driven along the road at about the same distance from and under nearly the same conditions that it passed the witness on the night of the fire. The evidence for the prosecution tended to show that the sleigh which the respondent had on the two nights in question was of a peculiar and unusual make in certain respects, so that the track made by it in the snow would differ materially from those of other sleighs in common use in that vicinity. It appeared that on the night of the fire some one had turned his team around on a road but little frequented, in the vicinity of the fire, and in so doing had backed his sleigh into the snow, which was drifted to a considerable depth beside the road. The snow had retained the impression of the sleigh which was backed into it. Two or three days afterwards the sleigh which the respondent had on that night was brought and fitted into the tracks so made. The evidence of the state tended to show that on the evening of the fire respondent took his team from his stable in St. Johnsbury, where he had put it after taking it from the livery-stable in the afternoon, at about 9 o'clock, and drove away with it. The respondent claimed, and introduced evidence tending to show, that on that same evening, at that hour, he was in the village of Littleton, N. H., which is some twenty miles from St. Johnsbury. The state produced one Smith, who testified that on the evening in question he had seen this sleigh in front of the respondent's barn. For the purpose of identifying the sleigh, he had been taken up to

the stable of Clutier, where was this one, with several others, and had picked out this sleigh as the one which he saw on that evening. The court permitted this fact to be shown. The sheriff, Sulloway, was allowed to testify that he had taken the witness Smith to the stable of Clutier, and he did there select the sleigh in question without any suggestion from any source. Immediately after the fire, Mr. Montgomery, who was then state's attorney, began an investigation, in the course of which he talked with many of the witnesses who testified on the trial with reference to the matters about which they finally testified. Many of these witnesses fixed the time of the occurrences of which they testified by the time when they first spoke to Mr. Montgomery about them. With a view to this, Mr. Montgomery was allowed to testify that he went into that vicinity, and talked with these witnesses, and when.

H. C. Ide, *M. Montgomery* and *C. A. Prouty*, for the state.
Bates & May, *L. H. Thompson* and *Harry Blodgett*, for respondent.

TAFT, J. 1. This court held that it was not legal error to appoint, as prosecutor in a criminal proceeding, an attorney who was at the time acting as counsel in a civil suit against the respondent to recover damages for the acts upon which the criminal action was based. Such appointment was within the discretion of the court below, and its exercise will not be revised by us. *State v. Miller* (Sup. Ct. Wash. Co., May term, 1887), not reported.

2. It is contended that it was error to allow peremptory challenges by the state, for that the statute permitting them is in conflict with the bill of rights, section 10, which guaranties to a respondent a trial by jury, which has been held in *State v. Peterson*, 41 Vt., 518, to be a common-law jury, and that at common law no peremptory challenges were allowed in behalf of the government. By the ancient common law, the crown could challenge without limit, but the "ordinance for inquest" (33 Edw. I., St. 4) narrowed the challenges down to those for cause shown. "There was," said Lord Campbell, C. J., "no intention of taking away all power of peremptory challenge from the crown, while that power, to the number of

thirty-five, was left to the prisoner." *Mansell v. Reg.*, 8 El. & Bl., 54, 71. The effect of the statute was early mitigated by a rule of practice not to compel the crown to show cause against the juror at the time of the challenge. The juror was directed to stand aside, and, the defendant having completed his challenging, if a panel could be procured from the unobjectionable jurors remaining, these were selected, and it was only in case of a deficiency that the crown was called upon to show cause in respect to those members who had been directed to stand aside. As the court could direct the return of any number of jurors for the trial of a particular case, the crown practically was never deprived of the right in substance. This was the settled practice as early as 1699. *Cowper's Case*, 13 How. State Tr., 1108. While the crown could not insist upon the rule as a legal right, and it was often questioned, it was said by Buller, J., in *O'Coigly's Case*, 26 How. State Tr., 1240, that it was "as firmly and as fully settled on this point as any one question that can arise on the law of England," and since this time the practice has never been successfully questioned in England. Thus, at the time of the adoption of our constitution, the crown, in summoning *ad libitum*, and standing aside, jurors, possessed all the advantages obtained by peremptory challenge. But, were this not so, what the constitution guaranties is a trial by a common-law jury, *i. e.*, one of twelve impartial men; and it is within the legitimate scope of legislation to regulate the manner of selecting them, and conducting the trial, nor, are we aware, has it ever been held otherwise. *Walter v. People*, 32 N. Y., 147.

3. At the request of the respondent, the court ordered "the witnesses examined separately and apart from each other." The respondent called as a witness one Carrick, to prove an *alibi*. In rebuttal of his testimony, the state was permitted to use Mr. Stafford, an attorney of the court, as witness. He had been present during the trial, and testified upon a matter to which no other witness was called. We think the case should fall within the rule stated by Royce, C. J., in *State v. Hopkins*, 50 Vt., 316, and re-affirmed in *State v. Lockwood*, 58 Vt., 378, 3 Atl. Rep., 539. It could not have been the intent of the rule to exclude from the court-room an attorney whose duty to his clients might require his presence in the room at

almost any time during the session, in the transaction of business with the clerk and the other attorneys. The spirit of the rule could not be violated where the witness is the only one testifying upon the subject to which he is called. Such was the fact in this case, and the respondent could not have been injured by Stafford's presence in the court-room during the trial. In Georgia it has been held that if a witness remains in the court-room, under the rule, he is not thereby rendered incompetent, but may be proceeded against for contempt. *Lassiter v. State*, 67 Ga., 739. The following cases sustain the ruling below: *Parker v. State*, 67 Md., 329, 10 Atl. Rep., 219; *Haskins v. Com.* (Ky.), 1 S. W. Rep., 730; *Leache v. State* (Tex.), 3 S. W. Rep., 539; *Rummel v. State*, id., 763.

4. The respondent insists that the remarks made by Mr. Ide in his opening statement to the jury were improper. Objection was made and exception taken after he had closed his remarks. The objection was made too late. It should have been made at the time of the statement, and the ruling of the court taken. The question, in this respect, is analogous to that of the introduction of illegal evidence without objection. The party against whom it is given cannot afterwards raise the question. This has been held to be the rule during the argument of the cause; much more should it obtain during an opening statement, when the jury are told by counsel, as they were in this case, that what he stated was not evidence. *Com. v. Worcester*, 141 Mass., 58, 6 N. E. Rep., 700; *Willingham v. State*, 21 Fla., 761.

5. Exception was taken to a part of the closing argument made by Mr. Ide for the prosecution. No objection was made to it at the time of its delivery, and we think, judging from the length and nature of the statements claimed to have been illegal, and the well-known vigilant character of the respondent's counsel, that none was intended. Where counsel sit still during an argument which they claim is illegal, and make no objection thereto, an objection afterwards is too late. The exception is waived by their silence. This court sits in revision of errors made in the ruling, and the refusal to rule, of the court below. Upon this question the court made no ruling, did not refuse to make one, and therefore there is nothing for us to revise.

6. The respondent excepted to an offer to prove a certain fact, evidence of which was excluded. There is nothing in the case to show that the offer was made in bad faith, and, in the absence of such showing, we cannot hold that it was error to offer to prove such fact. The ruling was in favor of the respondent, and he ought not to complain of it.

7. One witness was permitted to testify that the horse on the morning of the 27th January appeared tired; another, that, in his opinion, the track on the wall was made by an overshoe; and another, that, in his opinion, the tracks in the snow were sleigh tracks. The point taken is that the witnesses testified to their opinions, and not facts from which the jury could form opinions of their own. A witness is allowed to state appearances in any case where they are in their nature incapable of exact and minute description, *e. g.*, the health or sanity of a person, the appearance of a person when charged with crime; and, "when the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, the witness is allowed, to a certain extent, to add his conclusion, judgment or opinion." *Bates v. Sharon*, 45 Vt., 474. Under this rule the evidence was properly admitted. See *Crane v. Northfield*, 33 Vt., 124; and see *Stowe v. Bishop*, 58 Vt., 500, 3 Atl. Rep., 494; *Knight v. Smythe*, 57 Vt., 529.

8. The buildings were burned on the 26th of January, 1886, and the evidence tended to connect the respondent with the burning. The state was permitted to show that an attempt was made to burn them four weeks prior to that time, but the respondent insists that there was no evidence tending to connect him with it. It had a tendency to show that he took a horse, and left St. Johnsbury; that he went to Walden, and returned to the same place that he went to, at the time of the fire, but by a different route. This, with that tending to show a motive upon his part to commit the crime, had a tendency to connect him with the attempt, and, if believed, would be pertinent upon the question of whether he committed in January the crime which he attempted to commit the preceding

month. Evidence of previous unsuccessful attempts to commit the same crime for which a respondent is on trial is admissible. *Com. v. Jackson*, 132 Mass., 16. Evidence of previous threats to burn Foster's buildings would have been admissible; we think evidence of an attempt to carry such threats into execution equally so. It is too clear to require discussion. The cases cited on this point are mostly those of other and distinct crimes, such as *State v. Hopkins*, 50 Vt., 332; *Brock v. State*, 26 Ala., 104; *People v. Sharp*, 107 N. Y., 427, 14 N. E. Rep., 319; and others. Or to show previous attempts to commit the same crime without evidence to connect the respondent with them, as in *State v. Freeman*, 4 Jones (N. C.), 5. We should not be inclined to follow *Baker v. People*, 105 Ill., 452, where it was held that, upon a trial for an attempt to commit an abortion, a prior attempt to commit it upon the same person, during the same pregnancy, could not be shown.

9. It is insisted that the court erred in admitting evidence of the sleigh tracks, and experiments with the sleigh, for the reason that there was no evidence to connect the respondent with the tracks. The evidence tended to connect him with the fire, and tended to show that the one who set the fire was with the sleigh which made the tracks on the Goodenough road. To make such evidence admissible it was not necessary to show that the respondent was actually seen with the sleigh upon the road. It was enough to give evidence tending to show he was there with it, and there was ample evidence in the case for that purpose.

10, 15, 16, 17. The prosecution claimed, and the evidence tended to prove, that very intimate relations had existed between the respondent and Miss Olivia Amsden; that he desired to possess her in marriage; that these relations had been broken off, and she had refused to marry him, through influence of her foster parents, the Fosters; that he was aware of these facts, and in revenge committed the crime to injure them, because they had interfered between him and her, either to take revenge upon them for such interference, or to wound her by injuring those to whom she was much attached, and who stood to her *in loco parentis*. These were legitimate claims upon the question of the respondent's guilt. The motive actuating a person in the commission of a crime is always

pertinent. "When a crime has been proved, and circumstances point to the accused as the perpetrator, facts tending to show a motive, though remote, are admissible." *Somerville v. State*, 6 Tex. App., 433. This is not controverted by defendant's counsel, but it was the character of the evidence admitted to show the motive which they criticise. We think the evidence admitted was legitimate, as tending to show facts from which the motive might be found by the jury.

(*a*) The testimony of Foster, as to the relations existing between Miss Amsden and himself and wife, was certainly pertinent, and the objection that the details of the relations were given is not borne out by the record, for he was directed to state what they were, "without going into the details;" and a careful scanning of the exceptions (pages 8 and 9) fails to disclose an instance of his having done so. The testimony of Olivia that she had informed Ward of what the Fosters had said to her about him, and her being with him, was material to show knowledge on his part of their objection to her relations with him. We think that whatever the Fosters said to her about Ward, which she communicated to him, was legitimate upon the question of motive. The objection was general, and, the testimony being proper for one purpose, there was no error in admitting it; it not appearing that it was used for any other purpose. What the Fosters said, it being communicated to Ward, in reference to Olivia's relations with him, was evidence upon one of the material issues of the trial, and the case, therefore, unlike *Campbell v. State*, 8 Tex. App., 84, cited by respondent, where it was held error for a witness to testify that he told the defendant what his neighbors thought about a matter in controversy. What his neighbors thought was wholly irrelevant, as any instance of hearsay upon an immaterial matter would be.

(*b*) The letter which the testimony tended to show was written by Ward to Olivia's sister was strong evidence to show the relations theretofore existing between Ward and Olivia, and Ward's knowledge or belief that the Fosters influenced her against him.

(*c*) The evidence of Olivia in regard to her conversation with Ward at the railroad station was admitted upon the question of Ward's connection with the team. It tended to

show an admission by him that he had the team both nights, and, so far as the case shows, was used for that purpose only, and was in every respect legitimate.

(*d*) The letters and postal-cards had a tendency to show the past intimate relations of Olivia with the respondent, the termination of them against his will, and threats against Olivia, and were material upon the question of motive.

11. In the early part of the trial some inquiries indicated that a claim might be made that Foster burned the buildings for the purpose of procuring the insurance money. In view of this fact, it was permissible to show what his conduct was at the fire. The fact that he might feign conduct, for the purpose of deceiving the by-standers, would not determine the question of its competency. If he had fired the buildings, the less likely he would be to burn himself in fighting the fire, and his conduct and acts at the fire might be very significant, in the eyes of the jury, upon that question.

12. In view of the same claim, it was proper to show the value of the buildings destroyed, but the value of the land of Foster was a collateral fact, and therefore immaterial. In the cases cited to sustain this point, *Wood v. McGuire*, 17 Ga., 318, and *Hyland v. Miller*, 99 Ind., 309, the error consisted in depriving the excepting parties of the cross-examination of witnesses to material facts.

13. The witness Osgood testified that he heard a team pass Wilson's house on the night of the 29th December. He was at Wilson's house several nights, both before and after the 29th, and the evidence tended to show that the team passed the night one Ryan was his co-watcher. We think it was proper in testing his accuracy as a witness to ask him whether that was the only night he heard a team pass. The fact that he heard a team pass but one night, and that its passage was spoken of by him and Ryan at the time, might, in connection with the other circumstances, enable the jurors to determine whether it was the night of the 29th, or of some other day, that the team passed.

14. The question asked Streeter was not objected to until the answer had been given. There is nothing in the record to show that the question was answered before an objection could have been interposed, and we should not presume it,

upon suggestion of counsel. Whether the question was improper we are not called upon to decide.

18. The testimony of the state tended to show that the person who set the fire took a team from the stable in St. Johnsbury, drove to the Noyesville road, in Walden, then on the Hazen and Goodenough roads, to a point on the latter, where he left the team, went to the Foster buildings, fired them, went back to the sleigh, turned it about, and returned to St. Johnsbury by the same route over which he traveled in going from it; that in going to the place where the team was left in the road, in passing from one road to the other, a sharp angle was turned in each instance. Under exception, the state was permitted to show that the horse, driven over the same route within four days after the fire, left to itself, and without guidance, instead of passing the two roads at the point of junction, voluntarily made the turns conforming to the route leading to the tracks and place of turning on the Goodenough road. Was the admission of this testimony error, or, in other words, was this testimony evidence, in the strict sense of the term? "The word 'evidence' is applied to that which renders evident;" and is defined to be any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. 1 Best, Ev., § 11. Does the fact that, when the horse was driven into the vicinity of Foster's on Saturday, he voluntarily left the road upon which he was traveling, and turned into the Hazen and Goodenough roads, have a tendency to produce in the mind a persuasion that he had been there the prior Wednesday? If so, it was evidence of the fact. The testimony tended to show that the horse had the habit of turning into premises and roads where he had before been driven, and every one familiar with horses is aware of their constant habit and custom in that respect; so much so that they can often be trusted to go without drivers in such places. We think the testimony had a tendency to create in the mind a persuasion that the horse had been there before,— to render that fact evident. The question is not how strong a persuasion, but had it a tendency to create any? We think the invariable answer would be, "Yes," and the testimony was properly admitted.

19. The witness Clutier testified that the respondent had the team the night of the attempt to burn Foster's buildings, and what was said by him about it when he returned it, and that he testified before the justice upon the same matter. It was material to show what he testified to before the justice in connection with admissions which it was claimed the respondent made. The court then permitted counsel for the state to ask if he testified before the justice substantially as he had upon trial. In this there was no error, although the respondent would have had the right to have the details of his former testimony given, if he requested it. If leading, the court had the right to permit it.

20. Testimony for the respondent tended to show that at 9 or half past 9 o'clock the night of the fire he was at Littleton, N. H. Lynch testified that he saw a horse in respondent's barn at about 6 o'clock one evening, and Lynch's wife testified she saw the respondent at his barn harnessing a horse at about 9 o'clock one evening, and that at a later hour that evening the horse was gone. Testimony tending to show that the fact that the horse was there at respondent's barn, and was afterwards taken out, was spoken of between Lynch and his wife the evening that each testified they saw the horse there, was objected to, and admitted under exception. The fact that they had conversation about the horse would tend to show that they were testifying about the same evening, and for that purpose was admissible. For that purpose the details of a conversation are sometimes held admissible. *Earle v. Earle*, 11 Allen, 1; *Hill v. North*, 34 Vt., 604. Testimony of a like character was held inadmissible in *Whitney v. Houghton*, 125 Mass., 451, but it was upon the ground that declarations by a party in his own favor could not be shown. If the testimony in this case was inadmissible, whether the court erred in charging it out of the case we do not pass upon.

21, 25, 26. The testimony of Montgomery, Smith and Sulloway mentioned in these points was clearly admissible upon the question of identifying the sleigh.

23. It was not error to permit the witness Drouin to exhibit an overshoe. He had testified that he sold the respondent one the year before, of the same size and width as the one shown. There was testimony in the case tending to show the

length and width of the track which it was claimed was made by the respondent near Foster's house the night of the fire. In connection with this testimony it was proper to exhibit the overshoe. It would enable the jurors to judge whether the tracks described could have been made by the respondent.

24. The respondent further insists that there was error in admitting as evidence the sleigh, lard-pail, candles, beets, and the newspaper, upon the ground that there was no evidence tending to connect the respondent with the same. We have held under point 8 that the evidence tended to connect him with the attempt to burn the buildings in December, and it tended in like degree to connect him with the articles used upon that occasion, and with the sleigh and newspaper. These articles, having been used in connection with the commission of the crime, and the prior attempt to commit it, or by the perpetrator of it, were properly placed before the jury for their inspection, in connection with the other testimony.

27. Sulloway testified that he did not know that Ward had used a hitching weight, but his impression was that he had seen him use one. His testimony indicated that the fact was impressed with some strength upon his mind, not amounting, however, to positive assurance. Witnesses often say: "That is my impression." "I think so." "I'll not positively say so, but that is my impression." We think it competent testimony; the fainter the impression, the less weight it should have. *Clark v. Bigelow*, 16 Me., 246; *Humphries v. Parker*, 52 Me., 502.

28. The testimony of Montgomery in relation to the time he talked with several of the witnesses was properly admitted for the purpose of fixing the time to which they testified. It was admitted for that purpose only.

29. To discredit Foster, May testified to facts tending to show that Foster on the trial testified differently than he did on the hearing before the justice. May stated a part of Foster's testimony; the court properly admitted evidence of all of it. To impeach a witness by showing a part of what he said would be unjust. All he said should be shown; then the jury can judge whether his statements are inconsistent with his testimony. It is argued that its admission rendered the truth of Foster's other testimony more probable in the minds

of the jury. This would naturally be the effect of removing the impeachment of Foster, if any, and for that purpose was legitimate.

30. Exception was taken to the statements of the court, in its charge, that there was no claim that the fire was an innocent one; that it was the wicked and malicious act of somebody; that it was maliciously set. The exceptions show that it was not claimed on trial that the fire was an innocent one. The case was tried upon the opposite theory. The statements of the court were true. Was it error to so state? It was the duty of the court to charge the jury upon every phase of the case without request; to present the case to them as plainly as possible; to eliminate all uncontroverted matters and distinctly point out the precise issues. Facts about which there is no dispute, and concerning which no issue is made, may properly be called to the attention of the jury in the discretion of the presiding judge. *State v. Fenlason*, 78 Me., 495; *State v. Day*, 79 Me., 120. To enable the jurors to act intelligently the court could adopt no wiser course than to explain to them the respective claims of the parties. The only danger from this that could possibly have happened to the respondent was for the jury to get the impression that it was not necessary to find the body of the crime proven. We think they could not have done that from the remarks of the judge. The language used negatives such an idea. The judge said that everything in the case pointed with great force to the fact, not that it was an accidental fire, but that somebody purposely, maliciously, set it. We think the court did not assume, and was not understood to assume, that any disputed fact was proven. It would be casting too great a slur upon the intelligence of the jurors to think they received the impression from the words used by the court that they could convict without finding the fire purposely and maliciously set. To suppose they did imputes to them much less than ordinary intelligence. The question was not taken from them in the least. The court made the remark simply as a reason why it did not give them a full and technical definition of the crime. It did do so substantially when it called the act a wicked, malicious burning, intentionally caused. This holding is not in conflict with *Phillips v. State*, 29 Ga., 105, cited by

the respondent upon this point, where a charge that, if it did not appear that the fire was caused by some accidental or providential cause, the law implied a malicious burning, was held erroneous. The law makes no such implication. The jurors in this case were not so told, but simply that the facts pointed to a malicious burning, and were then left at liberty to find one or not from the evidence.

31. The duty of the court required it to explain to the jury the law applicable to a case of circumstantial evidence. Exception was taken because the court said that many great jurists have pronounced it "of a nature equally satisfactory with positive evidence, and less liable to proceed from perjury." Counsel admit that perhaps the judge had the right to tell the jury what he thought of it, but deny his right to cite the authority of great jurists. When we consider that the law is made up of the opinions of jurists, and that it was the duty of the court to tell the jury what the law was, it cannot be held error that the presiding judge referred to such opinions and told the jury what they were. It is not contended that the opinions of the great jurists upon the question were unsound, but that the court had no legal right to tell the jury what they were. We think there was great propriety in telling the jury so, in giving them to understand that it was as proper to convict on circumstantial evidence as on positive evidence, and in citing the opinions of the learned sages of the law. There is no difference between stating a rule to the jury and reading it to them from the text-books written by great jurists. The latter has always been the practice in this country, at least in most of the states. In the celebrated case of *Com. v. Webster*, 5 Cush., 295, the learned Shaw, C. J., read the whole of several sections of East's Pleas of the Crown, relating to the law of homicide, and read from a text-book "that in some cases perhaps strong circumstantial evidence was the most satisfactory of any." In *State v. McDonnell*, 32 Vt., 491, Bennett, J., in the trial read copious excerpts from the text-books Hale's and East's Pleas of the Crown, Foster's Crown Law, Wharton on Homicide, and Russell on Crimes, as well as from the Reports; and, while the practice of reading text-books to the extent to which it was carried in that case was severely criticised by Redfield, C. J., it was in no wise intimated

that it was legal error. Like instances might be cited *ad libitum.*

32. An exception was taken "to the charge as to the conduct of the respondent, and inference to be drawn by the jury therefrom," in that the court gave no instruction as to what kind of conduct was evidence of guilt. The evidence in relation to his conduct had been admitted during the trial, and presumedly the jurors understood at the time the purpose for which it was admitted, and, this being so, there is nothing in the case to show that the nature and character of the evidence as to the conduct of the respondent was not understood at the time of its admission by the jurors, and the court were not under any duty to explain to them what they already presumedly knew. It will be noticed that the exception was to the charge as given, not to a failure to charge, which is the question mainly argued in the respondent's brief. The criticisms are that the court gave no instructions, etc.; not a complaint of what the court said, which would be covered by the exception, but of what it did not say, which is not within it. Under this exception the counsel criticise the course of the trial permitted by the court, claiming that the fact that the respondent did not testify in his own behalf was considered against him. We do not understand from the exceptions that the statute (R. L., § 1655), which provides that the refusal of a respondent to testify shall not be considered by the jury as evidence against him, was in the least degree violated by either court or counsel. It is evident from the whole case that the fact that the respondent did not produce testimony to show where he was on the two nights in question told strongly against him; for it seems improbable, to say the least, that he could have twice taken a team at St. Johnsbury, driven fifteen or twenty miles, and returned without being able to show by some witness his whereabouts. Had he gone to Littleton on the night of the fire, as he claimed, is it probable that he could have gone there and been in the village for a time without being able to call some person with whom he came in contact to show he was there? If he failed to do so, the inference was strong that such was not the fact; and, as we understand the case, it was this failure to show where he was at the critical moment, and not that he did not testify on the trial, that

was commented upon by the counsel, and, as we think, properly. If the jury were satisfied that on the night of the fire, and of the attempt to set it, the respondent was in some place other than the *locus criminis*, and could have called witnesses to prove it, his failure to do so was a proper matter of comment by counsel and consideration by the jury. The rule is well stated by Poland, C. J., in *Seward v. Garlin*, 33 Vt., 583: "A failure to produce proof, when in the power of the party, is recognized, even in criminal cases, as proper to be considered by the jury." Under Virginia Code 1887, chapter 190, section 3897, prohibiting comments upon the prisoner's failure to testify, it is not error for the prosecuting attorney to remark that the respondent has not accounted for his whereabouts at the time of the homicide. *Sutton v. Com.* (Va.), 7 S. E. Rep., 323.

33. Exception was taken to the charge on the subject of *alibi*. The jury were told that, if the proof of it did not outweigh the proof that he was at the place when the crime was committed, it was not sufficient. In this statement there was no error. Where an *alibi* is proved it is an absolute bar to the prosecution, and constitutes the best possible defense. It is a direct attack upon the case made by the state, by alleging a fact wholly inconsistent with it; for one person cannot be in two places at the same time. If a respondent can show that he was at another place when the crime was committed, the conclusion is irresistible that he did not commit it. The respondent alleges it, not in his pleadings, as it can be shown under the general issue of not guilty, but in his proof, as a full, substantive defense, and, alleging it, he must prove it. It is a defense resting upon extraneous facts, not arising out of the *res gestæ*, and the *onus* of proving it devolves upon the respondent, who alleges it. The burden being upon him, some courts hold "that the evidence must exclude the possibility of the prisoner's having been at the scene of the crime so as to prove the *alibi* beyond a reasonable doubt;" others that it must preponderate or outweigh that for the state. The latter was the rule adopted in the court below, and we think correctly. But it must be taken in connection with the rest of the charge. Had the above been all the charge upon the *alibi* evidence there would be just ground of complaint; for, while

the evidence might not have been sufficient to establish an *alibi*, it was not, therefore, to be discarded, laid out of the case, not considered by the jury, which has been the error in many of the American cases, *e. g.*, *Walters v. State*, 39 Ohio, 215, where the jury were told, unless the testimony established an *alibi* by a preponderance, it was not to be considered. Such cases are clearly erroneous. The attitude of the case at bar was this: An *alibi* was alleged and the jury were told that the evidence to prove it must outweigh the evidence to show the respondent at the place of the crime, and, if so established, they should acquit him. After this instruction it was the duty of the court to go further and to tell the jury that, if the *alibi* was not so established, evidence of it was not to be excluded from the case, but that it should considered with the other evidence, and if, upon the whole, including that in relation to the *alibi*, there was a reasonable doubt of the respondent's guilt he was entitled to an acquittal. Did the court discharge that duty? We think it would be difficult to do it in plainer terms than those used by the court when it said: "But this proof of an *alibi*, even if not sufficient as against the other evidence to establish the fact of an *alibi*, does not change the rule I have before stated,— that, in order to warrant conviction, you must be satisfied upon all the evidence in the case beyond a reasonable doubt. How has all the evidence in the case, including the *alibi* evidence, giving it, in its bearings in all directions, due consideration and weight, left your minds? A party relying on an *alibi* as a defense must prove it. But the setting it up does not change the presumptions of innocence or the burden of proof on the prosecution, as the same has been explained,— that the respondent was at the place of the crime and committed it, and therefore not at home at the time of it." We think the charge covered the whole question and stated the law correctly. As we construe the charge in *State v. Cameron*, 40 Vt., 555, it was like the one in this case and was sustained in this court. The charge below was like the one in *Com. v. Webster*, *supra*, which has been often followed by the courts and cited with approval in text-books. Instructions like those below were held not contradictory in *State v. Maher*, 74 Iowa, 82; *Ackerson v. People*, 124 Ill., 563; *State v.*

Kline, 54 Iowa, 183; *State v. Reitz*, 83 N. C., 634; *People v. Fong Ah Sing*, 64 Cal., 253; *State v. Reed*, 62 Iowa, 40; *State v. Hemrick*, 62 Iowa, 414; and see *State v. Johnson*, 91 Mo., 439. In many of the later cases upon this subject no instructions have been given in relation to the testimony offered to prove an *alibi* considered separately and apart from the main question, and we think the courts are tending in that direction, and to hold that the defense of an *alibi* does not demand specific instructions from the court; and for one I am inclined to think it the better practice, although it is not error to follow that of the court below, which I think more favorable to the respondent. In *State v. Sutton*, 70 Iowa, 268, the accused relied for his defense upon an *alibi*. The court omitted any special instructions as to it, but gave the jury a general direction to consider all the facts in the case, and give the defendant the benefit of a doubt arising upon all the evidence; and the court held that the omission to instruct specially as to the *alibi* did not prejudice the defendant.

34. The next exception noted is to the charge upon the subject of introducing false evidence of an *alibi*. The jury were told that the introduction of false or fabricated evidence constituted a circumstance against the respondent, and was an inferential admission of guilt, but not conclusive; that the fact that he had been guilty of producing the false and fabricated evidence should be established beyond all question; that, if it was doubtful, no weight should be given it, *i. e.*, to use the fact that he had offered and used false evidence as a circumstance against him the jury must be satisfied beyond all question that he was guilty of fabricating it, or, in other words, introducing it knowing it to be false,— making it. The charge was correct. *State v. Williams*, 27 Vt., 724.

35. Was the conviction under the second and third counts legal? The second count was for burning the shed and barns, under section 4128, R. L. The third was for doing the same act with intent to burn the dwelling-house, under section 4127, R. L. The same act was charged in both counts, but with different intent. There can be no objection to joining a count under each section in one indictment. It is often necessary to insert in one indictment many counts, charging the

crime in as many different ways, in order to meet the various phases of the case as developed by the evidence, and after a general verdict, if one count is sufficient, and others bad, the court will pronounce judgment upon the good count only; if all are good, judgment will be rendered upon the count charging the highest offense. *State v. Hooker*, 17 Vt., 658.

36. The last point in the respondent's brief is a criticism upon the charge, but not upon any legal question presented by the exceptions, except such as have been above noticed.

No error is disclosed by the record; the respondent takes nothing by his exceptions; the judgment is affirmed; sentence imposed upon the verdict; and execution ordered. All concur.

WHITE v. STATE.

(86 Ala., 69.)

FALSE PRETENSES: *Act of attorney — Privileged communications.*

1. A plea in abatement to an indictment setting up the pendency of another indictment against defendant for the same offense cannot be maintained.
2. Where defendant filed an affidavit for continuance on account of absent witnesses, not stating their names nor what he intended to prove by them, and refused on request of the court so to do, the continuance was properly refused.
3. Under the Criminal Code of Alabama of 1886, sections 3811, 4383, allowing the intent, in an indictment for attempting to obtain money on false pretenses, to be alleged in the alternative, "to injure or defraud," an indictment charging an "intent to defraud" alone is sufficient.
4. Defendant was arrested for attempting to obtain money on false pretenses from a railroad company. It was alleged that he sought to obtain damages for two trunks which he falsely claimed had been lost by the company. *Held*, that the attorney of the defendant was properly required to testify as to his employment by defendant to demand compensation from the company.
5. An application by the attorney of defendant to the railroad company for compensation for the loss of the trunks and presentation of the checks for the same, under implied authority to do anything necessary for the prosecution of the demand, was within the scope of his authority, and was the act of his client.
6. Evidence that the wife of defendant was on the platform of the station where the trunks were delivered, and to which they were checked, and that she was traveling with her husband, and that she afterwards wore some of the dresses that were in the trunks, was properly admitted to show proper delivery and knowledge of that fact by defendant.

Appeal from city court of Mobile; O. J. Semmes, judge.

The indictment in this case contained six counts, to each of which a demurrer was interposed, "because said count does not allege that the alleged attempt to obtain money was made with intent to injure or defraud, or that said pretenses were made with any intent to injure or defraud." The court overruled the demurrer as to the first, fifth and sixth counts, which were as follows: "(1) That William F. White did falsely pretend to the Louisville & Nashville Railroad Company, a corporation duly incorporated under the constitution and laws of Kentucky, with the intent to defraud, that two of his trunks, for which he held the checks of said company, and which he had shipped by said company over its road from Mobile, Ala., to Bluff Springs, Fla., had not been delivered to him by said company, and by means of said false pretenses attempted to obtain $200 from said company." (5) That said White "unlawfully, knowingly and designedly did pretend to the Louisville & Nashville Railroad Company, a corporation," etc., that said two trunks for which he held the checks of the company "had not been delivered to him or come again into his possession, but were withheld from him by said company, by means of which said false pretenses he did then and there unlawfully, knowingly and designedly attempt and endeavor to obtain from said company certain moneys, to wit, $200, the value of said trunks, with the intent then and there to cheat and defraud the said company of the same; whereas, in truth and in fact, he had received the said trunks into his possession at Bluff Springs, Fla., as he well knew." (6) That said defendant unlawfully, knowingly and designedly did pretend to said railroad company "that he had never received two trunks for which he had obtained, and then held, the checks of said company, and which he had put in the possession of the said company at Mobile, Ala., to be transported for him to Bluff Springs, Fla., presenting the said checks to said company, as evidence of the fact that said trunks had never been received by or delivered to him; by means of which said false pretenses said White did then and there unlawfully, knowingly and designedly attempt to obtain from said company certain moneys, to wit, $200, of the money of said company, with the intent then and there to cheat and defraud said company of the same, whereas" he had already received the trunks, etc.

Before demurring to the indictment, the defendant pleaded in abatement to each count, alleging that, "at the time of the commencement of this prosecution, there was pending in said city court a former indictment against defendant for the same offense in said count complained of." On motion, the court struck out each of these pleas as frivolous, to which action the defendant excepted. The defendant having pleaded not guilty, and the state having announced that it was ready for trial, the defendant stated to the court, as the bill of exceptions recites, "that he was not ready for trial; that he had not been arrested upon the indictment in this case until the cause was called for trial that day, when he was present in court under bond to answer another indictment then pending; that he had, for that reason, not had opportunity to obtain process of subpœna for the attendance of his witnesses; that they lived at such a distance that it would be impossible for him to obtain their presence at the trial, if the case should now go on, and that he objected to being put upon his trial for the offense without an opportunity to procure the attendance of his witnesses." In support of this objection he filed an affidavit, stating that "there are two or more witnesses whose testimony he is advised and believes is material to his defense in this case, and who are absent without any fault of his, and that he believes that he can procure their presence at the next term of the court." The court refused to continue the case, or to delay the trial, on this showing, unless the defendant would give the names of the witnesses, and state what he expected to prove by them; which he declined to do, and duly excepted to the action of the court in proceeding with the trial.

On the trial, as the bill of exceptions further shows, the prosecution proved that the defendant and his wife traveled over said railroad on the 19th day of May, 1887, from Mobile, Ala., to Bluff Springs, Fla., where they resided; that they had two trunks with them, for which baggage checks were given, and these trunks were delivered on the railroad platform at Bluff Springs. Miss Maggie Byars, a witness for the state, who traveled with the defendant and his wife on the occasion referred to, and had assisted in packing their trunks, testified that she saw the trunks on the platform at

Bluff Springs; saw Mrs. White take a hat and some other articles out of one of them, and afterwards saw her wearing one of the dresses which had been packed in the trunk; but she further stated that the defendant was not present when she saw the trunks on the platform, having gone off for some purpose. The defendant objected, and excepted to the admission of this evidence, because he was not present at the time. W. T. Lewis, another witness for the state, testified that the defendant and his wife, on the day of their arrival at Bluff Springs, came out to his house, two or three miles distant, bringing two trunks with them; that both of the trunks had ropes around them, and strap checks on them; that he saw the defendant with the checks in his hand, and heard him say, holding them up: "Couldn't I give the railroad hell, if I had a mind to?" George Muntz, assistant baggage-master of the railroad company, who testified to the railroad's receipt of the trunks at Mobile, and the delivery of the check for them to the defendant, further testified that the defendant came to him about six weeks afterwards and said: "We never received that baggage, and I wish you would check it up, and find out as quick as you can what became of it." Gaylord B. Clarke, attorney for the Louisville & Nashville Railroad Company, testified, on the part of the prosecution, to his receipt of a letter, which purported to be signed by G. L. & H. T. Smith, as attorneys for defendant, and in which they made a demand for compensation on account of the alleged loss of the defendant's trunks. The defendant objected to each part of this evidence, but without stating any particular ground of objection, and excepted to the overruling of his objections. The state then introduced Harry T. Smith as a witness, and asked him: "Were you the attorney of the defendant last July?" The witness declining to answer the question, the court instructed him "that he must testify as to his employment by White, and as to all he did as such attorney in writing the letter, but not as to what conversation took place between himself and the defendant;" and the witness then testified as to the writing of the letter by him, in the name of his firm, as attorneys for the defendant, demanding compensation for the loss of the trunks therein alleged to have been checked from Mobile to Blount Springs, Ala. The defendant excepted to

the ruling of the court requiring said Smith to testify, and to the admission of the testimony as given. The loss of the original letter was proved, after having been filed with the other papers in the case, and a letter-press copy was admitted as evidence.

G. L. & H. T. Smith, for appellant.
T. N. McClellan, attorney-general, for the state.

SOMERVILLE, J. 1. The several pleas in abatement, setting up the fact of the pendency of another indictment against the defendant for the same offense at the time of the commencement of the present prosecution, presented no sufficient defense to the present indictment by way of abatement or otherwise. "The pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause." Whart. Crim. Pl., § 431. But an acquittal or conviction under either indictment would be a good plea in bar to the other indictment, in a trial on the merits. 2 Greenl. Ev. (14th ed.), § 26, note *a; Dutton v. State*, 5 Ind., 533; *Com. v. Drew*, 3 Cush., 279; Code 1886, §§ 4390–4394. The trial court correctly sustained the motion to strike these pleas from the file as frivolous.

2. The demurrer to the indictment was properly overruled. The statute allows the intent to be alleged in the count in the alternative,— "to injure or defraud." Crim. Code 1886, §§ 3811, 4383. The averment of an intent to defraud alone was clearly sufficient. *Carlisle v. State*, 76 Ala., 75; Crim. Code 1886, form 47, p. 272.

3. It is earnestly insisted that the defendant was precipitated into the trial of this cause immediately after being arrested without opportunity to prepare for his defense or to summon his witnesses, and that the action of the court was in violation of a constitutional right of the defendant derived from section 7 of the declaration of rights, providing that in all criminal prosecutions the accused has a right "to have compulsory process for obtaining witnesses in his favor." Const. 1875, art. 1, § 7. The established rule in this state is that the grant or refusal of a continuance rests in the sound discretion of the trial court, and is not revisable on error. 1

Brick. Dig., p. 774, § 2; 3 Brick. Dig., p. 404, § 1. Whether there might in a possible case exist such a gross and palpable abuse of this discretion as to authorize a reversal, we do not decide. We discover nothing to except the present case from the general rule above stated. The court has a clear right to put the accused to a showing with the view of testing the merits of the application, and thus enlightening the exercise of the judicial discretion. The refusal of the accused to state the name of his witnesses, and what he expected to prove by them, or else to show good reasons for such refusal, when he was required to do so by the court, certainly justified the action of the court in refusing to continue the cause.

4. While the law protects certain confidential communications professionally disclosed between an attorney at law and his client, on grounds of public policy, there are some transactions between them as to which the attorney may be compelled to testify without violation of this rule. He may be compelled to state the fact of his employment, *i. e.*, that he is or was the authorized attorney of the client as to a certain transaction. *Railway Co. v. Yeates*, 67 Ala., 164. And to testify as to any matter disclosed to him by the client which was manifestly not intended to be private or confidential, but was intended to be communicated to the adverse party. 1 Greenl. Ev. (14th ed.), §§ 244, 245. There are numerous other exceptions, such as proving the identity or handwriting of his client, the payment of moneys to him, the execution of papers by him, which the attorney attested as the subscribing witness, and like cases.

The trial court did not, in our opinion, go further than legally authorized in its examination of the witness Harry T. Smith, who was the attorney of the accused, nor require him to make any disclosure in the present case not warranted by law. He was only required to state facts tending to prove his employment by the accused to demand of the Louisville & Nashville Railroad Company compensation for the two trunks alleged to have been lost by the negligence of the company, and the delivery to the attorney of the baggage checks as evidence of the company's liability.

5. These baggage checks, if genuine, might be *prima facie* evidence of the fact that the passenger's baggage had been de-

livered to the railroad for transportation, and, taken in connection with the passenger's ticket or other corroborating evidence, would impose an obligation upon the company to carry the baggage through to the station to which it was checked. And the possession of the checks by the claimant would tend to prove that the baggage had not yet been delivered to him. 3 Wood, Ry. Law, pp. 1521, 1522, § 403. The fact was undisputed on the trial that the two trunks in question had been delivered to the railroad to be transported to Bluff Springs, Fla., and the checks were given the defendant as evidence of this fact. A claim upon the company for failure to deliver these trunks necessarily had relation to this contract to deliver at this particular destination. The mistake made by the defendant's attorney, in his letter to the railroad authorities in which he spoke of the trunks as checked to Blount Springs, Ala., does not constitute a variance between the false pretense charged and that proved. It is nowhere proved that this letter correctly recites the representation authorized by the accused to be made through the agency of his attorney. The jury were authorized to infer as they did, that the false pretense attempted to be practiced upon the railroad company had reference to this obligation imposed by the baggage checks themselves, which was one to deliver, not at Blount Springs, Ala., but at Bluff Springs, Fla. The attorney, having been employed to assert a claim against the railroad company based on these checks, as the evidence tends to prove, possessed the incidental authority to do everything necessary to the prosecution of such a demand by suit or otherwise, and within the scope of his authority his action was that of his client.

6. The evidence showing that the wife of the accused was present, although he himself was not, when the trunks were delivered on the platform at Bluff Springs station, Fla., was relevant, in connection with the fact that she was shown to have taken clothing from the trunk, and to have worn some of it afterwards under circumstances which might well have justified the inference that her possession of this clothing at that time was known to the accused. He had traveled with her on the train, and the evidence tends to show that he was in her company when the trunks were hauled from the station

to the house of the witness Lewis. These circumstances not only tended to show the proper delivery of the trunks, but to establish the defendant's knowledge of the fact, which was pertinent to the issues of the present case. The possession of the trunk keys, moreover, by the wife tended to prove her authority as agent of the husband to take custody of the baggage and have access to it.

Under these principles, the rulings of the court on the evidence were free from error. No exceptions are otherwise taken, so far as appears from the record.

Affirmed.

NOTE.—The first and greatest safeguard which the law throws about a man accused of crime is the right to counsel. For a long period under the English law, one accused of treason or felony was not entitled to counsel, as it was charitably presumed by the law that in such cases the court was counsel for the prisoner. How well-founded was this presumption, a glance at the report of any great English state trial prior to 1695 will show. In Great Britain, after the revolution of 1688, the law permitted one charged with treason to make his defense by counsel, but it was only in 1836 that this privilege was extended to persons accused of other felonies. However, the right to counsel in this country is universal and protected to the very fullest extent. The most important privilege which accompanies this right is that the communications made to an attorney by his client in the course of his employment are sacred in the eyes of the law; and though, in many instances, they may be employed in his defense, yet they never can be used against him. An attorney, solicitor or counselor can neither be permitted nor required to divulge the communications which his client has made to him in the course of professional consultation, or to enable him to advise or act professionally in the client's behalf. *Rhoades v. Selin*, 4 Wash., 418; *Heister v. Davis*, 3 Yeates (Pa.), 4; *Yordan v. Hess*, 13 Johns. (N. Y.), 492; *Chirac v. Reinecker*, 11 Wheat., 280; Weeks on Attorneys, ch. VIII.

"The foundation of the rule," says Lord Brougham, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, but it is out of regard to the interests of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." *Greenough v. Gaskell*, 1 Mylne & K., 103.

The rule which prohibits an attorney from disclosing professional communications does not arise from the moral obligation to preserve a secret confided to him, nor from the peculiar power of the court to regulate the conduct of attorneys as officers of the court; nor yet from any general grounds of public policy forbidding confidential communications to be disclosed. The rule is a mere extension of the immunity of the party to his substitute, the attorney. *Rochester City Bank v. Suydam*, 5 How. (N. Y.) Pr., 254.

The privilege is the privilege of the client, and is accorded on grounds of public policy and in order to facilitate the administration of justice. That the attorney is willing to divulge the communications is not enough to warrant receiving them. *Jenkinson v. State*, 5 Blackf. (Ind.), 465; *Chirac v. Reinecker*, 11 Wheat., 280, 294.

The privilege of an attorney or counselor extends to all information derived from his client as such, either by oral communications, or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel by such client; but does not extend to information derived from other persons or other sources, although the information is derived or obtained while acting as attorney or counsel. *Crosby v. Berger*, 11 Paige (N. Y.), 377.

The privilege is not affected by the fact that no fee was asked or expected. If the communication was made to obtain advice or aid upon the rights of the party, in view of anticipated litigation, it is sacred. *March v. Ludlum*, 3 Sandf. (N. Y.) Ch., 35; *McManus v. State*, 2 Head (Tenn.), 213. To nearly the same effect: *Sargent v. Hampden*, 38 Me., 581; *Hunter v. Van Bomhorst*, 1 Md., 504.

The privilege is not confined to facts disclosed in relation to suits actually pending, but extends to all cases in which counsel are applied to in the line of their profession, whether such facts are communicated with the injunction of secrecy or for the purpose of asking advice, or otherwise; unless, indeed, the client should seem to vaunt his disclosures to the public, and, as it were, challenge the by-standers to hear him. *Parker v. Carter*, 4 Munf. (Va.), 273; *Jackson v. Inabinit*, Riley (S. C.), Ch., 9; *Beltshoover v. Blackstock*, 3 Watts (Pa.), 20.

The privilege extends to facts disclosed to a counsel by his client, upon application to him as conveyancer, to draw a deed. *Linthicum v. Remington*, 5 Cranch, C. Ct., 546. And also to an interpreter employed to translate between the attorney and the client. *Parker v. Carter*, 4 Munf. (Va.), 273.

An attorney is bound to testify, like any other witness, to statements made by his client to other persons, or by other persons to his client, or to each other in his presence. *Gallagher v. Williamson*, 23 Cal., 331.

To entitle communications between individuals to be considered as privileged, the relation of client and attorney must exist; they must be made in relation to a matter in which the client's private interest is concerned, and for the purpose of enabling the attorney to understand his client's cause, or his legal rights. *Granger v. Warrington*, 8 Ill. (3 Gilm.), 299.

The privilege is confined to such as are made in strictly professional intercourse. *Pierson v. Steortz*, 1 Morr. (Iowa), 136; *Milan v. State*, 24 Ark., 346.

The privilege does not extend to protect an attorney from testifying as to acts done by the client, in his presence, such as the execution of a writing, though he was present in consequence of his engagement as counsel. *Patten v. Moor*, 29 N. H. (9 Fost.), 163.

A communication made to an attorney will not be protected, unless it appears that, at the time it was made, he was acting in the character of legal adviser upon the very matter to which the communication referred. *Branden v. Gowing*, 7 Rich. (S. C.), 459.

In order to render communications privileged they must be of a confi-

dential and professional character, and the attorney must be acting for the time being in the character of legal adviser, or the party must have good reason to suppose he is so acting. Therefore where one, by profession an attorney, was endeavoring, merely as a neighbor, and without any suit in court, to procure from an insurance company the allowance of a claim in favor of another, without anything being said by either party in regard to his being engaged in the matter or paid for his services, and with no intention or expectation on his part to charge anything therefor, it was held that admissions made to him in this way in regard to the nature of his claim were not privileged from being disclosed in evidence by the attorney. *Com. v. Swan*, 30 Vt., 6.

The rule that professional intercourse between client and attorney should be protected by profound secrecy is not limited in its application to advice given or opinions stated; it extends to fact communicated by the client; to all that passes between client and attorney in the course and for the purpose of the business. *Langsfield v. Richardson*, 52 Miss., 443.

Communications made in consultation by a client to his attorney are privileged and protected from inquiry when his client is a witness as well as when the attorney is a witness, and are privileged, though no action is at the time pending or contemplated concerning the matter of which such statements are made. *Bigler v. Reyher*, 43 Ind., 112.

Communications made to a prosecuting attorney relative to criminals or suspected persons are privileged, and cannot be divulged without the consent of the person making them. The immunity from disclosure of communications so made is a privilege personal to the one making them, which is not waived by his voluntarily testifying generally in an action against him for malicious prosecution in his own behalf, but is waived if, being a witness in his own behalf, he voluntarily discloses what statements he made to the prosecuting attorney, who then may testify to the communications. *Oliver v. Pate*, 43 Ind., 132.

If, by reason of improper disclosures of professional communications made by defendant, charged with murder by shooting with a pistol, to his attorney, it is suspected that the pistol with which the murder was committed is in the trunk of the attorney at a hotel, and the trunk is searched and the pistol is there found, the state may show the fact that the pistol was there found, but not anything said by the attorney. *State v. Douglass*, 20 W. Va., 770.

An attorney who testifies to the fact that a client called himself by a certain name discloses no confidential communications. *Com. v. Bacon*, 135 Mass., 531.

An attorney may be required to disclose by whom he was employed. *Chirac v. Reinecker*, 11 Wheat., 280; *Satterlee v. Bliss*, 36 Cal., 489; *Martin v. Anderson*, 21 Ga., 301; *Brown v. Payson*, 6 N. H., 443; *M. & M. R'y Co. v. Yeates, infra.* But this privilege can never be used as an aid for the actual commission of crime; for it was held that where the attorney and client both engage in committing a wrongful act, the former cannot refuse to disclose the facts of the transaction, on the ground that his knowledge thereof resulted from the relationship of attorney and client. *Dudley v. Beck*, 3 Wis., 274. And that the doctrine of privileged communications does not apply to

a case where a client, being about to commit a criminal act, informs an attorney of his intention, and asks information or advice from him as to the effect or consequences of such acts. *People v. Mahon*, 1 Utah T., 205.

Where the attorney testified that "the declarations of M. (the client) to me, I think, are privileged," *held*, that great weight ought to be attached to his testimony, although expressed as an opinion; for the attorney could better understand the relation between him and the client than any one else. *Orton v. McCord*, 33 Wis., 205.

On a trial for murder, evidence of statements concerning the crime made by defendant to one who he thought was a lawyer, but who was a newspaper reporter, while the defendant was under arrest and in the custody of officers who had repeatedly told him that it would be better for him to tell them all about the matter, and to keep his mouth shut if he could not tell the truth, and that they knew he had been lying, is inadmissible. *People v. Stewart*, 75 Mich., 21.

Confidential communications made by the prisoner in reliance on the supposed relation of attorney and client, whether the person assuming to act was an attorney or not, are excluded from evidence. *People v. Barker*, 60 Mich., 277. But it has been held in Iowa that communications made by a client to one whom he supposed to be an attorney and whom he employed as such, but who, although doing business as a member of the bar, was not, in fact, admitted at that time, are not privileged. *Sample v. Frost*, 10 Iowa, 266. The rule adopted in Michigan seems more consonant with reason as it does with the general policy of law upon this subject.

Communications between attorney and client openly made before third persons are not privileged. Nor can one refuse to disclose by whom he was employed in a judicial proceeding. So held in an action against the M. "railroad" company on a judgment against the M. "railway" company; the witness having appeared in the original suit and pleaded for the "railway" company. *Mobile & Montgomery R'y Co. v. Yeates*, 67 Ala., 164. As was said in a later case decided by that court:

"The rule as to the inviolability of professional confidences applies, as between attorney and client, only to communications made and received for the purposes of professional action and aid, and the secrecy imposed extends to no other persons than those sustaining to each other the confidential relationship, except the necessary organs of communication between them, such as interpreters and their own agents and clerks. If the parties choose to hold their conferences in the presence and hearing of third persons, whether they be officers of the law, and as such, charged with the custody of the client, and hence necessarily present, or indifferent by-standers, there is no rule of law which forbids such third persons to depose to facts thus coming to their knowledge." *Cotton v. State*, 87 Ala., 75; *People v. Barker*, 60 Mich., 277; *Parker v. Carter, supra.*

Ex parte Barker.

(87 Ala., 4.)

Extradition: *Habeas corpus.*

One arrested and detained under extradition papers and a *capias* issued on an indictment for grand larceny, and taken into the state where the offense was committed, will not be released on *habeas corpus* for the reason that the extradition papers were defective and failed to charge a crime, except on complaint of the authorities of the state from which the prisoner was extradited.

Application for *habeas corpus.*

Parsons, Darby & Burney, for the petitioner.
W. L. Martin, attorney-general, for the state.

Somerville, J. The prisoner was arrested in the state of Georgia, without legal process, and was afterwards handed over by the officers of the law in that state into the custody of one McCain, who acted as agent of the state of Alabama under a warrant issued by the governor of the latter state under the interstate extradition laws of the United States. This was done pursuant to a warrant of the governor of Georgia. These extradition papers are claimed to have been so defective as to confer no jurisdiction on any of the officers in whose custody the prisoner had been detained. The return made to the writ of *habeas corpus* by the deputy-sheriff of Elmore county shows that the petitioner was detained in his custody not only under the authority conferred by these papers, but by virtue of a *capias* issued on an indictment for the offense of grand larceny — the same crime for which he was extradited from the state of Georgia as a fugitive from justice from Alabama.

The proposition contended for by the petitioner's counsel may be reduced to this: that the petitioner is entitled to be discharged from custody, and should be allowed reasonable time to make good his escape again from this state, because he was illegally arrested in Georgia and brought to Alabama. This proposition is not sound, and there is an overwhelming array of authority against it. We may admit that the affi-

davit charging the offense upon which the extradition warrant was based was fatally defective in omitting the word "feloniously" before the words "took and carried away," which purport to charge the crime of grand larceny, and, for this reason, the affidavit legally charges no crime. And we premise also that when the affidavit in such cases fails on its face to state facts which constitute a crime, the defect is jurisdictional, and may be ascertained and declared by the investigating tribunal on an application for the writ of *habeas corpus*. R. S. U. S., § 5278; Spear, Extrad., 471, 472, 477, 498, 548; 7 Am. & Eng. Cy. L., 632, 637; *People v. Brady*, 56 N. Y., 182. So, without affecting the merits of this case, it might be admitted for the sake of argument, as contended, that the judge of the county court of Elmore county had no authority to issue a warrant for the arrest of a person for a felony, although it is obvious that he is invested by the statute with this authority as a lawful magistrate (Code 1886, §§ 4255, 4279, 4680), and although "an affidavit made before any magistrate of a state or territory," certified as authentic by the governor of the demanding state, is obviously sufficient, if otherwise unobjectionable, under the federal statute governing the subject of the extradition of fugitives from justice between the states and territories. R. S. U. S., § 5278; Hurd, Hab. Corp. (2d ed.), 610. It nevertheless is true, the courts of a state will not generally investigate, either on *habeas corpus* proceedings or on final trial, the mode of the prisoner's capture, whether it was legal or illegal, whether it was under lawful process or without any process at all, where he has fled to another state or country and been brought again into its jurisdiction. The question is the legality of the prisoner's detention, not the legality of his arrest, unless on the complaint of the governor of the state whose laws were violated by such unlawful arrest. The person making the arrest may be prosecuted criminally for kidnaping, or be held liable to respond in civil damages for false imprisonment, but the prisoner cannot himself claim to be released from any legal process for the same crime, under authority of which he may be detained in the custody of the law. In other words, the mere fact that the prisoner, being a fugitive from justice, was kidnaped in another state — to put the case strongly — and was brought into this state, is

alone no reason why he should be released, unless the demand for release is made by the governor or other executive authority of such foreign state. This is the accepted doctrine of the state and federal courts, and is founded on an ancient and well-settled principle of the common law. Spear, Extrad., 181, 492, 554; 7 Am. & Eng. Cy. L., 643, 653, note; *In re Fetter*, 57 Am. Dec., 400, note, and cases cited; *Commonwealth v. Shaw*, 6 Crim. L. Mag., 245 (1885).

In *Ex parte Scott*, 9 Barn. & C., 446 — a case of *habeas corpus*,— the prisoner, a female, had been arrested at Brussels, without authority of law, and brought back to England. Lord Tenterden refused to inquire into the circumstances of her arrest, whether legal or illegal, upon its being made to appear that an indictment had been found against her in the proper jurisdiction in England, where the investigation occurred and the crime was alleged to have been committed. It was not denied that the foreign country, whose laws may have been violated by the illegal arrest, could vindicate their breach by making demand for the prisoner's return.

In *Dows' Case*, 18 Pa. St., 37, the prisoner had escaped from justice in Pennsylvania and fled to Michigan. He was arrested in the latter state without legal authority, and brought back to the former state, where a prosecution was pending against him for forgery. He was held not to be entitled to his discharge, his release not being demanded by the executive of Michigan.

In *State v. Brewster*, 7 Vt., 118, where the prisoner had been kidnaped in Canada and forcibly brought into the state of Vermont, his discharge was refused, and he was held liable to answer an indictment for crime in the latter state.

A like ruling was made in *Ker v. People*, 110 Ill., 627, in the case of one who had been seized by private persons in Peru, without warrant of law, and was brought to California, and from thence to the state of Illinois by process of extradition. The authorities on the subject are ably reviewed in this case by Scott, J., and the United States supreme court, on appeal to that tribunal, declined to disturb the judgment of the supreme court of Illinois. *Ker v. Illinois*, 119 U. S., 436; 7 Sup. Ct. Rep., 225. See, also, Spear, Extrad., 181–186; *Ker's Case*, 18 Fed. Rep., 167.

It is not denied that the crime of grand larceny described in the *capias* on the indictment against the prisoner, and under which the sheriff claims to detain him, is the same offense as that intended to be charged in the extradition warrant of the governor. There can be no serious question, under these circumstances, of the legality of the petitioner's detention under the *capias* on this indictment, irrespective of all other questions discussed in the briefs of counsel. *Fetter's Case*, 23 N. J. L., 311; 7 Am. & Eng. Cy. L., 627, 628.

The application for the writ of *habeas corpus* must be denied.

NOTE.—Where a person violates the criminal laws of a state and departs therefrom without waiting to abide the consequences of his act, he is a fugitive from justice. *Matter of Voorhees*, 32 N. J. L., 141. And this applies to statutory as well as to common-law crimes. *In re Hughes*, Phill. (N. C.) L., 57. One who goes into another state, commits a crime, and returns home, is as much a fugitive from justice as though he had committed the crime at home and then fled into another state. *Kingsbury's Case*, 106 Mass., 223. It is the imperative duty of the governor upon whom the requisition is made, if all the requisite formalities have been complied with, to deliver up the fugitive. *Johnson v. Riley*, 13 Ga., 97. And the certificate of the governor that an indictment was found is conclusive. *Ex parte Leary*, 10 Ben., 197. The fact that crime has been committed by a person in one state and he is found in another state conclusively establishes the fact that he is a fugitive from justice. *Ex parte Leary*, 6 Abb. (N. Y.) New Cases, 43. The restrictions in articles 4 and 5 of the amendments to the constitution have no relation to the subject of extradition. Therefore one who comes to this country before the making of an extradition treaty has no right of asylum, but may be surrendered for an offense committed before the making of the treaty. *Re De Giamoca*, 12 Blatch., 391.

It is held that one wrongfully extradited is exempt from arrest in civil as well as in criminal proceedings until he has had time to return from whence he came. Judge Brown, in passing upon this question, says:

"No reasons are perceived why the limitations of the treaty and the provisions of the statute, as thus construed, are not as applicable to a civil arrest as to a criminal one. The prisoner may, indeed, give bail in a civil action. But so might he in all those minor criminal offenses for which he could not be extradited, and upon which no arrest is permitted. If he could not procure bail on the civil arrest, or pay the final judgment, he might, indeed, be discharged under the state practice after a certain term of imprisonment; but that term might be as long as the sentence allowed on conviction for many of the minor crimes. It may be said that the implications of extradition treaties have reference to crimes only, and that neither of the contracting governments can be supposed to have concerned itself about the mode of collecting private debts, or about any arrest of a prisoner that might be incidental to a civil suit; but this is hypothesis only, and an examination of some of the more recent treaties shows the contrary. Thus,

the treaty of 1872, between England and Germany (article 11), provides that 'a person surrendered can in no case be kept in prison . . . for any other crime, or on account of any other matters, than those for which the extradition shall have taken place.' Clarke, Extrad., Appendix, lxiv. It is certain that no government surrenders a person for the purposes of arrest in a civil action; and such an arrest is as much an infringement of personal liberty and a diversion of the object of the treaty as an arrest for crime; and there is the less justification for the former, since the courts of all civilized countries are alike open for the prosecution of money demands, while crimes can be punished only within the jurisdiction where committed.

"The main question must be as to the presumed intention of the treaty itself, and of the acts of congress supplementary to it. If these intend only the surrender of the prisoner for the limited purpose of a trial for the extradition offense, and if by express enactment and by the implications of good faith they guaranty him protection for a reasonable time thereafter, to enable him 'to return unmolested' to the country from which he was brought, as the supreme court declares, a civil arrest must be as unlawful as a criminal one. Section 5275, moreover, makes no distinction between a civil and a criminal arrest, against which the accused may require protection for a reasonable time to enable him to return. The demands of public justice, on elementary principles, are superior to claims for the satisfaction of private debts. If, therefore, the demands of the state must give way to the prisoner's right of return, much more, it would seem, must the right of private arrest.

"There are numerous cases holding that a person brought within the jurisdiction by violence or fraud is amenable to prosecution at the instance of persons not privy to the wrong. *Ker v. Illinois*, 119 U. S., 436; *Mahon v. Justice*, 127 id., 700. These cases all proceed upon the ground that the defendant is not himself clothed with any immunity or right of protection, by the mere fact that third persons have done him violence or injury in bringing him within the jurisdiction. He has his private remedy for that wrong. Hence, though the person guilty of the wrong cannot profit by it in any suit of his own, this furnishes no defense against public justice, or against private suitors, who are in no way responsible therefor. But this principle cannot apply where the prisoner is himself clothed with a legal right or immunity. And, in the *Case of Rauscher*, the supreme court declares that the prisoner is clothed with such an immunity. At page 422, 119 U. S., it is said that 'it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty . . . without an implication of fraud upon the rights of the party extradited.' Again, as respects the prisoner's right of return, it is said (119 U. S., 424) that section 5275 'is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.' At page 430, 119 U. S., also, the court again speak of a reasonable time to return as a 'right of the prisoner under such circumstances.' In *Ker v. Illinois*, 119 U. S., 443, also, the court say that the prisoner 'came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed . . . was that he should be tried for no other

offense,' etc. If the opportunity to return is a 'right conferred' upon the prisoner as well as a duty owed to the extraditing government, it is manifest that both the right and the duty are infringed by a civil arrest as much as by a criminal one. The good faith of third persons who prosecute the prisoner becomes immaterial. See Lowell, J., in *Winslow's Case*, 10 Am. L. Rev., 620.

"Finally, the language used by the various publicists and text-writers referred to with approval by the supreme court in the *Rauscher Case* forbids an arrest in one form of proceeding as much as in the other. Mr. William Beach Lawrence says that the prisoner is entitled, unless found guilty of the offense for which he is extradited, to be restored in safety to the country of his asylum at the time of his extradition. Judge Cooley declares that 'the prisoner has a right to have the particular offense disposed of, and then to depart in peace.' And Mr. Spear considers it 'the duty of courts to secure to him, as against all attempts at legal interference therewith, a reasonable opportunity to exercise this right,' Spear, Extrad. (2d ed.), 131–145, 557." *In re Reinitz*, 39 Fed. R., 204. See, also, *In re Baruch*, 41 Fed. R., 472.

It has also been held that a defendant, who has been brought into a state, cannot at the expiration of the term of imprisonment imposed, be arrested on an extradition from another state until he has had a reasonable time to return to the state from which he was extradited. *In re Hope*, 10 N. Y. S., 28. So the service of a civil writ under like circumstances is void and confers no jurisdiction. *Moletor v. Sinnen*, 76 Wis., 308. For a full discussion of the right to try a prisoner for an offense other than that for which he was extradited, see *United States v. Rauscher*, 6 Am. Cr. R., 222 and note.

In re Luis Oteiza Y. Cortes, Petitioner.

(136 U. S., 332.)

EXTRADITION: *Habeas corpus — Writ of error.*

1. A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error.
2. If the commissioner has jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court on *habeas corpus*, either originally or by appeal.
3. In section 5 of the act of August 3, 1882, chapter 378 (22 Stat., 216), the words "for similar purposes" mean "as evidence of criminality," and depositions, or other papers, or copies thereof, authenticated and certified in the manner prescribed in section 5, are not admissible in evidence on the hearing before the commissioner, on the part of the accused.

Petition for a writ of *habeas corpus*. The writ was denied, from which judgment the petitioner took this appeal. The case is stated in the opinion.

Appeal from the circuit court of the United States for the southern district of New York.

Mr. Louis S. Philips, for the petitioner.

Mr. Emmet R. Olcott, on behalf of the Spanish government, opposing.

Mr. Justice Blatchford delivered the opinion of the court.

By section 12 of article II of the convention between the United States and the kingdom of Spain for the extradition of criminals, concluded January 5, 1877, and proclaimed February 21, 1877 (19 Stat., 650), it was provided that persons should be delivered up according to the provisions of the convention, who should have been charged with, or convicted of, any of the following crimes: "12. The embezzlement of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries."

By a supplemental convention between the United States and the kingdom of Spain concerning extradition, concluded August 7, 1882, and proclaimed April 19, 1883 (22 Stat., 991), section 12 of article II of the convention of January 5, 1877, was amended to read as follows: "12. The embezzlement or criminal malversation of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries."

On the 2d of January, 1890, Miguel Suarez Guanes, the consul-general of Spain at the city of New York, duly recognized as such by the president of the United States, filed a complaint, on his own oath, before Samuel H. Lyman, a duly authorized United States commissioner for the southern district of New York, charging that one Luis Oteiza y Cortes, the secretary or clerk of the bureau of public debt of the island of Cuba, at Havana, and an officer in the employment of the kingdom of Spain at Havana, had charge of the public funds and moneys belonging to the kingdom of Spain, namely, the bureau of public debt of the island of Cuba, at Havana; that in December, 1889, the said Luis Oteiza y Cortes (who will hereinafter be called Oteiza) at Havana, and within the

jurisdiction of the kingdom of Spain, in the course of his said employment, had in his possession, as such clerk or secretary, a large amount of public bonds or certificates of indebtedness of the kingdom of Spain, belonging to the public debt of the island of Cuba, and being a part of the public funds of the kingdom of Spain; and that Oteiza, at that time, at Havana, wrongfully and feloniously embezzled bonds or certificates of indebtedness belonging to the said public debt of the island of Cuba, of the value of $190,000, and converted the same to his own use, and also the coupons of other government bonds, of the value of $500,000, and the stub-books thereof. The complainant, therefore, charged Oteiza with the crime of embezzlement of bonds or certificates of indebtedness of the said public debt of the island of Cuba, committed at Havana, and further stated that Oteiza had fled to the United States, and that criminal proceedings had been begun in Havana against him for such embezzlement, and asked for a warrant for his apprehension under the above-named two conventions, that evidence of his criminality might be heard by the commissioner, and that if, on the hearing, the evidence should be deemed sufficient to sustain the charge, a warrant might issue for his surrender. In the course of the proceedings before the commissioner this complaint was amended by adding the words "or criminal malversation" after the word "embezzlement" wherever it appeared in the complaint.

On the 2d of January, 1890, a warrant was issued by the commissioner, reciting the complaint, and stating that Oteiza was charged by it "with having committed the crime of embezzlement or criminal malversation of public funds within the jurisdiction of the kingdom of Spain," and that such crime was enumerated and provided for by the two conventions before mentioned. The warrant was directed to the marshal or any deputy, and commanded that Oteiza be apprehended and brought before the commissioner, in order that the evidence of his criminality might be heard. Oteiza was arrested, and evidence in the matter on both sides was heard by the commissioner. On the 13th of March, 1890, the commissioner certified that, on the examination and the hearings which had been had, he deemed the evidence sufficient to sustain the charge, and that he committed the accused to the custody of

the marshal, to be held until a warrant for his surrender should issue according to the stipulations of the treaty, or he should be otherwise dealt with according to law.

On the 14th of March, 1890, a writ of *habeas corpus*, to bring the body of Oteiza before the circuit court of the United States for the southern district of New York, directed to John W. Jacobus, the marshal of the United States for the southern district of New York, and to the warden of the jail, and a writ of *certiorari* to the commissioner to transmit the proceedings to the said circuit court, were allowed by Judge Lacombe. These writs were returnable on the 28th of March, 1890. The case was heard by Judge Lacombe in the circuit court, and on the 18th of April, 1890, that court made an order discharging the writ of *habeas corpus*. Oteiza has appealed to this court.

In his opinion in the matter, which forms part of the record, Judge Lacombe arrives at the conclusion that either the coupons alleged to have been abstracted by Oteiza were public funds, or that, by discharging the functions of his office falsely and with corrupt intent, he had got possession of certain moneys which were public funds, paid out by the Spanish bank of the island of Cuba, which would not have passed from the possession of that bank to his own possession, except as a consequence of his official action; that he, therefore, obtained charge of such moneys by virtue of his office, and thereupon converted them to his own use; that his acts were, therefore, within the terms of article 401 of the Spanish Penal Code of Cuba, which is a part of title VII, "Of the crimes of public employees in the discharge of their duties," and of chapter 10 therein, entitled "Malversation of public funds," and reads as follows: "Art. 401. A public officer, who, having charge of public effects or funds by virtue of his office, takes or allows others to take the same, shall be punished as follows," etc.; and that like acts are made punishable by section 5438 of the Revised Statutes of the United States, and by section 165 of the Penal Code of New York. The judge also refers to the warrant of arrest issued against Oteiza in Cuba, as specially stating the offense which it was claimed he had committed. From that warrant it appears that the complaint against Oteiza in Cuba was for having committed the crime of "embezzlement of public funds" as a public officer.

We are of opinion that the order of the circuit court, refusing to discharge Oteiza, must be affirmed. A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court on *habeas corpus*, either originally or by appeal.

In the case of *Benson v. McMahon*, 127 U. S., 457, 461, 462, 463, which was an appeal to this court from an order of a circuit court of the United States denying a discharge to a prisoner, on a writ of *habeas corpus* issued by that court to a United States marshal in case of extradition, where a United States commissioner had held the accused by a final commitment, this court, speaking by Mr. Justice Miller, said: "Several questions in regard to the introduction of evidence which were raised before the commissioner, some of them concerning the sufficiency of the authentication of papers and depositions taken in Mexico, and as to the testimony of persons supposed to be expert in the law of that country regarding the subject, are found in the record, which we do not think require notice here. The writ of *habeas corpus* directed to the marshal of the southern district of New York does not operate as a writ of error. . . . The main question to be considered upon such a writ of *habeas corpus* must be, Had the commissioner jurisdiction to hear and decide upon the complaint made by the Mexican consul? and also, Was there sufficient legal ground for his action in committing the prisoner to await the requisition of the Mexican authorities? . . . We are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country, before an examining or committing magistrate, for the purpose

of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that 'the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.' This describes the proceedings in these preliminary examinations as accurately as language can well do it. The act of congress conferring jurisdiction upon the commissioner or other examining officer, it may be noted in this connection, says that, if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged." In the present case, article 1 of the convention of January 5, 1877, provides that the surrender of the accused "shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed." In the opinion in *Benson v. McMahon*, *supra*, the court proceeds: "We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him, or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of congress and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government."

Without discussing the questions raised in the present case, it is sufficient to say that we concur in the views of Judge Lacombe. The only point raised on behalf of Oteiza which we deem it important to notice is his offer to introduce in evidence before the commissioner, on his own part, certificates, made by public officers in Cuba, as to the existence of certain facts, and also certain copies of papers and certain *ex parte*

depositions in writing taken in Cuba before a notary public; all of which were sought to be made evidence under certificates made by the consul-general of the United States at Havana, certifying that the papers were properly and legally authenticated so as to entitle them to be received "in the tribunals of Cuba as evidence in defense of a charge of embezzlement, and as evidence in defense of said charge upon a preliminary hearing before a committing magistrate, and as evidence in defense of said charge in an extradition proceeding upon a hearing before a competent magistrate, and especially as evidence in all the cases enumerated where said charge of embezzlement is made against Don Luis de Oteiza y Cortes."

It is supposed that these documents were admissible in evidence by virtue of the provisions of section 5 of the act of August 3, 1882, chapter 378 (22 Stat., 216), which reads as follows: "Sec. 5. That in all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence upon the hearing of any extradition case under title 66 of the Revised Statutes of the United States, such depositions, warrants and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant or other paper, or copies thereof, so offered are authenticated in the manner required by this act."

We are of opinion that section 5 of the act of August 3, 1882, applies only to papers or copies thereof, which are offered in evidence by the prosecution to establish the criminality of the person apprehended; and that it does not apply to documents or depositions offered on the part of the accused, any more than did the provisions of section 5271 of the Revised Statutes, either as originally enacted or as amended by the act of June 19, 1876, chapter 133 (19 Stat., 59).

This view was held by Judge Brown in the district court for the southern district of New York in March, 1883. *In re Wadge*, 15 Fed. Rep., 864. In that case the commissioner had

refused to adjourn the proceedings before him in order to enable the accused to procure depositions from England to establish an *alibi*. Judge Brown considered the act of August 3, 1882, and held that, while it was the duty of the commissioner, under section 5 of that act, to take such evidence of oral witnesses as should be offered by the accused, the statute did not apply to testimony obtained upon commission or by deposition, adding that, so far as he was aware, there was no warrant, according to the law or the practice before committing magistrates in the state of New York, for receiving testimony by commission or by the depositions of foreign witnesses taken abroad, and that all the provisions of the law and the statutes contemplated the production of the defendant's witness in person before the magistrate for examination by him. The order dismissing the writ of *habeas corpus* in that case was affirmed by the circuit court, held by Judge Wallace, in *In re Wadge*, 21 Blatchford, 300. He said: "The depositions and proofs presented a sufficient case to the commissioner for the exercise of his judicial discretion, and his judgment cannot be reviewed upon this proceeding. He is made the judge of the weight and effect of the evidence, and this court cannot review his action when there was sufficient competent evidence before him to authorize him to decide the merits of the case."

In the case of *In re McPhun*, 24 Blatchford, 254, in the circuit court for the southern district of New York, before Judge Brown, in March, 1887, on a *habeas corpus* in an extradition case, it was held that the words, "for similar purposes," in the fifth section of the act of August 3, 1882, must receive the same construction they had received under the act of June 22, 1860, chapter 124 (12 Stat., 84), which was that they meant "as evidence of criminality," and that the same construction had been given to similar words in prior statutes; citing *In re Henrich*, 5 Blatchford, 414, 424, and *In re Farez*, 7 Blatchford, 345, 353. We concur in this view.

Since the close of the oral argument we have been furnished with a printed brief on the part of the appellant, which we have examined, but we do not deem it necessary to make any further observations on the case.

The order of the circuit court is affirmed.

COMMONWEALTH v. LEE.

(149 Mass., 179.)

FALSE PRETENSES: *Indictment — Instructions.*

1. An indictment for obtaining goods by false pretenses, which alleges that defendant falsely represented that he was the owner of certain property, and obtained the goods by giving a mortgage thereon, is sufficient, as the false representations were the direct, and not the remote, means by which defendant obtained the goods, even though they would not have been delivered to him but for the mortgage.
2. Where the owner of the goods testifies that he parted with them on the strength of the statements made by defendant, and also "on the statements and the mortgage," and the jury find the statements to be false, it is proper to refuse a ruling that the evidence does not support the charge of false pretenses, where the jury are instructed to acquit if the owner parted with his goods independently of the statements.
3. The fact that the false statements were incorporated in the mortgage given as security for the goods would not free defendant from liability for making the statements, though he could not be convicted by reason of breach of covenants in the mortgage; and an instruction that "unless the jury find that some other false pretenses were made besides those to which the covenants in the mortgage relate, the defendant cannot be convicted," was properly refused.
4. An instruction that, if the seller had means of knowing that the property was not defendant's, the indictment could not be sustained, was properly refused, as the seller had the right to rely on defendant's statements.
5. An instruction that "if the jury find that the bargain in which the alleged false pretenses were made, and its object was to secure James for a past debt and a future credit, then the defendant cannot be convicted," was properly qualified by adding: "If the defendant, at the time such representations were made, obtained any of the property . . . by reason of the alleged false pretenses, the indictment might be sustained."

Exceptions from superior court, Suffolk county; James R. Dunbar, judge.

Indictment of James T. Lee for obtaining goods by false pretenses from Worthen T. James. A motion was made to quash the indictment on the ground, among others, that it did not sufficiently allege that the goods were delivered to defendant by reason of his false pretenses. The motion was overruled. The second instruction asked by defendant was as follows: "If the jury find that, before the making of the false pretenses, James knew, or had means of knowing, that said

property was not the defendant's, this indictment cannot be sustained." The court gave this, omitting the words, "had means of knowing." The fourth instruction asked by defendant was: "If the jury find that the bargain in which the alleged false pretenses were made, and its object, was to secure James for a past debt and a future credit, then the defendant cannot be convicted under this indictment." The court gave this instruction, and added thereto: "If the defendant, at the time such representations were made, obtained any of the property charged in the indictment from said James, by reason of the alleged false pretenses, the indictment might be sustained." The fifth instruction asked by defendant was: "What passed between the parties by parol in relation to the title to the property merged afterwards in the mortgage, and the evidence shows a mere breach of covenants in the mortgage, and unless the jury find that some other false pretenses were made besides those to which the covenants in the mortgage relate, the defendant cannot be convicted." The court declined to give this request, and upon that subject instructed the jury that defendant could not be convicted by reason of breach of covenants in the mortgage; but, if the jury found that defendant made the false statements relied upon, he would not be less liable because those statements were afterwards reduced to writing in the mortgage. Defendant was convicted and excepts.

W. B. Orcutt, for defendant.

A. J. Waterman, attorney-general, and *H. A. Wyman*, assistant attorney-general, for the commonwealth.

DEVENS, J. 1. The motion to quash the indictment was properly overruled. The allegation that the goods were obtained by the false statement on the part of the defendant that he was the owner of certain property upon which he gave a mortgage to the seller, one James, thereby inducing him to part with his goods, was a clear and sufficient charge of obtaining goods by false pretenses. If, after this false pretense that the defendant was the owner of the property to be mortgaged, the mortgage was given, even if the goods would not have been delivered to the defendant but for this fact, the

false pretense was the direct, and not the remote, means by which the goods were obtained. If the seller had not believed in this pretense, he would have deemed the mortgage worthless, and would not have parted with his property. *Com. v. Coe*, 115 Mass., 481. In *Com. v. Lincoln*, 11 Allen, 233, it was held that one who obtains money by means of false pretenses that he owns certain personal property, which he mortgages to the lender as security for the loan, could properly be convicted of obtaining money by false pretenses. The fact that in the case at bar the goods were to be obtained from time to time, and not all at once, can make no distinction between the cases, as the false pretense was a continuing one, and applicable to each delivery.

2. The ruling requested, that the evidence did not support the charge of false pretenses, as laid in the indictment, should not have been given. In distinct terms, the witness James testified that he parted with the goods on the strength of the statement made by the defendant, and also "on the statements and the mortgage," which, in substance, was saying that he relied on the mortgage because of the statements of defendant which preceded or accompanied it. These statements the jury have found to be false pretenses. If James parted with his property solely on the strength of the security of the note and mortgage,— that is, independently of these statements,— it was instructed to acquit the defendant.

For similar reasons the fifth instruction requested should not have been given. While the defendant was not to be convicted by reason of the covenants in the mortgage as to the ownership of the property, if he in fact made the false statements relied upon to induce the seller to part with his property on the security of the mortgage, he would not be the less liable because they were afterwards reduced to writing therein.

3. The instruction that, if James, the seller, had the means of knowing that the property was not that of the defendant, the indictment could not be sustained, should not have been given. He was entitled to rely on the statements of the defendant, and was not further put upon his inquiry as to a motive which was within the knowledge of the defendant, and as to which he himself knew nothing. If he knew that the

defendant was not the owner, the instruction as given was that the statement could not be deemed a false pretense. Nor is any such case presented as that which exists where parties alike know whether an affirmation is true or false, being equally cognizant of or personally connected with the facts to which it relates. *Com. v. Norton*, 11 Allen, 266.

4. The fourth instruction requested by defendant was given. The addition that if the defendant, "at the time such representations were made, obtained any of the property charged in the indictment from said James, by reason of the alleged false pretenses, the indictment might be sustained," was correct. It compelled the commonwealth to show that some definite portion of the property charged in the indictment had been obtained by the alleged false pretenses. This was all that was necessary to sustain the indictment. *Com. v. Stone*, 4 Metc., 43; *Com. v. Coe*, 115 Mass., 481.

NOTE.— *False pretenses — What constitutes offense.*— This offense is purely statutory, and its creation is due to the inadequacy of the common law to cover many swindles and frauds which did not come under the punishment provided for cheats. The first important English statute upon the subject was 30 Geo. 2, ch. 24, § 1. This was from time to time amended until the enactment of 24 and 25 Vict., ch. 96, § 98. From these statutes the laws of most of the states are modeled. However, a great diversity of verbiage exists in the penal codes of the different states upon this subject, and from these differences arises often a seeming conflict in the decisions, which nearly always disappears upon a reading of the particular act under which the offense arose.

The statutes, like all criminal statutes, must be strictly construed, and any pretense not clearly within the statute does not constitute the offense. 2 Bishop, Cr. Law, § 397.

Very many important questions grow out of the construction of the different acts and some of the most diffcult problems in criminal jurisprudence. For instance, it is well settled that a mere promise to do an act in the future, even though falsely made, will not support the charge; the representation must be as to an existing fact. But the difficulty presents itself most frequently in determining whether the statement was indeed a representation or only a promise; and, if there were combined a representation and a promise, whether the promise alone induced the prosecutor to part with his goods, or whether the promise and the representation combined in this effect. The latter question, though of frequent recurrence, is usually difficult only in the application of the rule, and its illustration is presented in some of the cases hereinafter cited. While, as has been said, the enactments of the different states vary, there are some general features peculiar to all. The difference between the offense and that of common-law cheating is well marked.

To constitute a cheat or fraud an indictable offense at common law, it

must be such as to *affect the public;* such as common prudence cannot guard against, and must be by using false weights and measures or false tokens; or where there is a conspiracy to cheat (*State v. Justice*, 2 Dev., 199; *People v. Babcock*, 7 Johns. (N. Y.), 201); while to constitute the offense of obtaining goods by false pretenses it is not necessary that the cheat should have been accomplished by any false token.

The essence of the crime of obtaining money or property by false pretenses is that the false pretense should be of a past event, or of a fact having a present existence, and not of something to happen in the future, and that the prosecutor believed that the pretense was true, and that confiding in the truth of the pretense and by reason thereof, he parted with his money or property. *State v. Evers*, 49 Mo., 542.

It is not essential, to constitute the offense of obtaining a signature of a person to a written instrument by means of false pretenses, that any actual loss or injury should be shown to have been sustained. *People v. Sully*, 5 Park. (N. Y.) Cr., 142.

To constitute the offense of obtaining property by false pretense under How. St. Mich., § 9161, it must be made to appear, not only that some person has been defrauded, but that the person making the representations intended to defraud such person thereby. *People v. Wakely*, 62 Mich., 297.

Where a party sells a promissory note, which he knows has been paid but represents as still due according to its face, the offense is not an indictable one, but a mere civil injury to be redressed by action. *Middleton v. State*, Dudley (S. C.), 275.

If one induces an illiterate man, by false representations and false reading, to sign a note for a different amount from that agreed on, he is indictable for the cheat. *Hill v. State*, 1 Yerg. (Tenn.), 76.

A mere naked assertion may be a "false pretense," within the meaning of the statute with regard to obtaining goods "by color of any false token, pretense, or device whatever." *State v. Penley*, 27 Conn., 587.

In a prosecution for presenting a fraudulent claim to the board of supervisors, it is immaterial whether or not the warrant upon which the false claim made for traveling expenses was based was regularly issued. *People v. Carolan*, 71 Cal., 195.

A false pretense to an agent, who communicates it to his principal and who is influenced by it to act, is a false pretense to the principal. *Com. v. Call*, 21 Pick. (Mass.), 515.

So, obtaining money by false pretenses from an agent, who pays it by direction of his principal, is obtaining it from the principal. *Id.*

To constitute obtaining money by false pretenses, the pretense must have been made for the purpose of obtaining the money. *Bowler v. State*, 41 Miss., 570.

An indictment lies for obtaining goods by false pretenses, where a party represents himself to be the owner of property which does not belong to him and thereby obtains credit. *People v. Kendall*, 25 Wend. (N. Y.), 399.

A false representation is not within the statute unless calculated to mislead persons of ordinary prudence. *People v. Williams*, 4 Hill (N. Y.), 9.

Paying or exchanging counterfeit money for goods is not obtaining them on false pretenses. *Cheek v. State*, 1 Coldw. (Tenn.), 172.

If a false assertion be made in regard to an article, and money be thereby fraudulently obtained, the falsehood is a false pretense within the statute against obtaining money by false pretenses, if, in order to ascertain whether the representation is false, it is necessary to apply tests or experiments to the article. And it is none the less so that the party imposed on might, by common prudence, have avoided the imposition. *Re Greenough*, 31 Vt., 279.

It is not necessary to a conviction that the pretenses, which are proved to be false, should be the only inducement to the credit or delivery of the property. It is sufficient if they had so much effect that, without their influence on the party defrauded, he would not have given the credit or delivered the property. *People v. Haynes*, 11 Wend. (N. Y.), 557.

If a false pretense and a subsequent sale are proved, the jury may infer that the pretense was the inducement to the sale. *Jones v. United States*, 5 Cranch, C. C., 647.

Where false statements by which money is obtained manifestly relate to existing facts, they will support an indictment for obtaining money under false pretenses, though the accused promised to do certain things in the future with the money. *Com. v. Moore* (Ky.), 12 S. W., 1066.

In a prosecution under McClel. Dig. Fla., page 364, section 42, providing that whoever designedly, by a false pretense, or by a prior false token, and with intent to defraud, obtains from another person any property, etc., shall be punished, the indictment must show that the false pretense relates to a past event, or to a fact having a present existence, and not to something to happen in the future. *Scarlett v. State* (Fla.), 6 So., 767. To the same effect also, *Burrows v. State*, 12 Ark., 65; *People v. Blanchard*, 90 N. Y., 314; *Com. v. Moore*, 99 Pa. St., 570.

On the trial of an information for obtaining property under false pretenses, an instruction that to convict it must be found that defendant said he had money in bank to pay a check given in payment of the property, would be error. A bank check is a false token if the drawer knows when he gives it, payable to a person other than himself, that he has neither funds to meet it, nor credit at the bank on which it is drawn. *People v. Donaldson*, 70 Cal., 116.

Under the law of California (Penal Code, § 7) a promissory note may be the subject of the crime of obtaining property under false pretenses. *People v. Reed*, 70 Cal., 529.

A false statement that it is necessary for the prosecutrix to be the owner of certain shares of stock in a corporation in order that she might participate in a drawing of lots, although made by defendant for the purpose of inducing the prosecutrix to buy shares of the stock, is not a false pretense such as will support a conviction of an indictment. *Com. v. Springer*, 8 Pa. Co. Ct. Rep., 115.

It is an indictable offense in a baker employed for the army of the United States, if he puts false marks, denoting the weight of bread on the barrels that contain it, whereby the public is injured. *Respublica v. Powell*, 1 Dall., 47.

However, it is not indictable to get possession of a note, under pretense to look at it, and carrying it away and refusing to return it. *People v. Miller*, 14 Johns. (N. Y.), 371.

Nor to pretend to have money to pay a debt, and thereby obtaining a receipt in discharge of the debt without paying the money. *People v. Babcock*, 7 Johns. (N. Y.), 201.

Nor to obtain, in violation of an agreement and by false pretenses, possession of a deed lodged in a third person's hand as an escrow. *Com. v. Hearsey*, 1 Mass., 137.

Nor to obtain goods on credit, by falsely pretending to be in trade and to keep a grocery shop, and giving a note for the goods in a fictitious name. *Com. v. Warren*, 6 Mass., 72.

Where, after delivery of goods, the vendor suspects that the purchaser is not solvent, and expresses his intention to reclaim them, whereupon the purchaser makes false representations respecting his ability to pay, and the vendor in consequence thereof abandons his intention, the purchaser is not guilty under the statute, the sale being complete before the false representations were made. *People v. Haynes*, 14 Wend. (N. Y.), 547.

An indictment will not lie, in New York, for obtaining money by false pretenses, where the money is given in charity, though there is fraud in procuring it. *People v. Clough*, 17 Wend. (N. Y.), 351.

To constitute the crime under the New York statute, two things are essential — a false representation as to an existing fact, and a reliance on that representation as true. *People v. Tonkins*, 1 Park. (N. Y.) Cr., 224.

But the mere fact that a person buys goods without the expectation of paying for them does not justify his arrest on a criminal charge for false pretenses. *Tefft v. Windsor*, 17 Mich., 486.

Where defendant, as agent for her daughter, obtained property from C. which belonged to such daughter, who was entitled to its immediate possession, by falsely representing that she was the agent of another person, and it appears that neither defendant nor her daughter had any intent to defraud C., but only desired to get possession of the daughter's property, defendant is not guilty of obtaining property by false pretenses under the Kansas statute. *In re Cameron* (Kan.), 24 P., 90. To the same effect, see *People v. Thomas*, 2 Hill (N. Y.), 169.

On indictment for false pretense, by which defendant sold an unsound horse, it appeared that defendant knew that the horse had a disease of long standing, and that lameness would only occur after about three days' driving; also that the purchaser, discovering that the horse limped, was assured by defendant that it had never been lame, and that the limping was the result of recent shoeing and was temporary. *Held*, that an instruction that, if the purchaser could perceive the lameness, the principle of *caveat emptor* applied and defendant was not guilty, was properly refused. *State v. Wilkerson*, 103 N. C., 337.

Where defendant succeeds by considerable negotiation in exchanging a $4 watch for a $30 horse, such act is not necessarily indictable as obtaining goods under false pretenses, though it be of such nature that an action at law would lie for the difference in value. *State v. Fields*, 118 Ind., 491.

The fact that money is obtained, or attempted to be obtained, from one while he is himself engaged in an unlawful transaction, is no defense to an indictment for a conspiracy to obtain money under false pretenses. *People v. Watson*, 75 Mich., 582.

A person who, by false and fraudulent representations, obtains the consent of a city to the entry of a judgment in his favor against it in an action then pending, and the payment of a sum of money by the city in satisfaction of that judgment, cannot be convicted of obtaining money by false pretenses under Massachusetts General Statutes, chapter 161, section 54. (Gray, C. J., Ames and Soule, JJ., dissenting.) *Commonwealth v. Harkins*, 128 Mass., 79.

A conviction of obtaining property under false pretenses is sustained by proof that the pretenses had controlling influence with the party defrauded, although, perhaps, not the sole inducement. *State v. Tessier*, 32 La. Ann., 1227.

An indictment for obtaining money under false pretenses is sufficient if it states facts which show that the representations used were such as would deceive a man of common intelligence. *Miller v. State*, 73 Ind., 88.

A false statement by the seller, in making the sale of a horse, that he is "sound and kind," if made as a representation of fact, and known to him to be false, is a false pretense within Massachusetts General Statutes, chapter 161, section 54. *Com. v. Jackson*, 132 Mass., 16.

Where a manufacturer of sewing machines was induced to deliver a machine to defendant, relying on his representations, which were false, that he resided in a particular locality, *held*, that this was an indictable false pretense, though the manufacturer might have ascertained the truth by inquiry. *Woodbury v. State*, 69 Ala., 242.

Where, upon an exchange of personal property, one of the parties falsely and fraudulently pretends that the property which he is parting with belongs to himself and is unincumbered, and also warrants it against incumbrances, an indictment may be sustained against him if the false pretense, and not the warranty, was the inducement which operated upon the other party to make the exchange. *State v. Dorr*, 33 Me., 498.

A false representation by defendant that a mortgage which he gave was a first mortgage, being urged thus to represent by the actual first mortgagee, is not such false pretense as to render defendant guilty of larceny under Mansf. Dig. Ark., § 1645, providing that one who obtains anything of value from another by reason of false pretenses, with intent to defraud, shall be guilty of larceny, etc., since the first mortgagee, by urging such false representation, waived his prior lien, and thus rendered the mortgage fraudulently obtained a first mortgage, and therefore the pretense was not actually false. *State v. Asher*, 50 Ark., 427.

The Penal Code of California, section 532, provides that "every person who knowingly and designedly, by false or fraudulent representations or pretense, defrauds any person of money or property," is punishable. *Held*, that a statement by defendant that he had credit with the firm on which the draft was drawn for its amount, and that the firm would honor the draft, when he knew that he had no credit with the firm and that the draft would not be honored or paid, was within the statute. *People v. Wasservogle*, 77 Cal., 173.

On indictment for obtaining goods under false representations that a certain crop to be raised was not subject to a mortgage, it appeared that a mortgage, which it was alleged covered the crop in question, did not specify the

land on which it was to be raised. *Held*, that no property passed by such mortgage, that the defect could not be cured by parol evidence, and that there was therefore no false representation. *State v. Garris* (N. C.), 4 S. E., 633.

In the trial of one for obtaining goods by false pretenses, evidence of defendant's conduct in the disposition of the goods is admissible on the question of his intent in obtaining them. *State v. Lichliter*, 95 Mo., 402.

One who, at a cotton-gin, claims cotton belonging to another, and has it ginned and bailed with his and delivered to him, is not guilty of obtaining goods under false pretenses, but of larceny, if of any offense. *Hughes v. State* (Ark.), 11 S. W., 693.

As a matter of pleading, the question of the sufficiency of such representations to deceive a man of common understanding is one of law for the court. *State v. Burnett*, 19 Ind., 392.

An indictment charged that defendant represented himself to be a practicing physician; that he had restored sight to the blind; that he represented to A. that his house and the bed occupied by his grand-daughter were infected with poison; that his grand-daughter was poisoned; that he would find and remove the poison for valuable consideration; that A. relying upon these false and fraudulent representations, and believing them to be true, paid to defendant $22, etc. *Held*, sufficient to sustain a conviction for obtaining goods under false pretenses. *Bowen v. State*, 9 Baxter (Tenn.), 45; *S. C.*, 40 Am. Rep., —.

It was contended that these false pretenses were such as would not have been credited by one exercising ordinary caution, but the court decided that A. being an ignorant and superstitious negro, and being, in fact, imposed upon, defendant's contention was without weight. *Id.*

On trial of an indictment for obtaining money by false pretenses, it must be shown that the accused, and not merely a third person, received it. *Willis v. People*, 19 Hun (N. Y.), 84.

An indictment will lie for pointing out to a purchaser valuable property as that sold by him, and, in fact, conveying other property which is worthless; and in such case, the indictment need not allege want of ownership in the vendor of the property so pointed out. *State v. McConkey*, 49 Iowa, 499.

In a prosecution for obtaining money by false pretenses, evidence showing the steps preliminary to the commission of the crime is admissible when tending to show the intent. *People v. Winslow*, 39 Mich., 505.

A check representing funds in bank is a "thing of value," the obtaining of which by false pretenses is indictable under Ohio Revised Statutes, section 7076. *Tarbox v. State*, 38 Ohio St., 581.

At the trial upon an indictment for obtaining a horse by purchase on credit, for which a note was given by falsely pretending to be the owner of valuable unincumbered real estate, evidence to show that the note had not been paid is admissible. *State v. Hill*, 72 Me., 238.

When one obtains credit by falsely pretending that he is the owner of property which he does not own, the fraud consists not in the misrepresenting his intentions to pay, but in misrepresenting his ability to pay. *Id.*

The doctrine of constructive notice of an existing mortgage because of its record does not apply to indictments for obtaining credit by falsely pretending to be the owner of valuable real estate upon which there is no existing

mortgage. It is no defense in such case that the party deceived relied upon the statements made without examining the public records. *Id.*

An influential and intentionally false representation by the seller to the purchaser on the sale of a horse that the horse is sound, kind and true, the falsity not being apparent, is indictable as false pretenses. The fact that the vendor gave a written warranty does not relieve him from the penal effect of his act. *Watson v. People*, 87 N. Y., 561.

All who participate in the proceeds of a check obtained by false pretenses are equally guilty, although the check may have been delivered to one in the absence of the others jointly indicted for the same offense. *Jones v. United States*, 5 Cranch, C. C., 647; S. P., *Cowen v. People*, 14 Ill., 348; *Com. v. Harley*, 7 Metc. (Mass.), 462.

False representations made to an agent, if he has authority to sell the articles obtained by such false pretenses, will be sufficient to maintain an information, although the principal did not act upon the representations made otherwise than through the agent. *People v. Wakely*, 62 Mich., 297.

Evidence of offense.— Evidence that defendant before this transaction had drawn out drafts on the same firm, which had not been paid, is admissible, as tending to show that he had no credit with the firm, and must have known that the draft in question would not be honored. *People v. Wasservogle*, 77 Cal., 173.

On an indictment for obtaining money by falsely representing the qualities of a horse, and thereby inducing a purchase for a price far above its value, evidence of defendant's parol statements is admissible, though, after the sale and payment, written bills of sale were signed, containing specific warranty, and a clause stating the sale to have been on said warranty and not on parol representations. *Jackson v. People*, 18 N. E. (Ill.), 286.

Evidence that defendant had been engaged in renting private stables, advertising horses with a fictitious reason for being willing to sell; that he dealt in wind-broken, heavy and balky, as well as other, horses, is admissible, not to show other offenses, but as tending to prove his experience in the business, and therefore his knowledge of the falsity of the representations in the particular case. *Id.*

On an indictment for obtaining goods by falsely pretending that the defendant was acting as a broker of an undisclosed principal, the vendor may testify that he gave credit to such principal, although in his books of account he entered the transaction as a sale to the defendant, and made out a bill of parcels in that form; and it is proper to submit it as a question of fact to the jury to determine to whom the credit was in fact given. *Com. v. Jeffries*, 7 Allen (Mass.), 548.

On an indictment for obtaining goods under false pretenses, evidence that the defendant was deeply insolvent at the time of making the false representations relied on is competent against him, for the purpose of showing his intent. *Id.*

In such indictment, an averment that the defendant falsely pretended that he had an order from a certain person, whose name he did not disclose, to purchase the goods at a certain price, is sustained by proof that he falsely pretended that he had an order from the person to purchase the goods, and accordingly bargained for them on his behalf at that price. *Id.*

STATE v. BURNETT.

(119 Ind., 392.)

FALSE PRETENSES: *Criminal law.*

1. Representations that defendant was a witch doctor and could kill and destroy witches; that the person to whom the representations were made was the victim of witches; and that unless he employed defendant to exorcise them they would kill him and his family, constitute no offense, being mere expressions of opinion, and not calculated to deceive a man of common understanding.
2. As a matter of pleading, the question of the sufficiency of such representations to deceive a man of common understanding is one of law for the court.
3. If an affidavit on which a prosecution is based is bad for any reason, it is the duty of the court to sustain a motion to quash it without reference to the particular ground assigned in the motion.

Appeal from circuit court of Lake county; E. C. Field, judge.

Defendant, William H. Burnett, was prosecuted for obtaining money under false pretenses, the complaint being based upon the following affidavit:

"Paul Malch swears that Dr. W. H. Burnett, whose christian name is unknown to this affiant, late of the county and state aforesaid, on or about the 30th day of January, A. D. 1889, did then and there, at and in said county, feloniously, falsely and knowingly pretend to him, said Paul Malch, with intent to cheat and defraud him, said Paul Malch, at and for the purpose of obtaining the property of the said Paul Malch, hereinafter mentioned, that he, the said W. H. Burnett, was then and there a 'witch doctor,' and that he could kill and destroy witches, and that he, the said Paul Malch, was being bothered and tormented with witches, and that witches were the cause of all the troubles of said Paul Malch, and that unless the said Paul would give him, the said W. H. Burnett, one colt, eight months old, and one cow and one ham and two chickens, the property of the said Paul Malch, all of which were of the value of eighty-five dollars ($85), that the said witches would kill him, the said Paul Malch, and his family, and that some of the neighbors would burn his barn up; and that if he, the said Paul Malch, would turn over, give and de-

liver to him, the said Dr. W. H. Burnett, all of said property, as aforesaid, that he, the said Dr. W. H. Burnett, would kill or destroy all of said witches and save him, the said Paul Malch, and his family from further trouble with them; that the said Paul Malch, relying upon said representations and false statements so made by the said Dr. W. H. Burnett, and believing the same to be true, and having no other means of ascertaining the contrary, was thereby induced to and did then and there turn over, give up and deliver to the said Dr. W. H. Burnett all of said property, as aforesaid; that by means of the pretenses aforesaid, and with the intent and knowledge aforesaid, the said Dr. W. H. Burnett did then and there obtain from the said Paul Malch the property aforesaid; whereas, in truth and in fact, the said Dr. W. H. Burnett was not a witch doctor, and had no power over witches, and the said Paul Malch nor any of his family were not trouble or harassed by witches, all of which he, the said Dr. W. H. Burnett, then and there well knew; — contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Indiana. PAUL MALCH.

"Subscribed and sworn to before me this 5th day of February, 1889. GEO. I. MAILLET, Clerk."

The court quashed the affidavit and the state appeals.

C. N. Morton, for appellant.
John B. Peterson, for appellee.

BERKSHIRE, J. This is an appeal by the state as provided in section 1882, Revised Statutes of 1881. The court below quashed the affidavit, and the only question presented for our consideration is as to the correctness of that ruling. There is an agreement on file, signed by the attorney for the appellee and the prosecuting attorney, stating that the only objection made to the affidavit was that the false representations charged were not such as might deceive a man of common intelligence. We cannot regard the agreement. If the affidavit was bad for any reason, whenever a motion to quash it was presented, it was the duty of the court to sustain the motion, without reference to the ground upon which the defendant's attorney rested his motion. We are of the opinion that the affidavit

was bad for the reason that the false representations charged were not such as a man of common understanding was justified in relying upon, and because the representations consisted principally in expressions of opinion, and not of existing facts. Counsel for the state contends that as to whether the representations were calculated to deceive was a question of fact and not of law. The correctness of counsel's position depends upon the manner in which the question arises. As a question of evidence, it is a question of fact; but as a question of pleading, it is a question of law. The authorities to which our attention has been directed are not in opposition to the rule as we have stated it. We do not care to set out the affidavit, or even its substance. Judgment affirmed.

STATE v. HILTON.

(35 Kan., 338.)

FORGERY.

1. FORGERY — WHAT CONSTITUTES OFFENSE. — A false instrument or writing, made out with criminal intent to defraud, which is good on its face, may be legally capable of effecting the fraud, even though inquiry into extrinsic facts, or matters not appearing on its face, would show it to be invalid, even if it were genuine; therefore, the forging of such an instrument or writing is an offense under the statute (secs. 120, 139, Crimes Act).
2. SAME — LIFE INSURANCE BLANKS — PROOFS OF DEATH. — One B. had his life insured in a mutual benefit insurance company of Ohio. One of the officers of the company received a notice that B. had died in this state. Upon receiving the notice he forwarded blanks for proof of death to the address of the beneficiary in the policy of the alleged deceased, the blanks being in the forms of proofs of death in use by the company. The defendant was appointed a committee to investigate the cause of the death of B., and after a short time the proofs of death were sent by him from this state to an officer of the insurance company in Ohio. These proofs of death were false and untrue, because, in fact, B. was not dead, as alleged. The papers returned by the defendant to the company were headed: "Official Notice and Proof of Death." On the first page there appears in blank "the foregoing, and the report of the committee, together with the certificates thereunto annexed," with certain questions purporting to be answered concerning the death of the alleged deceased. On page 2 is the certificate of

the attending physician, with the statement of an officer, under oath, that the physician is respectable, entitled to credit and engaged in active practice. On the third page is a report of the council examining committee on the cause of the alleged death, and on the same page an undertaker's affidavit and a clergyman's certificate; the first stating when the remains of the alleged deceased were interred, and the other giving the date of the funeral of the alleged deceased. On the fourth page are blanks for certain officers of the insurance company to sign, setting forth that they have examined the reports and certificates of the death of the member, and approved the same. The blanks on this page were never signed or filled up. Upon receiving the proofs of the alleged death, the insurance company discovered that there was a material discrepancy in the proofs presented, in this: from the certificate of the attending physician and the statement of the committee appointed to examine the cause of the alleged death, it appeared that the alleged deceased died May 2, 1885, while the undertaker's affidavit and clergyman's certificate showed that the funeral of the alleged deceased and his burial were prior thereto, to wit, on March 4, 1885. The defendant was thereupon arrested for the forgery of the undertaker's affidavit and the clergyman's certificate. *Held*, that the false affidavit and certificate which the defendant executed must be treated as complete and separate instruments, and the same as though they were wholly detached from the other papers constituting the proofs of death; and being in the exact form required by the insurance company, and not being in any way invalid or defective upon their faces, are the subject of forgery, within the terms of the statute (secs. 129, 139, *supra*).

Appeal from Mitchell county

On October 22, 1885, there was filed in the district court of Mitchell county, by the county attorney of that county, an information containing twelve counts, against W. H. Hilton and Joel Miley. The first and second counts thereof were in words and figures, to wit:

"*First count.* I, F. J. Knight, county attorney of, within and for the county of Mitchell and state of Kansas, aforesaid, in the name, by the authority, and on behalf of the state of Kansas, come now here and give the court to understand and be informed that on or about the twentieth day of June, A. D. 1885, and at and within the county of Mitchell and state of Kansas, aforesaid, one W. H. Hilton and one Joel Miley, persons then and there being, unlawfully, falsely, fraudulently and feloniously then and there did make, forge and counterfeit one certain instrument and writing purporting to be the act of another,—that is to say, of N. G. Munn,—by which

instrument and writing a certain pecuniary obligation purported to be transferred, the said instrument and writing then and there being in the words and figures following, that is to say:

"'UNDERTAKER'S CERTIFICATE.

"'I, N. G. Munn, do hereby certify that I am an undertaker, residing at No. —, ——— street, city of Mitchell, state of Kansas, and as such undertaker I attended the funeral of C. W. Brown, and that his remains were interred in the —— cemetery, at [city or town of] Mitchell, on the fourth day of March, 1885. N. G. MUNN.

"'Signature of Undertaker.

"'Sworn and subscribed to before me this twenty-second day of June, 1885. "'S. PEELE, J. P.'

With the intent then and there and thereby, falsely, unlawfully and feloniously, to cheat and injure, and to defraud of the sum of five thousand dollars, the National Union of Mansfield, Ohio, a corporation duly organized, incorporated, existing, and acting under and by virtue of the laws of the state of Ohio, which said corporation, on or about the twelfth day of July, A. D. 1884, issued to one Sarah Brown, the wife of the said C. W. Brown, one certain certificate or policy of insurance, whereby the said corporation, for a valuable consideration, well and truly undertook and promised to pay to the said Sarah Brown the sum of five thousand dollars upon the decease of the said C. W. Brown, and the reception by said corporation of proof of such decease; and which said certificate or policy of insurance was valid, outstanding and in force at the time of the false making, forging and counterfeiting of the aforesaid instrument and writing; and the said W. H. Hilton and Joel Miley so as aforesaid did falsely make, forge and counterfeit the aforesaid instrument and writing for the purpose and with the intent of causing the said instrument and writing to be presented to the said corporation as and for proof of the decease of the said C. W. Brown, and with the intent to procure from the said corporation, and to cheat and defraud the said corporation out of, the said sum of five thousand dollars,— which the said corporation had, by the terms of its said certificate and policy of insurance, undertaken and agreed to

pay upon the reception by the said corporation of proof of the decease of said C. W. Brown.

"*Second count.* I, the undersigned, county attorney of said county, do hereby give the court here to understand and be informed that on or about the twentieth day of June, A. D. 1885, and at and within the county of Mitchell and state of Kansas, as aforesaid, one W. H. Hilton and Joel Miley, persons then and there being, then and there unlawfully, falsely, fraudulently and feloniously did make, forge and counterfeit one certain instrument and writing, purporting to be the act of another,— that is to say, of H. G. Miller,— by which instrument and writing the right and property of, in and to the sum of five thousand dollars purported to be effected, the said instrument and writing then and there being in the words and figures following, that is to say:

"'CLERGYMAN'S CERTIFICATE.

"'I, H. G. Miller, do hereby certify that I am a clergyman, residing at Blue Hills, Kans., and that I officiated at the funeral of the late C. W. Brown, on the fourth day of March, 1885.

"'H. G. MILLER.

"'Signature of Clergyman.'

With the intent then and there and thereby, falsely, unlawfully and feloniously to cheat and injure, and to defraud of the sum of five thousand dollars, the National Union, of Mansfield, Ohio, a corporation duly organized, incorporated, existing and acting under and by virtue of the laws of the state of Ohio; which said corporation, on or about the twelfth day of July, A. D. 1884, issued to one Sarah Brown, the wife of C. W. Brown, one certain certificate or policy of insurance, whereby the said corporation, for a valuable consideration, well and truly undertook and promised to pay to the said Sarah Brown the sum of five thousand dollars upon the decease of the said C. W. Brown and the reception by said corporation of proofs of such decease, which said certificate or policy of insurance was valid, outstanding and in force at the time of the false making, forging and counterfeiting of the said instrument and writing as aforesaid; and the said W. H. Hilton and Joel Miley so as aforesaid did falsely make, forge and counterfeit the aforesaid instrument and writing for the

purpose and with the intent of causing the said instrument and writing to be presented to the said corporation as and for proof of the decease of the said C. W. Brown, and with the intent to procure from the said corporation, and to cheat and defraud the said corporation out of, the said sum of five thousand dollars, which the said corporation had, by the terms of its said certificate and policy of insurance, undertaken and agreed to pay upon the reception by the said corporation of proof of the decease of the said C. W. Brown."

The alleged proof of death, and the papers to which the undertaker's certificate and the clergyman's certificate above referred to were attached, was in the following words and figures, to wit:

"[Official Notice and Proof of Death.]

"SENATE OF NATIONAL UNION.

"Hall of Mansfield Council, No. 85, located at Mansfield, State of Ohio.

"*To Geo. W. Harn, Senate Secretary, National Union:* By vote of this council we are instructed to certify that friend Charles W. Brown, a 5th-rate member of this council, died at Blue Hills, state of Kansas, in good standing in the order, on the second day of ——, 1885, at 3 o'clock, P. M. Deceased was admitted to the order, May 3, 1884; residence at date of initiation, Indianapolis, Ind.; age assessed at initiation, 28 years; amount of first assessment, $ one 44-100; age at death, 29 years; amount of last assessment, $ one 45-100; No. of benefit certificate, 4,000; No. on Roll-book, 44; cause of death, congestion of the lungs; first assessment paid by deceased at initiation, No. 12; deceased was suspended, ——; cause of suspension, ——; deceased was reinstated, ——; assessments not paid during suspension, ——; last assessment paid by deceased, No. —; total amount paid by deceased to benefit fund, $ fifteen 65-100; residence at time of death, Blue Hills, state of ——; person or persons named in the benefit certificate to whom the benefit is to be paid (relationship must be stated), Sarah Brown, wife.

"*Questions to be Answered.*

"Are all the persons named in the benefit certificate living? (If either is dead, give the name and date of death, and for-

ward proof of such death to the senate secretary.) *Answer.* Yes. Are any of the beneficiaries minors? If so, give the name and age. *A.* No. Has a guardian of the estate of the minor beneficiary been appointed? (If the answer is 'Yes,' certificate from the proper court of such appointment and of filing of bonds must be forwarded to the senate secretary, with this notice, if possible; and if not possible, the time when it can be forwarded should be stated. Certificate must be received by senate secretary before draft can be issued.) *A.* There are no minors. Where do the beneficiaries reside? In Mitchell Co., Kansas.

"The foregoing, and the report of the committee, together with the certificates hereunto annexed, were read in open council on the fifth day of August, 1885, approved, noted in council minutes, and ordered to be transmitted herewith to the senate secretary.

"In witness whereof we have hereunto set our hands and affixed the seal of the above-named council, on this —— day of ——, 188–.

[Council Seal.] "Yours in L., P., T.,

"—— ——, Council President.

"—— ——, Council Secretary.

"ATTENDING PHYSICIAN'S CERTIFICATE.

"——, State of ——, ——, 188–.

"This is to certify that I was the attending physician in the last sickness of Charles W. Brown, and that he died at Blue Hills, state of Kansas, on the second day of May, 1885, at 3 o'clock P. M. Cause of death, congestion of the lungs; duration last sickness, 3 days.

"*Questions to be Answered.*

"(1) How long have you practiced medicine? *Answer.* 13 years. (2) Where did you receive your medical education? *A.* Graduated at Keokuk, Iowa. (3) Name of deceased? *A.* Charles W. Brown. (4) How long, if ever, were you the medical adviser of deceased? *A.* Only in his last illness. (5) Had deceased any other medical adviser? If so, give name and address. *A.* No. (6) Date of your first prescription or visit in last sickness of deceased. *A.* April 30th. (7) Had the

deceased been suffering from this illness before you prescribed for him? If so, how long? *A.* No. (8) Date of your last visit? *A.* May 2, 1885. (9) Were there any pre-existing diseases, habits, tendency to disease, or infirmities which may have had an influence in causing or hastening deceased's death? *A.* No. (10) Give an account of the principal symptoms and progress of the disease? *A.* Chilliness; dys——; cough; spitting of blood; rapid pulse, and prostration. (11) State the cause of death and whether or not there was a *post-mortem* examination. If so, what was shown by it? *A.* Congestion of lungs. No *post-mortem.* (12) Was there anything in the habits of deceased, his occupation, or family history, that rendered him liable to this disease or any other? *A.* No. (13) State any other facts pertaining to last sickness and death of deceased? *A.* I have none. J. MILEY, M. D.

"Signature of Attending Physician.

"*State of Kansas, County of Mitchell — ss.:* Personally appeared before me, on this sixteenth day of June, 1885, the above-named —— ——, personally known to me as the physician whose name is subscribed to the foregoing affidavit, and whom I know to be a respectable physician, entitled to credit, and engaged in active practice at Beloit, county of Mitchell, and state of Kansas, and made oath before me, a clerk of district court, that the foregoing statement made by him is true.

"Witness my hand and official seal the day and year above stated. JOHN MEHL,

[Seal.] "Clerk of District Court.

"[N. B. The above affidavit must be made before a clerk of court, justice of the peace, or notary public. If made before a justice of the peace or notary public, a certificate from the proper authority, showing that he is authorized to act, must be attached.]

"REPORT OF COUNCIL EXAMINING COMMITTEE ON CAUSE OF DEATH.

"Hall of —— Council, No. —, N. U., located at ——, County of ——, State of ——.

"*To the Officers and Members of Above Council, N. U.:* Your committee appointed to investigate the cause of the death of friend Chas. W. Brown, late a 5th-rate member of

this council, and also of all the circumstances attending and connected with said death, do hereby report that they have duly made such investigation, and report the following facts: Cause of death, congestion of lungs; date of death, second day of May; duration last sickness, just 3 days; place of death, Blue Hills, Mitchell county, Kansas; name and address of attending physician, Joel Miley, Beloit, Kansas; name and address of undertaker, N. G. Munn, Blue Hills district; cemetery and town where buried, county grave-yard, in vicinity of church; residence of deceased at time of death (if in city, give street and number), Mitchell Co., Kansas; names of members of this council who saw and identified the remains as those of the above-named deceased friend: ——. (If the council attended the funeral in a body, enter a few names only, and say 'and others.' A number of names of members who attended should be entered.)

"(Include herein anything relating to the deceased which the committee deem worthy of mention.)

"Remarks: I learned, on inquiry, that friend Brown's habits of life were correct, and health very good up to a very short term before his last illness.

[Signed by] "W. H. Hitten, Committee.

[Council Seal.]

"Attested by:

"—— ——, Secretary. —— ——, President.

"*Dated*, ——, 188–.

"Name and address of treasurer of council, —— ——.

"UNDERTAKER'S CERTIFICATE.

"I, N. G. Munn, do hereby certify that I am an undertaker, residing at No. —, —— street, city of Mitchell, state of Kansas, and as such undertaker I attended the funeral of C. W. Brown, and that his remains were interred in —— cemetery, at [city or town of] Mitchell, on the fourth day of March, 1885. "—— ——.

"Signature of Undertaker.

"Sworn and subscribed before me this twenty-second day of June, 1885.

[Seal of Court.] "S. Peele, Justice of the Peace.

"CLERGYMAN'S CERTIFICATE.

"I, H. G. Miller, do hereby certify that I am a clergyman, residing at Blue Hills, Kas., and that I officiated at the funeral of the late C. W. Brown on the fourth day of March, 1885.

"—— ——. —— ——.

"Signature of Witness. Signature of Clergyman.

"[Erase all except title of office.]

"☞ NOTE — The senate can call for additional proof if deemed necessary.

"MEDICAL DIRECTOR'S CERTIFICATE.

"——, 188–.

"*To* —— ——, *Senate Secretary:* I hereby certify that I have examined the within reports and certificates, and believe them to be —— correct, and —— approve of including the within-mentioned death in the next assessment, and of issuing a draft on the benefit fund in favor of the beneficiaries for the amount they are entitled to, in accordance with the laws and usages of the order relating thereto.

"Record and publish the cause of death as follows: ——.

"Remarks: ——.

[Signed] "—— ——, M. D.,

"Medical Director of the Senate of the N. U.

"CERTIFICATE OF THE PRESIDENT OF THE SENATE.

"——, 188–.

"*To* —— ——, *Senate Secretary:* I hereby certify that I have examined the within reports and certificates, and believe them to be —— correct, and hereby —— approve of including the within mentioned death in the next assessment, and of issuing a draft on the benefit fund in favor of the beneficiaries for the amount they are entitled to, in accordance with the laws and usages of the order relating thereto.

"Remarks: ——.

[Signed] "—— ——,

"President of the Senate of the N. U."

Indorsed: "Death No. 634. Senate National Union. Received by senate secretary, ——, 188–; forwarded to medical director, ——, 188–; forwarded by medical director to senate president, ——, 188–; received by senate secretary, ——, 188–. *Memoranda:* ——."

Trial had at the October term for 1885. On November 5, 1885, the jury returned a verdict of guilty against the defendant of the crime of forgery in the third degree, as charged in the information. Subsequently a motion in arrest of judgment was filed, and also a motion for a new trial. These were overruled, and the defendant was sentenced to be confined at hard labor in the penitentiary of the state for the term of seven years from November 13, 1885, and also was adjudged to pay all the costs of the prosecution, taxed at $204.30. He appeals to this court.

S. B. Bradford, attorney-general, and *F. J. Knight*, for appellee.

H. A. Yonge, *Horace Cooper* and *Holt & Hicks*, for appellant.

HORTON, C. J. The facts in this case are these: Charles W. Brown had his life insured in a mutual benefit insurance company of Mansfield, Ohio, called the "National Union," for the sum of $5,000, payable on proof of his death to Sarah Brown, his wife. This insurance company conducted its business chiefly through a number of men selected by the policy-holders, who constituted a body called the "Senate of the National Union." The defendant was a policy-holder in the company, and formerly resided at Mansfield. He held an office in the company known as "Deputy Senator." The duty of such officer was, in part, to organize councils, which bore the same relation to the senate that subordinate lodges of Masons bear to the grand lodge of the state. He located at Beloit, in this state, in the spring of 1885. Soon after, the secretary of the council to which Charles W. Brown belonged received notice that he had died at Blue Hills, Mitchell county, in this state. Upon the receipt of this intelligence, the secretary forwarded blanks for proof of death to the address of Mrs. Sarah Brown, the blanks being the forms of proof of death in use by the company. The defendant was then appointed by the council to which Brown belonged a committee to investigate the cause of his death, and after a short time the proofs of death were sent by the defendant to the secretary of the council. Dr. Joel Miley made affidavit that Brown died May 2, 1885, after an illness of three days, and John Mehl made statement that Miley

was a respectable physician, entitled to credit and in active practice. The affidavit of Miley was false, though made and signed by himself. The defendant made a statement, signed by himself, upon the third page of the "Proof of Death," that Brown died May 2, 1885, but this was also false. Attached to this proof of death were the following affidavit and certificate:

"UNDERTAKER'S CERTIFICATE.

"I, N. G. Munn, certify that I am an undertaker, residing at No. —, —— street, city of Mitchell, state of Kansas, and as such undertaker I attended the funeral of C. W. Brown, and that his remains were interred in —— cemetery, at Mitchell, on the fourth day of March, 1885.

"N. G. MUNN.

"Sworn and subscribed before me this twenty-second day of June, 1885. S. PEELE, J. P."

"CLERGYMAN'S CERTIFICATE.

"I, H. G. Miller, do hereby certify that I am a clergyman, residing at Blue Hills, Kan., and that I officiated at the funeral of the late C. W. Brown, on the fourth day of March, 1885.

"H. G. MILLER."

Upon receiving the papers containing the alleged proof of death, the secretary of the senate of the National Union at once discovered that in the statement of the defendant it appeared that Charles W. Brown had not died until May 2, 1885, while the undertaker's and clergyman's certificates showed that Brown had been buried on March 4, 1885. The secretary at once wrote to the defendant as to this discrepancy, and he answered if the papers were returned to him he would try to have the errors corrected, as they were simply clerical. The papers were not returned, nor were the proofs approved, and no money was paid upon the policy issued to Brown. Subsequently, an information was filed by the county attorney of Mitchell county, in this state, against the defendant, charging him with the forgery of the "Undertaker's Certificate" and the "Clergyman's Certificate," sent to the secretary of the National Union to obtain the payment of $5,000 upon the life policy taken out by Charles W. Brown in the National Union. Upon the trial the defendant was convicted

of forgery in the third degree, and sentenced to confinement and hard labor for the term of seven years.

From the judgment he appeals to this court.

The contention of counsel for defendant is that the making of the affidavit of the undertaker and the certificate of the attending clergyman could not, in this instance, be forgeries, and in support thereof cites the rule of criminal law that an instrument void upon its face cannot be subject of forgery, because it has no legal tendency to effect a fraud. In support of this contention it is claimed that the affidavit and certificate were a part of the "Official Notice and Proof of Death," and that all the papers constitute one instrument only; that other recitations in the instrument are so repugnant and irreconcilable to those set forth in the affidavit of the undertaker and the certificate of the clergyman, that the whole death proof is a mere nullity, and absolutely void upon its face. The claim of counsel is more plausible than sound. We concede that a writing invalid on its face cannot be the subject of forgery, but a false instrument, which is good on its face, may be legally capable of effecting a fraud, though inquiry into extrinsic facts should show it to be invalid, even if it were genuine; therefore the forging of such an instrument is a crime. Secs. 129, 139, Act Regulating Crimes and Punishments; 2 Bish. Crim. Law (7th ed.), §§ 538–541. These papers headed "Official Notice and Proof of Death" embrace several separate and complete documents or written instruments. On page 1 we have a statement, with questions answered; on page 2 the certificate of the attending physician, with the statement of an officer, under oath, that the attending physician is respectable, entitled to credit and in active practice; on the third page there is a report of the council examining committee on the cause of death, and on the same page the undertaker's affidavit and the clergyman's certificate; on the fourth page are blanks for the medical directors and president of the senate. The undertaker's affidavit and clergyman's certificate, as executed, are complete and separate instruments, and are not defective, or in any way invalid, on their faces. It is true that all these separate and independent instruments are necessary to complete the proof of death; but, in our opinion, the undertaker's affidavit and the clergyman's certificate, as executed, are as complete and separate instruments as though they were

wholly detached from the other papers constituting the proof of death. We do not think that where a certain number of written instruments are required to be presented in connection with each other as indispensable to establish any alleged fact, that a person who falsely and fraudulently makes one or more of these written instruments is guiltless of offense because he does not falsely make all, or because, in some of the other written instruments to be presented, a discrepancy or defect occurs which prevents the accomplishment of his fraudulent purpose. The undertaker's affidavit and the clergyman's certificate are in the exact form required, and we think are the subject of forgery, within the terms of the statute. Secs. 129, 139, *supra*. The fraud of the defendant was not defeated by the form of the forged affidavit, or the forged certificate, but only through an examination of the other written instruments. That these written instruments are connected or attached together we do not think exculpates the defendant. The case before us is the same as where the invalidity of an instrument depends on some fact not appearing on its face; that is, not appearing upon the face of the forged paper or instrument. *People v. Galloway*, 17 Wend., 540.

Complaint is made of the ninth instruction given by the court, to the effect that the crime of forgery is complete when the written instrument is made and forged with criminal intent. No exception, however, was taken to this instruction by the defendant, and therefore no question is before us concerning the correctness of the instruction for our determination. Complaint is also made of the reception of certain evidence, the giving of certain other instructions, and the refusal of the court to compel the state to elect upon which of the counts of the information it would rely for a verdict. We have examined all of these matters, but we discover no errors in the proceedings affecting prejudicially the substantial rights of the defendant. Sec. 293, Crim. Code; Whart. Crim. Pl. & Pr. (8th ed.), §§ 285, 290, 293; *Noakes v. People*, 25 N. Y., 380.

The judgment of the district court will be affirmed.

(All the justices concurring.)

NOTE.— *What constitutes.*— The Oregon court in a late case, in deciding that the execution of a promissory note in the name of a fictitious person or

under an assumed name with an intent to defraud is forgery, discusses in a very able manner the constituent elements of the offense, and says:

"Forgery is defined by Blackstone to be 'the fraudulent making or alteration of a writing to the prejudice of another's rights.' 4 Bl. Comm., 247. Willes, J., in *Reg. v. Epps*, 4 Fost. & Epp., 81, says: 'Forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document really in existence as it appears on the face of it, when in fact there is no such genuine document really in existence as it appears on the face of it to be.' In *State v. Wooderd*, 20 Iowa, 541, Dillon, J., says: 'The making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery.' Mr. Bishop says: 'Forgery' is the false making or materially altering with intent to defraud of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability.' 2 Bish. Crim. Law, § 523. Section 1808, Hill's Code, provides that, 'if any person shall, with intent to injure or defraud any one, falsely make, alter, forge or counterfeit . . . any bill of exchange, promissory note or evidence of debt, . . . shall be punished in the penitentiary not less than two nor more than twenty years.' From the definitions of 'forgery' as above stated, as well as from the statute, it will be seen that the essential elements of the crime are (1) a false making of some instrument in writing; (2) a fraudulent intent; (3) an instrument apparently capable of effecting a fraud. That the first and third ingredients above stated appear in this case cannot be doubted. The note executed by defendant under the name of John Williams is certainly a false note. It is not what it purports on its face to be; is false, not genuine; fictitious, not a true writing. The falsity of the note consists in its purporting to be the note of some party other than the one actually making the signature. It purports to be a note of one John Williams, while the signature was made by the defendant; and, although the defendant represented that his name was John Williams, if he assumed that name for the purpose of defrauding, and under such a name executed the promissory note in this case with an intent to defraud Milner, such an act would constitute forgery. 2 Bish. Crim. Law, § 583. The law is well settled that the signing of a fictitious name to an instrument with a fraudulent intent constitutes forgery. 8 Amer. & Eng. Enc. Law, 457 and note; *People v. Brown*, 72 N. Y., 571; *State v. Hahn*, 38 La. Ann., 169; *Luttrell v. State*, 85 Tenn., 232; 2 Whart. Crim. Law, § 1424; 2 Russ. Crimes, 733. As was said in *Com. v. Costello*, 120 Mass., 370: 'The essential element of forgery consists in the intent, when making the signature or procuring it to be made, to pass it off fraudulently as the signature of another party than the one who actually makes it. If this intent thus to personate another exists, the instrument is still a forgery, even if the name affixed is actually the same name with that borne by the party who signs it. So there may be forgery by the use of a fictitious name as well as by the use of a person's own name, if the intent exists to commit a fraud by deception as to the identity of the person who uses the name.'

"In *Shepherd's Case*, 1 Leach, 226, the prisoner purchased some silverware of the prosecutor, giving in payment therefor a draft which he indorsed with the name 'H. Turner, Esq.,' his true name being Shepherd. The prosecutor testified that he gave credit to the prisoner, and not to the draft,

the prisoner being a stranger to him. The jury found the prisoner guilty, and on a case reserved on the question whether, as the prosecutor had sworn that he gave credit to the prisoner and not to the draft, it could amount to the crime of forgery, the twelve judges were unanimously of the opinion that the conviction was right; for it was a 'false instrument,' not drawn by any such person as it purported to be, and the using of the fictitious name was only for the purpose of deceiving. So in *Whiley's Case*, 2 Leach, 983, stated by Mr. Russell in his work on Crimes, the prisoner was charged with forging a bill of exchange, drawn in the name of Samuel Milward, in payment for some goods by him purchased of the prosecutor. The prisoner's real name was Samuel Whiley, and he was a stranger to the prosecutor, who testified that he took the draft on the credit of the prisoner whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; but that, if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods, and have taken the draft from him, and paid him the balance, as he had done when he came under the name of Milward. It was left to the jury to say whether the prisoner had assumed the name Milward in the purchase of the goods, and giving the draft with intent to defraud the prosecutor; and the jury, saying they were so satisfied, found the prisoner guilty, and, upon a case reserved, the judges were of the opinion that the question of fraud being so left to the jury, and found by them, the conviction was right. So where the person accepting the instrument knew the prisoner only by his assumed name, it appearing that it was assumed for the purpose of fraud. *Rex v. Francis*, Russ. & R., 209. So where the prisoner was unknown to the person in whom the instrument was passed, who had never heard of the name assumed, and would have trusted the prisoner just as readily by his real name. *Rex v. Marshall*, id., 75. The authorities agree that forging in a false name, assumed for the purpose of concealment, and with an intent to defraud in the particular instance of the forgery, is sufficient to constitute the offense. But when a party signs a name not his own, but one which he has adopted, using it without the intent to deceive as to the identity of the person signing, it is not a forgery. *Rex v. Bontein*, id., 260; *Rex v. Peacock*, id., 278. The question of intent is material in determining the guilt of the party charged and the falsity of the instrument. It is the false making with an intent to defraud at which our statute is aimed. The term 'falsely,' as applied to making a promissory note, in order to constitute forgery, has reference not to the contract or tenor of the instrument, or the fact stated in the writing, because a note or writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the writing is false, not genuine; fictitious, not a true writing; without regard to the truth or falsehood of the statement it contains. The note must in itself be false, not genuine; a counterfeit, and not the true instrument which it purports to be. *State v. Young*, 46 N. H., 270. A person may falsely make a note, yet the note be true in point of fact; or he may make a note which is false in fact. It is the former, the falsely making of the note with the intent to defraud, which is the essential ingredient of the crime here charged. The falsely making of a note in the name of a person, as already shown, is forgery; so is the falsely making of a note under an assumed name."

What instruments may be the subjects of forgery.—A bill of costs in a fictitious case (*Luttrell v. The State*, 85 Tenn., 232; *Fonte v. The State*, 15 Lea, 712); a writing, "Please send my diploma by this young man. W. W. WOLF," the diploma being the certificate of an educational institution (*Alexander v. The State*, 28 Tex. App., 186); an order for clothing (*Stewart v. The State*, 113 Ind., 505); a printed theater ticket, although it expresses no consideration and contains no promise (*In re Benson*, 34 Fed. Rep., 649); signing one's own name with intent to pass it off as the name of another of the same name (*Bunfield v. The State*, 29 Ga., 127); the signing of a fictitious name (*Com. v. Chandler*, Thatcher (Mass.), Cr. C., 187); it is forgery for a bookkeeper to alter his journal entries (*Biles v. Commonwealth*, 32 Pa. St., 529); a mortgage (*People v. Sharp*, 53 Mich., 523; *People v. Caton*, 25 id., 388); a copy of a decree of divorce, certified by the clerk and attested by the seal of the court (*Ex parte Finley*, 66 Cal., 262); an acquittance of a specific sum of money (*United States v. Green*, 2 Cranch, C. C., 521); or a receipt in full for money (*Com. v. Talbot*, 2 Allen, 161; *Reg. v. Carson*, 14 Up. Can. C. P., 309); a writing in the common form of a receipt is an acquittance (*Com. v. Ladd*, 15 Mass., 526; *State v. Sheltens*, 51 Vt., 102; *Rex v. Martin*, 7 Car. & P., 549; *Reg. v. Houseman*, 8 id., 180; *Reg. v. Atkinson*, 1 Car. & M., 325); to falsely alter accounts after joint settlement (*Barnum v. State*, 15 Ohio, 717); the forgery of a certificate imposing no duty, or conferring no right, is no offense (*Rembert v. State*, 53 Ala., 467); but forging and uttering certificates of good character may be indictable at common law (*Reg. v. Mitchell*, 2 Fost. & F., 44); as, a certificate of character to a seaman to act as a master (*Reg. v. Toshack*, 4 Cox, C. C., 38); or that a liberated convict is gaining his living honestly, if made to obtain an allowance (*Reg. v. Mitchell*, 2 Fost. & F., 44); or a testimonial of character to obtain an appointment (*Reg. v. Sherman*, Dears. C. C., 285) as a police constable (*Reg. v. Moah*, 7 Cox, C. C., 503); or parish school-master (*Reg. v. Sherman*, Dears, C. C. 285). But a mere letter of introduction does not fall within the rule (*Waterman v. People*, 1 Am. Cr. Rep., 225): yet a letter of credit for the collection of money is within the rule (*United States v. Green*, 2 Cranch, C. C., 521). An instrument under which a mortgage is released and canceled, payment thereof being acknowledged, and which quitclaims the premises (*Meserve v. Commonwealth*, 137 Mass., 109); an indorsement of a promissory note (*Page v. State*, 3 Ohio St., 229; an indorsement or a receipt, made by the maker in the presence, with the concurrence and by the direction of the payee, on the back of a note, of the payment of money on account of the note, although such indorsement is not signed (*Kegg v. State*, 10 Ohio, 75). County warrants are subject to forgery. *State v. Fenly*, 18 Mo., 445. So of deeds of lands (*Reg. v. Ritson*, Law R. 1 C. C., 200); though lying in another state (*People v. Flanders*, 18 Johns., 163); or to insert a false date when the date is material (*Reg. v. Ritson*, Law R. 1 C. C., 200); or a false certificate of acknowledgment (*State v. Dufour*, 63 Ind., 567); a forged transfer of lands, though a blank be left for the name of the transferee (*Philips v. State*, 6 Tex. Ct. App., 364). Federal securities are subjects of forgery, and the state courts have jurisdiction. *Bletz v. Columbia Bank*, 87 Pa. St., 87. So of telegraph messages (*Reg. v. Stewart*, 25 Up. Can. C. P., 440); railroad and other tickets (see *Com. v. Ray*, 3 Gray, 441); trade-marks and labels (see 1 Whart.

C. L., 8th ed., § 690); and writings purporting to contain promises to pay in labor without consideration (*People v. Shall*, 9 Cowen, 778); a school warrant (*Crain v. State*, 45 Ark., 450); a city assessment roll (*Turbeville v. State*, 56 Miss., 793); books of a national bank, as in case the teller alters them (*Commonwealth v. Luberg*, 94 Pa. St., 85); a teacher's school certificate of qualification (*State v. Grant*, 74 Mo., 33); a recorder's certificate of record of a deed, although it fails to name the year in which it was deposited for record (*State v. Tompkins*, 71 Mo., 613, 616); a certificate of indebtedness purporting to be issued by another state, where that state has authority to issue such certificate (*People v. Brie*, 43 Hun, 317); a certificate of acknowledgment of power of attorney purporting to have been executed in another state (*People v. Marion*, 29 Mich., 31); a certificate of indebtedness issued by the mayor of a city (*Bishop & Helm v. State*, 55 Md., 138); a marriage certificate, although no marriage ever existed (*State v. Bousso*, 38 La. Ann., 202, 206); a certificate of the justice authenticating the presentation and counting of gopher scalps, for which a bounty has been offered by the board of supervisors, which is to be received by such board as a legal proof of such counting for the purposes of issuing warrants to pay county claims (*State v. Johnson*, 26 Iowa, 407; 96 Am. Dec., 158); a railroad pass (*State v. Weaver*, 84 N. C., 836; 55 Am. Rep., 647); a bail bond for appearance of a party before a court (*Costly v. State*, 14 Tex. App., 156); an undertaking in writing to pay the debt of another, as the following: "Mr. Bostick: Charge J. S. Humphreys' account to us," and signed (*State v. Humphreys*, 10 Humph., 442); a condition made at the same time and on the same paper as a promissory note is forgery where fraudulently detached (*State v. Stratton*, 27 Iowa, 420; 1 Am. Rep., 282); an order, a letter, or a mere license (*People v. Stearns*, 21 Wend., 409); an order or request for the delivery of property, although such instrument is not addressed to any one (*Noakes v. People*, 25 N. Y., 380, 382); an instrument in writing, which purports to be signed by the proper authority, that a certain number of pounds of cotton have been picked, is such an order for the payment of money as to be the basis of a prosecution for forgery (*State v. Jefferson*, 39 La. Ann., 331); an instrument which reads, "Due 8.50 c., J. D." (*Nelson v. State*, 82 Ala., 44); an order "to let bearer trade ten dollars out of your store" (5 Day, 250); a postal money-order (*Ex parte Hibbs*, 26 Fed. Rep., 421, 431–435); an order to one person to pay money to another; nor is it necessary that a definite sum of money be specified in the order (*Wright v. State*, 79 Ala., 262); an order or draft to pay money to bearer, although it means neither drawee nor payee; "it is not necessary that the order should possess all the requisites of a bill of exchange" (*State v. Baumon*, 52 Iowa, 68, 70; *People v. Brigham*, 2 Mich., 550, 555); paper which reads, "Mr. Reed: Pay L. Johnson for corn: gross, —, tare —, net —, bu. —, at — cts., $35.75. M. Reed, per J. H. R., weigher," although such instrument is partly printed and partly written (*State v. Lee*, 32 Kan., 360); an instrument which reads, "Prime Wingard 507 I. cot. T. T. P." (*State v. Wingard*, 40 La. Ann., 733), since such instruments as the above were in a form which apparently had some legal efficacy. One's signature may be forged by making a writing over it which, if genuine, would possess legal efficacy, and which, although not genuine, may operate to the preju-

dice of another's rights. *Luttrell v. State*, 85 Tenn., 232; 4 Am. St. Rep., 760.

What is not.— An instrument of writing invalid or void on its face (*John v. State*, 23 Wis., 504; *State v. Wheeler*, 19 Minn., 98; 5 Lawson's Criminal Defenses, 25; *Fadner v. People*, 33 Hun, 240, 245; 5 Lawson's Criminal Defenses, 34; *Cunningham v. People*, 4 id., 455; *People v. Shall*, 9 Cow., 778; *People v. Harrison*, 8 Barb., 560; *Hobbs v. State*, 75 Ala., 1, 5; Wharton's Criminal Law, secs. 696 *et seq.;* 2 Bishop's Criminal Law, sec. 541; *State v. Briggs*, 34 Vt., 501, 503; *Rembert v. State*, 53 Ala., 467, 469); such as a writing which reads, "hides $400/100 Sitman," and is addressed to no one (*Howell v. State*, 37 Tex., 591). However if there be extrinsic facts which show that by their aid the holder would be able to defraud another, these facts may be averred in the indictment and shown upon the trial. *State v. Briggs*, 34 Vt., 501; *Rollins v. The State*, 22 Tex. App., 548. In the case of *Williams v. The State*, 8 S. R., 825 (Ala.), the court says: "Certain writings—a promissory note, or bill of exchange, for illustration — import on their face the creation of a pecuniary liability. So of many other written instruments, if they import legal validity,— that is, if the writing shows on its face, without reference to extrinsic facts, that, if genuine, it creates, discharges, increases or diminishes a money liability, or transfers or incumbers property, or surrenders or impairs an existing valid claim to or lien on property,— then the false making of such written instrument, with intent to defraud, is, without more, forgery, and will justify a conviction of that grave offense. To fall within the rule, however, which dispenses with the averment of extrinsic facts, the writing itself must show that, if genuine, it affects some existing property right or legal liability; for otherwise it fails to show its false making or utterance could defraud any one. There must be both the intention and power to defraud, or the legal offense is not committed. This principle rests on the soundest reason and the highest authority. *Dixon v. State*, 81 Ala., 61; 2 Bish. Crim. Law (7th ed.), § 545. So a painting is not a document of writing of which forgery may be committed (*Rex v. Closs*, Dears. & B., 460; 4 Lawson's Criminal Defenses, 12); and a clearance card from a social lodge is not (*Reg. v. French*, L. R. 1 C. C., 217). A written statement that certain persons are solvent, and able to pay their notes, is not a subject of forgery (*State v. Givens*, 5 Ala., 747); and a bill of lading is not a subject of forgery (*United States v. Green*, 2 Cranch, C. C., 521); forging letters or orders issued by a bishop is not forgery of a deed (*Reg. v. Morton*, 12 Cox, C. C., 456); the false making of a diploma without intent to commit a particular fraud has been held not forgery (*Reg. v. Hodgson*, 7 Cox, C. C., 122). An engrossed copy of a senate bill is not (*In the Matter of Corrywell*, 22 Cal., 179). A letter written to another introducing a party named therein, and recommending the loan of money to him, is not a writing of which forgery could be committed (*Foulk's Case*, 2 Rob., 836); so wrappers of baking powders are not a subject of forgery (*Regina v. Smith*, Dears. & B., 566); nor is a judge's memorandum-book, which is not required by law to be kept (*Downing v. Brown*, 3 Col., 593); one's own book of account is not the subject of forgery (*State v. Young*, 46 N. H., 266; 5 Lawson's Criminal Defenses, 43); nor is a military land warrant, within an

act which enumerates an "indent" and "public securities" as subjects of forgery (*United States v. Irwin*, 5 McLean, 178); so there can be no forgery in Nebraska of a deed of a married woman which is void without acknowledgment in the state where executed (*Roode v. State*, 5 Neb., 174; 25 Am. Rep., 475); nor is an inchoate bill of exchange a subject of forgery (*Regina v. Harper*, 14 Cox, 574; 5 Lawson's Criminal Defenses, 23); nor can forgery be predicated of an instrument which does not on its face purport to be a copy of the record, and such as, if genuine, would be effective, such as a fictitious decree of divorce procured in another state (*Brown v. People*, 86 Ill., 239; 29 Am. Rep., 25; 5 Lawson's Criminal Defenses, 31); nor can it be predicated on a writing which reads: "Pay to John Low or bearer fifteen hundred dollars in N. Meyer's bill or yours," it not being an order for the payment of money or the delivery of goods (*People v. Farrington*, 14 Johns., 348); nor of the following: "Let the bearer have one of your smallest with load and charge to me," and signed, it not being an order for the delivery of a pistol, as urged by the prosecution, or of goods or chattels" (*Carberry v. State*, 11 Ohio St., 410). In this as in nearly all other offenses the intent with which the act was done is the controlling element in the case, and if it appears that the defendant believed he had authority to make the writing or the alteration he must be acquitted. *Parmelee v. The People*, 15 N. Y. S. C., 623.

The indictment.— As to the indictment, its form and requisites, see *Billings v. The State*, 7 Am. Cr. R., 188; *Com. v. White*, id., 192; *Rounds v. The State*, 6 id., 266; *People v. Alstine*, id., 272; *State v. Garmire*, 5 id., 238; *United States v. Carll*, 4 id., 246.

HENDRICKS v. STATE.

(26 Tex. App., 176.)

FORGERY: *Character of instrument forged.*

An instrument in the following form: "Mr. Goldstone Please let Bare Have the sume of $5 Dollars in Grosses and charge the same to DR F T Cook,"— is not incomplete or unmeaning, without the averment of extrinsic facts, and is a subject of forgery.

Appeal from district court, Williamson county; J. C. Townes, judge.

The defendant, Jacob Hendricks, was indicted and convicted for forgery. From the judgment he appeals.

J. W. Parker, for appellant.

Assistant Attorney-General Davidson, for the state.

WHITE, P. J. As set forth in the indictment, the instrument alleged to have been forged is in these words, viz.:

"Prescriptions a Specialty.

"TAYLOR, TEXAS, ——, 188—.

"M——,

"*Bought of Dr. F. T. Cook,*

"Drugs, Medicines, Toilet Articles, Books, Jewelry, etc.
All bills due first each month."

"Mr. Goldstone Please let Bare Have the sume of $5 Dollars in Grosses and charge the same to DR F T COOK."

An order for merchandise may be the subject of forgery. *Peete v. State*, 2 Lea, 513; *United States v. Book*, 2 Cranch, C. C., 294; *United States v. Brown*, 3 Cranch, C. C., 268; *State v. Morgan*, 35 La. Ann., 293; *State v. Ferguson*, id., 1042; *Horton v. State*, 53 Ala., 488; *Anderson v. State*, 65 Ala., 553; *Burke v. State*, 66 Ga., 157; *State v. Keeter*, 80 N. C., 472; *People v. Shaw*, 5 Johns., 236; *Com. v. Fisher*, 17 Mass., 46; *Rollins v. State*, 21 Tex. App., 548; *Keeler v. State*, 15 Tex. App., 111. "It is not merely a request for the delivery of property, but is a writing obligatory promising to pay for the property. . . . Such a promise is clearly implied in the clause, 'and charge the same to me,' for it would be unreasonable to assert that, where a person asks the value of property furnished on his order to be charged against him, he intends that the charge shall be a mere idle and senseless form." *Garmire v. State*, 104 Ind., 444, 5 Amer. Crim. Rep. (Gibbons), 238.

The second ground urged in defendant's motion in arrest of judgment is that "the said instrument in writing, set out in the indictment, is of doubtful and uncertain validity, and is not apparently good on its face; and there are no averments in the indictment showing said instrument to be effectual as a pecuniary obligation." As otherwise stated in appellant's proposition in his second assignment of error, the position assumed is "that the instrument set out in the indictment is of doubtful and uncertain meaning on its face, and there are no innuendo averments in the indictment showing it to be valid and effectual as a pecuniary obligation; and therefore it does not appear from the indictment that an offense against the law was committed. There are no innuendo averments whatever in the indictment explanatory of the said instrument."

The sole question for our decision on this appeal is whether the indictment is valid and sufficient without innuendo or explanatory averments as to the words "bare" and "grosses," used in the alleged forged order. "It is an established rule that a written instrument, to be the subject of forgery, must be such as would be valid, if genuine, for the purpose intended. If void or invalid upon its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it. In other words, if the instrument is absolutely void upon its face, it cannot be made the subject of forgery; but if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery." *Rollins' Case*, 22 Tex. App., 548; *Anderson v. State*, 20 Tex. App., 595; *State v. Briggs*, 34 Vt., 503. It seems to be an equally well-settled rule that "a writing, so imperfect and obscure that it is unintelligible without reference to extrinsic facts, will not support an indictment for forgery, unless these facts are averred, and by the averment it is made apparent that it has the capacity of effecting fraud." *Hobbs v. State*, 75 Ala., 1. In *Rembert v. State*, 53 Ala., 467, which is the most able discussion of the question we have seen, the court says: "The fact that the paper is incomplete or improper in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders it necessary that the indictment should aver the extrinsic facts. In all indictments for forgery at common law it was necessary to set out the instrument, so that it would judicially appear to the court that it was the subject of forgery. When the instrument is complete, perfect, and not void on its face, and when it is spoken of as void, illegal in its very frame, or innocuous from its character, as in the case of the will not properly attested, or the void bill of exchange, or the certificate worthless as evidence, or the deed void because of the incapacity of the grantor, its criminal character was disclosed to the court. When the instrument is imperfect, incomplete, and its real meaning and terms are not intelligible from its words and figures, but are to be derived from extrinsic facts, then when such facts are averred, and the instrument, its meaning and purport, made intelligible to the court, it appears judicially with as much certainty as if the extrinsic facts were on the

face of the instrument, and that set out *in hæc verba* whether it has the vicious capacity, and is the subject of forgery." *Id.;* 2 Hawl. Crim. R., 141. Again, it is said in the same case: "Courts are very reluctant to pronounce written instruments void for mere uncertainty." In a recent case in Indiana, it was held that "where, in an indictment for forgery, the instrument on which the forgery is predicated is set out, without the averment of extrinsic facts explaining it, and it is so uncertain in its terms that it is impossible to tell whether it would or would not, if genuine, operate as the foundation of another's liability or right, or have any legal effect whatever, the indictment is bad, on motion to quash, for not stating the offense with sufficient certainty." *Shannon v. State*, 10 N. E. Rep., 87. Mr. Bishop says: "If a writing is so incomplete in form as to leave an apparent uncertainty in law whether it is valid or not, a simple charge of forging it fraudulently, etc., does not show an offense; but the indictment must set out such extrinsic facts as will enable the court to see that, if it were genuine, it would be valid. When such extrinsic circumstances are set out, and also proved at the trial, the defendant may be convicted, while without them he must be discharged." 2 Bish. Crim. Law (7th ed.), § 545. Mr. Wharton says: "Where an instrument is incomplete on its face, so that, as it stands, it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force. . . . But if the meaning of the transaction can be sufficiently extracted from the instrument itself, it will not be necessary to state matters of evidence so as to make out more fully the charge." 1 Whart. Crim. Law (8th ed.), § 740. Applying these principles of law to the validity of the instrument set out in the indictment, and copied above, both with reference to its being a subject of forgery, and being sufficiently averred in the allegations of the indictment without any explanation of its terms, in the light of extrinsic facts, it seems clear to our minds that the indictment is sufficient, is not liable to the objections urged, and that the motion in arrest of judgment was properly overruled. On its face the instrument was an order for merchandise or goods or property of some kind, and no explanation or averment of extrinsic facts was neces-

sary to show that such was its character. Such an indictment, we have already seen, may be the subject of forgery. It is evidently an order for five dollars' worth of something. What that something was we may not know, but we do know that it was property having value; and, though not known to us, might doubtless have been as well known to defendant, to Dr. Cook, to Goldstone, the drawee, and thousands of others, as is the word "groceries" known to the commercial world. If Goldstone, the drawee, had filled and taken up this order, and it had been the genuine act of Cook, there can be no question but that Cook would have been liable to him for the $5. The instrument, as set out, is neither incomplete, unmeaning nor unintelligible, and needed no explanation to make it the subject of forgery. No reason has been made to appear why the judgment of conviction in this case should be set aside, and it is therefore affirmed.

PEOPLE v. SWETLAND.

(77 Mich., 53.)

UTTERING FORGED INSTRUMENT: *Discharge of mortgage — Evidence.*

1. The recording of a forged discharge of a mortgage constitutes the uttering of a forged instrument as an "acquittance and discharge for money," though the note secured is still outstanding, as the discharge, if genuine, would discharge the note as well as the lien.
2. On an information for uttering a forged release of a mortgage, by recording the release, the mortgagee, by whom the instrument purported to be signed, testified that he did not sign it. The notary whose name appeared on the instrument testified that he was almost certain that he did not take the acknowledgment. The two witnesses whose names appeared, and were necessary to a valid execution of the instrument, were not sworn, nor did their names appear on the information. *Held*, that they were necessary witnesses for the people, and must be produced or their absence accounted for.
3. The notes secured by the mortgage were in evidence, and showed payments of interest made after the recording of the discharge. The mortgagee testified that these payments were received by him from a certain person to whom they were made, and who had the papers in his office. *Held*, that this testimony was improper unless supplemented by that of the person receiving the payments, as it might have been used as showing the falsity of the discharge.

4. Testimony of a person that, about a year after the discharge was recorded, defendant mortgaged the same land to him, and furnished an abstract which was identified in evidence, and showed the former mortgage discharged, was competent, both as showing a motive for uttering the discharge and as tending to prove that she uttered it knowing it was forged.
5. The record of a mortgage of part of the land covered by the discharged mortgage, and executed after the filing of the discharge, was inadmissible without proof connecting it in some way with the transaction in question, as the jury might infer that an abstract similar to the one in evidence was given, or be prejudiced against defendant as having wronged the mortgagee.
6. It was not necessary under the information to prove the *corpus delicti* before proving admissions of defendant, as the *corpus delicti* depended for its existence on the acts and intent of defendant.

Exceptions from circuit court, Kalamazoo county; Buck, judge.

Jennie M. Swetland, convicted of uttering a forged instrument, brings exceptions.

Wm. Shakespeare and *E. M. Irish*, for respondent.
Geo. P. Hopkins and *Wm. G. Howard*, for the people.

MORSE, J. On the 25th day of July, 1885, the respondent bought of George W. Parker a piece of land in Kalamazoo county. On the same day she executed a mortgage for $700 to him upon the said land. The theory of the prosecution in this case, as developed on the trial, was that the respondent or some one else forged a discharge of this mortgage, and that she put it on record or caused it to be recorded, and afterwards used the abstract showing said mortgage to be discharged to effect two other loans,— one from D. T. Allen and the other from Mrs. Amy E. Day. The respondent was tried and convicted in the Kalamazoo circuit court for uttering this forged discharge. The case is brought here on exceptions before sentence. The respondent was charged with uttering and pulishing "as true a certain false, forged and counterfeited acquittance and discharge for money of a certain real estate mortgage," and the alleged forged discharge is set out in full in the information.

It is contended that there was no evidence of uttering as charged in the information. The evidence showed that either

the respondent or her sister took the false discharge to the office of the register of deeds and had it recorded and took it away again. It is claimed that the mere taking of it to be recorded was not an uttering. That it certainly was not the uttering of it as an "acquittance and discharge for money." It is said the mortgage was collateral to the notes which represented the debt, and that these notes were still held by Parker, and the only effect of putting the discharge on record was to show the real estate apparently clear of the lien. There may be some ingenuity in this argument, but there is no merit in it. If this false discharge had been genuine, as it purported to be, it would have been an acquittance and discharge, not only of the lien upon the real estate, but of the notes as well, and would therefore have been an acquittance and discharge for money. It would have been the voucher or receipt for the payment of $700, the amount secured by the mortgage. But we think error was committed upon the trial. This discharge purported to be signed by George W. Parker, the mortgagee, and to have been acknowledged before James H. Kinnane, an attorney and notary public at Kalamazoo, and witnessed by C. W. Swetland and M. A. Hascall. Parker testified that he never signed any such discharge, and Kinnane was quite certain that he never took any such acknowledgment. The discharge itself was not produced, nor was its absence fully accounted for. The record of the instrument was produced by the register of deeds, Mr. Simmons. He could not remember who left it for record or who took it away, except that either the respondent or her sister brought it to his office, and the same person that brought it took it away. When the record of the discharge was offered in evidence it was objected to by the defense on the ground that it was secondary evidence, and that it did not yet appear that the original instrument was lost, and no notice to produce it had been given. *Mr. Howard*, of the prosecution, then said: "If you prefer the original discharge, we ask you to produce it here in court." *Mr. Irish*, for the defense: "We have received no notice to produce it." *Mr. Howard:* "I give you notice now." *Mr. Irish:* "We have nothing to say about the proposition, because it does not come in the proper form or at the proper time." The court declined to pass upon the ques-

tion finally at this time, but admitted the record of the instrument, as he stated, *pro forma*. Upon other evidence being introduced, the record was permitted to stand in lieu of the original instrument.

The counsel for the people in this court claim that this record, under the statutes of this state, was original evidence, and could be used as such without reference to the original; that it was neither necessary to produce the original false discharge nor account for its loss. See How. St., § 5685. We do not think this statute applies where the question of the forgery of the original instrument is in issue either in a criminal or civil suit. Where the main issue is whether a deed, mortgage or discharge of mortgage has been forged, the original instrument is the best evidence, and ought to be produced, if it can be. But it is further claimed by the counsel for the people that, if this be so, when the original discharge was traced into the hands of the respondent it was sufficient; that the instrument was then satisfactorily accounted for, and that no notice to produce it was necessary; that such a notice would be, in effect, compelling the respondent to give evidence against herself. We agree with counsel that when an instrument claimed to be forged is last shown in the hands of the person accused of forging or uttering it, then secondary evidence may be given of its contents, and without notice to the accused to produce it. But it never became by any means certain in this case that it was last in the hands of respondent. The proof showed it to be quite as likely in the hands of her sister as herself. No attempt appears to have been made to find the original instrument, or to secure the testimony of the sister, whose name does not appear in the record. Another thing. It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so. This rule has been frequently applied to the eye-witnesses of a transaction, unless the number were so great as to make the testimony merely cumulative. But in this case the main issue was whether or not this discharge was a false one,— a forgery. The uttering of it, unless it were forged, could not be a crime. There were the names of four persons attached to this instrument,— the

alleged maker, Parker; the notary, Kinnane; and two witnesses, who were necessary, if it was a valid discharge and to be recorded, M. A. Hascall and C. W. Swetland. They were eye-witnesses of the execution of this paper, if it was genuine; they were all material witnesses as to its truth or falsity. Parker and Kinnane were sworn, but no mention is made in the record of the two witnesses save as their names appear upon the record of the discharge as being witnesses to its execution by Parker. Their names were not put upon the information, and there is no showing made why they were not called as witnesses. It is not claimed that these names are fictitious, and that no such persons are in existence, or do not live in Kalamazoo. It is very clear to my mind that in the absence of this original discharge it was the duty of the prosecuting attorney, under the repeated decisions of this court, to bring the four persons, and all of them, if they could be found, into court as witnesses in behalf of the people.

As this case stands upon the record before us, the falsity of this discharge rests entirely upon oral testimony, without the instrument itself, with which to test the genuineness or falsity of the signatures, or to aid there collection of the witnesses. Parker, who is certainly interested financially in the issue, swears absolutely that he never made the paper. Kinnane thinks, and is almost certain, that he never took the purported acknowledgment, but he has taken too many acknowledgments, in too many different places, to swear positively that he did not take it. Simmons, the register of deeds, the only person sworn who testifies to having seen the original discharge, swears that he believes the acknowledgment to have been in the handwriting of Kinnane. Now, it will readily be seen that the evidence of these two purported witnesses, Hascall and Swetland, becomes most important. If these persons exist, and can be found, the people and the respondent are both entitled to their testimony, and as a part of the direct evidence on behalf of the prosecution. Unless they are mere myths, or cannot be procured, the people could not well ask the jury to find beyond a reasonable doubt that this instrument was a forgery. If the names were fictitious, that fact alone would be strong, if not conclusive, evidence that the instrument was forged, and it appears strange that this was not

shown, if it be true. If the persons named as witnesses exist, their names should be placed on the information before the next trial, and they must be produced on such trial, and sworn as witnesses on behalf of the people, if their attendance can be procured. Their testimony is a necessary part of the people's case, under the rules, and cannot be omitted without good excuse. The record of the mortgage given by respondent to Parker was admitted in evidence against the objection of the counsel for respondent. There was no error in this. There was no question as to the genuineness of the instrument, and the record of it was authorized to be read in evidence under the statute. How. St., § 5685.

The original mortgage was afterwards introduced, for the apparent purpose of proving that it had never been paid. The notes accompanying the instrument — one for $200 and the other for $500 — were also offered in evidence. Upon these notes indorsements of interest appeared as having been paid since the recording of the discharge. Mr. Parker was permitted to testify that this interest had been received by him from Mr. Coleman, to whom it was paid; Coleman having the notes and mortgages most of the time in his office. Coleman was not sworn. This evidence should not have been allowed to stand in the case, unless supplemented by Coleman's testimony. It could have been used, and probably was, as a circumstance tending to show that the discharge was a false paper. And yet there was no evidence but this hearsay testimony of Parker that any interest had been paid on this mortgage by the respondent or any one in her behalf. Frank E. Knappen, who was prosecuting attorney at the time respondent was arrested, testified to certain admissions made to him by her. His evidence was to the effect that the respondent came to him of her own accord, and voluntarily made her statement to him, without any inducement or hope being held out to her in any manner. The respondent gave testimony tending to show the contrary. The court very properly left this conflict of testimony with the jury, and instructed them that, in order to use or take into consideration the respondent's statement to Knappen, they must find beyond a reasonable doubt that the statement was purely voluntary, and "made freely, of the respondent's free will, without any hope of favor

or fear of the consequences." This was certainly as favorable to the respondent as the law permits, if not more so. For if no inducements of any kind are held out by an officer to an accused person, nor any threats made, the accused may make a statement to such officer, hoping thereby to gain favor or escape punishment; but for that reason it will not be rejected, if it is voluntarily made, without any influence be exerted by the officer. The fact that a person arrested for a crime may of his own accord tell the truth or a lie to screen himself or gain favor with the officers of the law does not prevent his statements so made from being used against him. It is only when statements are drawn out by some artifice, promise or threat, which induces the hope of benefit, or acts upon the fears of the accused, or made under compulsion, that the law precludes their being used as admissions. If they are free and voluntary, without the influence of threats or promises, artifice or redress, then the motive or intent of the accused in making the statements is not material as regards the question of their admissibility in evidence.

The court also instructed the jury that the burden of proof was upon the people to show the statements to have been voluntary. The testimony of D. T. Allen was material and admissible. The discharge was dated August 10, 1886. August 8, 1887, the respondent executed a mortgage for $350 to Allen upon part of the lands embraced in the Parker mortgage. Allen testified that the respondent, when she negotiated the loan, furnished him with an abstract of the title of the land. This abstract he identified, and it was introduced in evidence, showing the Parker mortgage as discharged. It is claimed by respondent's counsel that, while this might have a tendency to show her guilty of obtaining money of Allen under false pretenses, it had no bearing upon her guilt or innocence of the offense for which she was being tried, and it was therefore prejudicial as well as incompetent evidence in this case. We think it had a direct bearing upon the issue in this case. It not only presented a motive upon respondent's part for the commission of the crime charged against her, but it had a tendency to prove that she uttered this alleged false discharge knowing it was forged. She must have known what the abstract contained, and she uses it knowing it to be false, if it

were forged, for one of the purposes which may have been, and probably was, the object of uttering this forged discharge by placing it upon record. Such placing upon record must have been either for the purpose of selling the land apparently free from any lien, or obtaining a loan upon it under the same appearance of the title, or for the purpose of defrauding the mortgagee. The fact that she deliberately uses this discharge, by means of this abstract, to obtain a loan, knowing that the mortgage is undischarged, is a most weighty circumstance, tending to show that she recorded this discharge, or directed its record, knowing it to be forged. Indeed, the presenting of this abstract, when she knew it to be false, was an uttering of this discharge with intent to defraud.

But the court erred in permitting the record of a mortgage executed by respondent upon some of the lands covered by the Parker mortgage to Mrs. Amy E. Day to be admitted in evidence. The mortgage was for $200, and on other lands than those embraced in the mortgage to Allen, and dated September 16, 1887. Mrs. Day was not called as a witness, and none of the circumstances of the inception of this instrument were laid before the jury. When the record was offered, objection was interposed to its admission by respondent's counsel as being irrelevant and immaterial. "*The Court.* How is it proposed to connect it with this transaction? *Mr. Howard.* Only showing that this is a mortgage covering the same land, put on shortly after this discharge was recorded." If this mortgage had been obtained in the same way as the Allen mortgage, by the showing of the same or a similar abstract of title, such fact would have been admissible, but the name of the witness testifying to such fact ought to be on the information, for the benefit of the respondent. By the admission of this record of the mortgage the jury might infer these facts without proof, because of the Allen transaction, or be prejudiced against the respondent, because it would look as if she had also wronged Mrs. Day. This mortgage had no business in the case, unless it was connected by some evidence, as in the case of the Allen mortgage, with the issue, to wit, the falsity of the discharge and the respondent's knowledge of such falsity. We find no other errors in the trial, and no error in the order of the admission of the proof, save as heretofore noted.

It is claimed that, until the *corpus delicti* was proven, the statements of the respondent to Knappen were not admissible. There are some cases where the *corpus delicti* — generally in homicide — is clearly separated and distinct from the question as to who committed the offense, if any is found to have been committed. In such cases the evidence to establish the *corpus delicti* must first be given, before acts or admissions of the accused can be put in evidence. But the present case is one where the body of the offense — the uttering of a forged instrument, knowing it to be false — is so intimately connected with the question whether or not the respondent is guilty of the crime that there can be no such separation. The *corpus delicti* in this case depends entirely for its existence upon the acts and intent of the respondent, so that her acts and admissions, if admissible at all, were admissible at any stage of the proceedings upon the trial. The conviction of the respondent must be set aside, and a new trial granted.

SHERWOOD, C. J., and CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

FRANKLIN v. STATE.

(85 Ga., 570.)

FORMER JEOPARDY: *Nolle prosequi entered without prisoner's consent.*

That a *nolle prosequi* was entered without the prisoner's consent after issue was joined and the jury were sworn will bar a subsequent indictment for the assault with intent to murder, where the first indictment alleged that offense, and was good and sufficient for a simple assault, even if not so for the aggravated assault charged. There can be no second jeopardy as to either grade of assault, and, as the major includes the minor, the second indictment comprehends the same simple assault of which the accused was acquitted on the first indictment.

Error from superior court, Chatham county; Falligant, judge.

W. W. Osborne, by *S. B. Adams*, for the plaintiff in error.
W. W. Fraser, solicitor-general, for the state.

PER CURIAM. The constitution (Code, § 5000) declares: "No person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." Our statute law (Code, § 4649) declares that "no *nolle prosequi* shall be entered on any bill of indictment after the case has been submitted to the jury, except by the consent of the defendant." That jeopardy begins when the jury are impaneled and sworn is the rule recognized in Georgia. *Newsom v. State*, 2 Ga., 60; *Reynolds v. State*, 3 id., 53; *Nolan v. State*, 55 id., 521. And the same view is taken by the better authorities elsewhere. Big. Estop., p. 89; 1 Herm. Estop., § 419. In this case, after "not guilty" was pleaded and the jury were sworn, and without the prisoner's consent, a *nolle prosequi* was entered on the first indictment. That indictment, after charging and accusing the plaintiff in error, Thomas Franklin, with the offense of assault with intent to murder, proceeded as follows: "For that the said Thomas Franklin, in the county of Chatham, and state of Georgia aforesaid, on the 14th day of November, in the year of our Lord 1889, with force and arms, in and upon one Sol Williams, in the peace of said state being, did unlawfully, wilfully, feloniously and of his malice aforethought, make an assault; and with a certain pistol loaded with gunpowder and leaden ball, said pistol so loaded being a weapon likely to produce death, in, at, towards and upon *him*, the said Thomas Franklin, did unlawfully, wilfully, feloniously and of his malice aforethought to kill and murder, contrary to the laws of said state, the good order, peace and dignity thereof." By the aid of punctuation and emphasis (which we supply), it will be seen that this indictment may be made consistent in all its parts, and a good indictment, not only for a simple assault, but for an assault with intent to murder, by the use of a weapon likely to produce death. Without these aids it would be ambiguous, and would doubtless be amenable to a special demurrer, but would not, we are inclined to believe, be so defective as to warrant an arrest of judgment had the accused been found guilty upon it of the aggravated assault for which he was indicted. Bishop says: "The doctrine is general that the court will consult sound sense, to the disregard of captious objections, in looking for the meaning of

allegations in an indictment. Moreover, of two permissible constructions, it will adopt the one sustaining the proceeding." And again: "It ought not to be ambiguous; and, if really equivocal, it will be inadequate. But, referring to a milder sort of ambiguity, Chitty observes 'that, where a matter is capable of different meanings, that will be taken by the court which will support the proceedings, not that which would defeat them.' And 'it does not seem to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense in which the party framing the charge must be understood to have used it, if he intended his accusation to be consistent." 1 Bish. Cr. Pro., §§ 356, 510. And the rule of our code is, that an indictment is sufficient which charges the offense in the language of the code, or so plainly that the nature of the offense charged may be easily understood by the jury. Code, § 4628. Surely the jury might have understood from the language of this indictment, construed all together, that Thomas Franklin attempted to kill and murder Sol Williams, not by shooting at himself, but by shooting at Sol Williams. But, be this as it may, the indictment certainly charges an assault by Franklin upon Williams, and, therefore, whether it be good for an aggravated assault or not, Franklin, under our law, could have been legally convicted upon it of a simple assault. *Bard v. State*, 55 Ga., 319; *Rataree v. State*, 62 id., 245. Inasmuch, therefore, as the punishment for a simple assault may be imprisonment with or without labor (Code, § 4358), the accused was undoubtedly put in jeopardy of his liberty by this first indictment.

The second indictment is for the same aggravated assault intended to be alleged by the first, and therefore comprehends, necessarily, the offense of simple assault (Lumpkin, J., in *Jacobs v. State*, 20 Ga., 841), of which the accused might have been convicted on the first, and of which he has, in effect, been acquitted by the *nolle prosequi* entered without his consent. Should the second indictment be tried, he may be convicted thereon of a simple assault by exactly the same evidence which would have supported the first, and without that evidence he could not be convicted upon the second of any offense whatever; for the criminal transaction to which both relate is one and the same. In other words, to warrant any conviction whatever on the second indictment, it would be necessary

to adduce as much evidence applicable to the first as would be requisite to support the first. This is the ordinary, and generally recognized, test of identity of the offense where former jeopardy or former conviction or acquittal is pleaded. *Roberts v. State*, 14 Ga., 8; 1 Herm. Estop., § 422; 1 Whart. Ev., § 787; 2 Tayl. Ev., § 1705 *et seq.* It is true that an assault with intent to murder is a statutory felony, and a bare assault is a misdemeanor; but where the same offense in one grade or degree is a felony, and a misdemeanor in another, there is with us no obstacle to convicting for the misdemeanor on the trial of an indictment for the felony. And the code (section 4675) provides that, "upon the trial of an indictment for any offense, the jury may find the accused not guilty of the offense charged in the indictment, but guilty of an attempt to commit such an offense, without any special count in said indictment for such attempt, provided the evidence before them will warrant such finding." In view of this provision, it is certain that, after trial for any offense, whether a felony or a misdemeanor, and complete acquittal, there could be no subsequent indictment for an attempt; and, in view of the rule against a second jeopardy, it seems to us scarcely less certain that, after acquittal or conviction on an indictment for attempt, there could be no subsequent indictment for the offense itself.

According to sound principle and the weight of sound authority, not only where two indictments each contains all the necessary constituents of a compound offense, such as an aggravated assault, or an assault and battery, but where one contains them all, and the other enough of them to constitute a minor offense, a conviction or acquittal upon either indictment will, under the strict rule of former jeopardy, bar the other, provided that, by the law of the forum, a conviction for the minor offense may be had upon an indictment for the major. Plural jeopardy as to the minor is no less obnoxious than like jeopardy as to the major. *State v. Chaffin*, 2 Swan (Tenn.), 493; *State v. Locklin*, 59 Vt., 654; *State v. Ingles*, 2 Hayw. (N. C.), 4; *State v. Shepard*, 7 Conn., 54; *State v. Smith*, 43 Vt., 324; *Mitchell v. State*, 42 Ohio St., 383; *State v. Stanly*, 4 Jones (N. C.), 290; *Dinkey v. Commonwealth*, 17 Pa. St., 126; *Fox v. State* (Ark.), 8 S. W. Rep., 836; 1 Arch. Pr. & Pl. (8th ed. by Pomeroy), 338 *et seq.;* 1 Whart. Cr. L., §§ 563, 565; 2 Tayl. Ev., § 1708 *et seq.;* 1 Bish. Cr. L.,

§§ 1057, 1058. Bishop's language is as follows, and seems decisive of the question: "Where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes included, as before mentioned, within a larger, will it bar fresh proceedings for the larger? If it will not, then the prosecutor may begin with the smallest, and obtain successive convictions, ending with the largest; while, if he had begun with the largest, he must there stop,—a conclusion repugnant to sound sense. Besides, as a larger includes a smaller, it is impossible one should be convicted of the larger without being also convicted of the smaller; and thus, if he has been so found guilty or not guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller. Some apparent authority, therefore, English and American, that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle; and, even in authority, the doctrine which holds it to be a bar is sufficiently established in general. . . . A person convicted of an assault only is protected thereby from prosecution for the battery, because, said Totten, J., 'the one is a necessary part of the other; and, if he be now punished for the battery, he will thereby be twice punished for the assault.' And, according to the general and better doctrine, a conviction or acquittal of a common assault will bar proceedings for an assault with intent to do great bodily harm, and other assaults aggravated in like manner." In *Dinkey v. Commonwealth*, *supra*, Black, C. J. (the great Jeremiah S. Black, of Pennsylvania), said: "The right not to be put in jeopardy a second time for the same cause is as sacred as the right of trial by jury, and is guarded with as much care by the common law and by the constitution." A faithful guardianship of this sacred right constrains us (reluctant though we are to do so in view of the facts of this special case, the miscarriage of justice being apparently due to a mere slip or accident) to hold that the plea of former jeopardy was a good and sufficient answer to the second indictment, and that the court erred in overruling the same.

Judgment reversed.

NOTE.— *What will support defense.*—It must be shown that defendant was legally tried, or put upon trial, upon an indictment free from error, in a

court having jurisdiction of the particular offense. *Daniels v. State*, 78 Ga., 98. An interesting phase of this subject arose recently in Texas in the case of *Rudder v. The State*, 15 S. W., 117. The defendant was placed upon trial charged with murder. After the hearing the jury retired and remained out for two days, when they came into court and reported they could not agree. The defendant was not present, but his counsel was and objected to their discharge. The court, however, discharged the jury and again placed the defendant upon trial. The plea of former jeopardy was interposed, overruled, and the defendant convicted. Upon appeal the supreme court says: "Our statutes provide that 'in all prosecutions for felonies the defendant must be personally present on the trial.' Code Crim. Proc., art. 596. His presence is especially required when certain proceedings are had. Id., arts. 695–698. He must be present when the verdict is read. Art. 711. These are the only statutes on the subject. But jeopardy is a constitutional right, and it is not to be restricted or abridged by statutory provisions or omissions. We have no express rule with regard to the presence or absence of a defendant when the jury are to be discharged on account of a failure to agree, but it is declared that 'whenever the code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern.' Id., art. 27. At common law the well-established practice is that a prisoner accused of felony shall appear in person in all proceedings had in his case. 1 Chit. Crim. Law, 411, 414; *Sperry v. Com.*, 9 Leigh, 623. 'This necessity for the presence of the defendant in a capital case exists through every stage of the trial.' See a most elaborate and valuable note to *Sperry v. Com.*, 1 Lead. Crim. Cas. (2d ed.), 433. See, also, *Gibson v. State*, 3 Tex. App., 437; *Sweat v. State*, 4 Tex. App., 617. In *Mapes' Case*, 13 Tex. App., 85, it is said: 'It is an improper practice to take any step or have any proceeding, however trivial, formal, or unimportant it may appear to be, when the defendant is not present; and it is material error which will render the proceeding absolutely void where such proceeding is had during the trial of the case in the absence of the defendant.' See, also, *Granger v. State*, 11 Tex. App., 454. Mr. Bishop says: "The prisoner's right to be present at the rendition of the verdict is perfect; at least unless he waives it. And he is also entitled to be present when, if the jury cannot agree, the court therefore discharges them. To discharge them in his absence is in law to acquit him.' 1 Bish. Crim. Proc. (3d ed.), § 272. In *State v. Wilson*, 50 Ind., 487, it was held that 'where on the trial of an indictment for murder, after the jury had been deliberating on their verdict for thirty-two hours, and after they had answered that there was no probability of their agreeing upon a verdict, the court discharged the jury without the presence of the defendant, he being confined in jail, such discharge might be pleaded in bar of further prosecution.' That case is directly in point with the one we are considering, and is, in our opinion, supported by reason and authority. As stated above, the prosecution in this case demurred to defendant's plea of former jeopardy, and the court struck out said plea on said demurrer. The plea, in our opinion, was upon its face a good one, and the court erred in sustaining the demurrer and striking it out. There is no controversy as to the facts upon which the plea was based. We have stated them substantially. These facts establish to our minds most

clearly a case of former jeopardy. Our constitution and our laws declare that 'no person, for the same offense, shall be twice put in jeopardy of life or liberty.' Bill of Rights, § 14; Code Crim. Proc., art. 9. Having been once put in jeopardy on this indictment, the defendant could not again be legally put upon trial under it. Therefore the judgment is reversed, and a further prosecution of this case is dismissed."

For a full discussion of this subject, see the following cases and notes thereto: *Hilands v. Com.*, 6 Am. Cr. R., 339; *Com. v. Fitzpatrick*, 7 id., 199; *Com. v. Arnold*, id., 210; *Bloomer v. State*, 3 id., 37; *State v. Morgan*, id., 149; *People v. Gordon*, id., 26; *Flagg v. People*, id., 70; *State v. Colgate*, 5 id., 71; *Adams v. The State*, 4 id., 309; *People v. Dolan*, id., 308; *Taylor v. The State*, id., 30; *Garvey's Case*, id., 254; *Drake v. The State*, 320; and other cases cited in each volume of this series. As to acts made offenses under the state and municipal law, see *Hughes v. The People*, 5 id., 80.

GAUNT v. STATE.

(30 N. J. L., 490.)

FORNICATION: *Evidence — Single state of complaining witness — Resemblance between bastard and putative father.*

1. The omission to prove that the complaining witness in an indictment for fornication was a single woman is not error; the single state, being the natural state, will be presumed until testimony to the contrary is offered.
2. Upon the trial of an indictment for fornication, where both the bastard and the putative father were viewed by the jury, the jury may consider whether there is a resemblance or not between them. In such cases, the proper instrument of proof is inspection by the jury, and not the testimony of witnesses.

Error to court of quarter sessions, Camden county; Hugg, Woolston and Gaunt, judges.

Argued at February term, 1888, before Beasley, C. J., and Magie and Garrison, JJ.

Howard Barrow, for plaintiff in error.
Richard S. Jenkins, for defendant in error.

GARRISON, J. This is an indictment for fornication, brought here by writ of error. In his argument before this court, the counsel for the plaintiff in error relied upon two points. The first of these was the omission of the state to prove that the

complaining witness was a single woman. This exception is not tenable. The indictment, it is true, charges that the person with whom the defendant committed fornication was a single woman. The single state is, however, the natural, and, during early life, the only possible one; nor is there any period at which it is necessarily terminated or merged into marriage. In the absence, therefore, of testimony tending to the contrary, the presumption is that the celibacy which existed during puellescence continues. Therefore, until drawn into actual question, no affirmative testimony on this point was required from the prosecution.

The other point presented was that the trial court refused to charge the jury "that they must find a verdict upon the testimony in the case from the mouths of witnesses, and not from their own view of the resemblance of the child alleged by the complaining witness to be the issue of the alleged fornication, and that, as matter of law, the jury had no right to consider whether the child looked like the defendant or not." It was probably the object of counsel to raise by this exception the question whether the resemblance of a child to its alleged parent may be considered by the jury, and, if so, upon what evidence. The record, however, does not present so broad a question. Neither upon objection to evidence, nor upon comment of counsel, nor upon exception to the charge of the court, is error assigned in this particular. At the close of the trial the court was requested to charge the jury that they had no right to consider the question of resemblance, although the natural material for such an inquiry had been viewed by them as a necessary incident of the trial. It is upon an exception to the refusal of the court to so charge that error is assigned. I think it is extremely doubtful whether error can be predicated upon the refusal of a court to charge against intangible impressions, arising naturally from the incidents of a trial, where no foundation, by objection or otherwise, has been laid. If we give, however, to the exception under consideration the fullest significance claimed for it, two questions are presented: First. Is the resemblance between the child and the alleged father a relevant matter? And second, if relevant, should it be determined by inspection, or by the testimony of witnesses?

In considering the first of these questions, viz., as to the relevancy of resemblance as an element of proof, it is clear that testimony of this character must be treated as a class. Thus viewed, whatever opinion may be held as to the illusory nature of such evidence in cases like the present, there is no question that, as a class, resemblances are admitted wherever relevant. In cases involving handwriting, for instance, it has always been deemed pertinent to have a comparison of hands. Likewise in sales by sample, in patent cases, in trade-mark and infringement suits, resemblance is of the essence of the proof. Nor can it be said that the tendency of recent applications of this rule has been towards restriction,— rather the reverse. In the courts of a sister state, New York, operas have been performed in court, and comic songs sung, plagiarized papers have been read, and the so-called materialization of spirits exhibited,— all within the scope of the doctrine of the relevancy of resemblance; while in a case now pending in the courts of Pennsylvania a board of experts have been ordered to inspect a certain contrivance called the "Keeley Motor," with a view to the determination of its resemblance or mechanical equivalency to a motor described in plaintiff's partnership bill. Examples of the application of the same rule to family likeness are not wanting. In the notorious *Douglass Case* (House of Lords, 1769), Lord Mansfield allowed the resemblance of the appellant and his brother to Sir John Stewart and Lady Jane Douglass to be shown, as well as their dissimilarity to those persons whose children they were supposed to be; while as late as 1871, Lord Chief Justice Cockburn, in the *Tichborne Case*, held that the resemblance of the claimant to a family daguerreotype of Roger Tichborne was relevant, and intimated that comparison of features between the claimant and the sisters of Arthur Orton would be permitted. The extension of this rule to cases of family likeness in bastardy and other suits of alleged parentage cannot be questioned seriously on principle; the illusory nature of such resemblances rather imposing a duty on the court in conjunction with the admission of the proof than militating against the relevancy of the inquiry. Such has been the view taken by the courts in this country. In *Garvin v. State*, 52 Miss., 207, an indictment rested on the ground that the defendant was a colored

man. Of this there was no proof; but, as the defendant had been before the jury, the court held that their inspection did away with the necessity of proof; saying: "Juries may use their eyes as well as their ears." In *Jones v. Jones*, 45 Md., 148, the court permitted the jury to judge as to a personal resemblance, but not to hear testimony on that subject, upon the ground that, when the parties are before the jury, whatever resemblance there is will be directly apparent, but to permit third persons to give their opinions would be raising a class of experts where expertism does not exist. In Iowa the courts have held, on the question of resemblance of a bastard to its alleged father, that an infant two years old might be exhibited to the jury (*State v. Smith*, 54 Iowa, 104, while a babe of three months could not be shown. *State v. Danforth*, 48 Iowa, 43. This discrimination rests upon a physiological notion adopted by the court, which can scarcely find justification as a rule of evidence. In *Risk v. State*, 19 Ind., 152, a child of three months was put in evidence. The court held that, as there had been no objection to the evidence, the jury had a right to consider it. In North Carolina, in the case of *State v. Woodruff*, 67 N. C., 89, the charge of the court, that the resemblance of a bastard to the defendant was relevant, was held good. In the case of *Warlick v. White*, 76 N. C., 175, the question was whether the girl was of mixed blood. Plaintiff had subpœnaed the girl for the sole purpose of having her seen by the jury. Upon objection being made, the court overruled the offer. *Held*, on appeal, that the court erred; that, on a question of mixed blood, the offer to exhibit the girl should have been permitted. In the cases in New York which prohibit testimony upon resemblances, the question of view by the jury does not arise; but in *Petrie v. Howe*, 4 Thomp. & C., 85, the court, in rejecting testimony, says: "If this species of physiological evidence is admissible, it should not be covertly introduced." In that case, which was for *crim. con.*, the court had received testimony as to the color of the hair of plaintiff's other children; the illegitimate child having hair of a different color. In *Gilmanton v. Ham*, 38 N. H., 108, counsel commented upon the resemblance of the child to the defendant, and upon appeal the court affirmed his right so to do, upon the ground that the matter was relevant,

and the parties before the jury. *Finnegan v. Dugan*, 14 Allen, 197. In this case the child was in court, and the judge, against defendant's objection, charged the jury that they might consider whether there was any resemblance between the child and the defendant. In affirming the judgment the supreme court says: "It is a well-known physiological fact that peculiarities of feature and personal traits are often transmitted from parent to child. Taken by itself, proof of such resemblance would be insufficient to establish paternity; but it would be clearly a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass." The same court, in *Eddy v. Gray*, 4 Allen, 435, sustained a ruling rejecting testimony upon the same subject, upon the ground that it did not come within the rule of expert testimony.

The further question, then, arises whether the court below erred in refusing to charge the jury that they must judge of this matter of resemblance, not from their own view, but from the testimony delivered in the case from the mouths of witnesses. Upon this point the position of the plaintiff in error lacks the support of the weight of authority. Of the cases cited in his brief as against the admission of testimony as to resemblance, many proceed solely upon the ground that the opinions of witnesses cannot be received for this purpose, while not intimating that the question of resemblance is impertinent. There seems to be no good reason why a jury, if the question of resemblance is to be considered by them, should be compelled to base their decision upon a second-hand view. The effect of the substitution of testimony for inspection is to put the subject-matter of investigation one further remove from its responsible judges, and thus to add to the infirmities inherent in proof of this class the additional danger of bias and imposition. Inspection is like admission, in that, while not testimony, it is an instrument for dispensing with testimony, and, in a doubtful case, the class of testimony it dispenses with might be a controlling circumstance. Thus regarded, and in view of the almost utter worthlessness of the testimony of witnesses adduced on the question of the resemblance of a bastard to an alleged parent, it is obvious that inspection is on this account also to be preferred. In the case

under consideration the child was in court during the trial; the attention of the jury was directed to it as the offspring of the alleged fornication; the defendant was a witness in the cause. Under these circumstances, it was not error for the court to refuse to charge the jury that they must not consider the question of resemblance at all; and that, if they did consider it, it must be from the testimony from the mouths of witnesses, and not from their own view. Finding no error in their record, the judgment of the court below should be affirmed.

NOTE.— Upon this question, see, also, note to *State v. Borie, ante*, p. 87.

PEOPLE v. O'NEIL.

(71 Mich., 325.)

GAME LAWS: *Selling game killed in another state.*

Howell's Statutes of Michigan, section 2199, providing that "colin or quail" can only be killed during the months of November and December of each year, and section 2202, providing that "no person shall sell or expose for sale, or have in possession for the purpose of selling or exposing for sale, any of the kinds or species of birds protected by this act, after the expiration of eight days next succeeding the times limited and prescribed for the killing thereof," when construed together with act No. 68, Public Acts of Michigan, 1887, providing that in all prosecutions for violations of laws for the protection of game, proof of its possession at any time when the killing, taking or having in possession any such game is by law prohibited shall be *prima facie* evidence of a violation of the law, do not prohibit the having in possession and exposing for sale at any time quail killed in another state and afterwards brought into this state for sale.

Certiorari to police court of Detroit; Hon. Edmund Haug, justice.

Henry M. Cheever, for appellant.

Geo. F. Robinson, prosecuting attorney, and *Moses Taggart*, attorney-general, for the people.

CHAMPLIN, J. Section 2 of act No. 251 of the Public Acts of 1881 enacts: "No person shall kill or destroy, or attempt

to kill or destroy, any colin or quail, sometimes called 'Virginia partridge,' save only during the months of November and December of each year; nor kill, nor to attempt to kill, any pinnated grouse or prairie chicken before September 1, 1882, and thereafter only in the months of September and October in each year." Section 5 of the act provides: "No person shall sell or expose for sale, or have in possession for the purpose of selling or exposing for sale, any of the kinds or species of birds protected by this act, after the expiration of eight days next succeeding the times limited and prescribed for the killing of any such birds." The act declares a violation of its provisions a misdemeanor, and imposes a penalty of $50 for each offense on conviction; and, if the penalty is not paid, the offending person shall be committed to the common jail of the county until the penalty is paid, but such imprisonment shall not exceed thirty days. Thomas O'Neil was complained of on the 7th day of May, 1888, in the police court of the city of Detroit, which complaint charged him with "having in his possession, for the purpose of selling, a large number of quail, being game birds to the complainant unknown, on the 9th day of April, 1888." He was arraigned and pleaded not guilty, and was tried before Edmund Haug, a police justice. The testimony showed that on the 9th day of April, 1888, the defendant had in his possession two dozen quail. The defendant testified that he had in his possession on said 9th day of April two dozen quail, but that he purchased them in the state of Missouri in the month of December, 1887; that he had received them in the regular course of his business during said month of December, and had preserved them on ice from the day he received them until said 9th day of April, and that he had them then and there for sale. The justice found the defendant guilty and imposed the penalty of $50 and $3 costs, and sentenced the defendant to stand committed to the house of correction in the city of Detroit until such fine was paid, provided such imprisonment should not exceed thirty days. The defendant sued out a writ of *certiorari* from this court, and alleges the following errors in the record: "(1) The court erred in finding the defendant guilty on the evidence. (2) The court erred in finding the defendant guilty under the law. (3) The complaint does not set forth any offense known

to the law. (4) The statute under which the complaint was brought does not prohibit the having in possession and exposing for sale any quail killed in another state and brought into the state of Michigan after they are killed. (5) The law in question prohibits the having in possession, with intention to sell, quail which are 'protected' by the act only, and the only quail protected by the act are quail which are alive and at large within the state of Michigan. (6) The provisions of the law prohibiting the having in possession quail with intent to sell the same is unconstitutional and void, in that the object of the act in this regard is not expressed in its title."

If the statute applies to quail killed in another state and brought into this state after they are killed, then both the complaint and evidence were sufficient to sustain a conviction. The objection that the object of the law as to the possession of game being unlawful is not expressed in its title, and therefore unconstitutional, is without force, and is overruled. The main objection, and the one most strongly urged upon the argument, is that based upon the fourth assignment of error, viz.: "The statute does not prohibit the having in possession and exposing for sale, any quail killed in another state, and brought into the state of Michigan after they are killed." This precise question is not a new one to the courts. In February, 1876, the case of *State v. Randolph*, 3 Cent. Law J., 187, was decided in the St. Louis court of appeals under a similar statute, in which the same objection was taken, and the court said: "The game laws would be nugatory, if, during the prohibitory season, game could be imported from neighboring states. It would be impossible to show, in most instances, where the game was caught." The conviction was had under a statute which provided that "it shall be unlawful for any person to purchase, have in possession, or expose for sale any of the birds or game mentioned in the preceding section of this act during the season when the catching or injuring the same is prohibited." It was shown that the birds (prairie chickens) were imported from the state of Kansas and sold to the defendant, and it was claimed that the statute was a violation of the constitution of the United States; congress alone having power to regulate commerce among the several states. The court held that the act did not violate

this provision of the constitution, and that the state of Missouri had the right to preserve its game, and to prohibit the exhibiting for sale within the state of provisions out of season. The decision did not enter into an extended argument of the principles upon which it was based. In February, 1875, the same question came before the court of appeals of the state of New York in *Phelps v. Racey*, 60 N. Y., 10, under a statute which declared that "no person shall kill or expose for sale, or have in his or her possession after the same has been killed, any quail, between the 1st day of January and the 20th of October, under a penalty of $25." The defendant was convicted under this section. He had invented an apparatus to preserve game; and the game which he had in possession, and specified in the complaint, was put up by him in his apparatus in the month of December when the killing was lawful in New York state, or was received from the states of Minnesota and Illinois, where the killing was, at the time, legal. Church, C. J., in delivering the opinion of the court, said: "The language of these sections is plain and unambiguous. Hence there is no room for construction. It is a familiar rule that, when the language is clear, courts have no discretion but to adopt the meaning which it imports. The mandate is that 'any person having in his or her possession,' between certain dates, certain specified game killed, shall be liable to a penalty. The time when or the place where the game was killed, or when brought within the state, or where from, is not made material by the statute; and we have no power to make it so. . . . That it was either killed within the lawful period, or brought from another state where the killing was lawful, constitutes no defense. The penalty is denounced against the selling or possession after the time, irrespective of the time or place of killing." The court further held that the legislature had power to enact the law, and that it was not in conflict with the constitution of the United States. Two years later the same question came before the high court of justice in England, presided over by Lord Coleridge, in the case of *Whitehead v. Smithers*, 2 C. P. Div., 553; 21 Moak, Eng. R. 458. It was provided by section 2 of an act (39 and 40 Vict., ch. 29) that any person who shall have in his control or possession any wild fowl

recently killed, wounded or taken between the 15th of February and the 10th of July in any year, shall, on conviction, forfeit and pay for every such wild fowl so killed, wounded, or taken, or so in his possession, not exceeding one pound, with costs of the conviction. The defendant had purchased the birds, which had been killed in Holland, and consigned to and received by Mr. Howard, a poulterer, and it was claimed for defendant that the statute did not apply to birds killed in Holland, and imported into the United Kingdom. Lord Coleridge said: "I am of opinion that that argument is not well founded. It is said that it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretense of their being imported from abroad." In February, 1881, the supreme court of Illinois, in the case of *Magner v. People*, 97 Ill., 320, under a statute similar to ours, held that the defendant, who was a retail dealer in game in the city of Chicago, and who had bought a box of quail, on December 29th, from a dealer in Leavenworth, in the state of Kansas, who shipped them to defendant, and were by him received on the 23d of December, but who sold them in Chicago on the 15th of January, was liable to the penalty provided by the statute, notwithstanding it was lawful to purchase and receive the quail in Chicago at the time these arrived. The season closed on the 1st of January, and the act made it unlawful, after five days from that date, for any person to sell or expose for sale, or have in his or their possession for the purpose of selling, or exposing for sale, any of the wild fowls or birds mentioned in section 1 of the act, which included quail. In February, 1885, a decision was rendered in the case of *Game Ass'n v. Durham*, 51 N. Y. Sup. Ct., 306, in which the court followed *Phelps v. Racey, supra;* and the defendant was mulcted in penalties in the sum of $5,000 under circumstances which rendered such construction of the law peculiarly odious. Durham was a commission merchant

doing business in the city of New York. Warner, a resident of Chicago, Ill., consigned a few boxes and barrels of quail from Chicago, Ill., to Durham, to sell on commission. The season in New York did not close until February 1st. The birds were received in New York, January 2d. The consignor directed Durham not to sell short of $2 a dozen, and to put the birds in a refrigerator. Durham accordingly delivered the birds to a refrigerator company, where they were stored so as to preserve them. No sales were made during January, but in February a portion of the birds were withdrawn from the refrigerator company, and some of them sold in the city. The remainder Warner withdrew from the company, and the opinion does not disclose what became of them. The court, however, held that all of the quail were in possession of defendant, in violation of law, after the time limited for the open season, and affirmed the conviction of the trial court. In *State v. Judy*, 7 Mo. App., 524, that court held that the statute prohibiting the killing or having in possession certain game is not unconstitutional, either as depriving one of his property without due process of law or as in restraint of commerce.

A construction of a statute which leads to such harsh consequences, and punishes with severe penalties acts which are confessedly innocent in themselves, must not only be unambiguous, but mandatory; and the act done must be not only within the letter, but within the spirit, of the law to gain my assent to its enforcement. Our statute requires no such strict or harsh construction. The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and therefore detrimental to the public health, but the whole end and object of the legislation is to protect and preserve game in the state of Michigan. The first legislation upon the subject was in 1863 (act No. 236). The constitution requires the object of every act of the legislature to be expressed in its title. The title to this act was, "An act to provide for the protection of game in the state of Michigan." In 1865 section 2 of this act was amended. In 1869 a new act was passed, entitled "An act to revise and consolidate the several acts relating to the protection of game, and for the better preservation of elk, deer, birds and wild fowl." This was afterwards amended in 1873, 1875, 1877, 1881 and 1887;

but the revision and all the amendments had but one object, and that was the same stated in the original act, to protect and preserve the game of this state. The various provisions of the act are all directed to that purpose. And how it can be held that this law is violated, either in letter or spirit, by importing game from other states to supply food to citizens of this state is a point that I am unable to understand. The only ground upon which such construction is attempted to be defended is, that it prevents evasion of the statute; that game might be killed in this state in violation of law, and shipped to another state, and there reshipped into this state, and the prosecution might be unable to prove that it was Michigan game killed in violation of law. That may disclose a defect of proof; but I submit it does not apply to cases where the fact is conceded or proved to the satisfaction of the jury that the game was not killed in violation of law. This difficulty of proof has been remedied by the legislature. Act No. 68 of the Public Acts of 1887 enacts "that, in all prosecutions for the violation of any of the laws for the protection and preservation of game and fish, proof of the possession of any such game or fish, or of the skin, carcass, or any portion of the skin or carcass, of such game or fish, at any time when the killing, taking or having in possession any of such game or fish is by law prohibited, shall be *prima facie* evidence of the violation of the law by the person or persons in whose possession the same shall have been found." That quail and other wild fowl or birds fit for food come within the meaning of the word "game" there can be no doubt. They are so recognized by the game laws of England, and of New York, Massachusetts, and other states, which have passed acts for the preservation of game, and are mentioned in the act of 1863 under a title "to provide for the protection of game in the state of Michigan." Act No. 68 is a legislative construction of the game law under which this prosecution is had, and is in consonance with the view that it is not a violation of the law to have in possession and selling game imported into this state from other states, or killed in this state when it was lawful to do so. It was right and proper for the legislature to cast the burden of proof upon those having such game in their possession when the killing is by law prohibited, and fully protects

the state from its evasion. The game law of Massachusetts contains a similar provision; and in *Com. v. Hall*, 128 Mass., 410, it was held that "saying that possession should be *prima facie* evidence necessarily implies that it shall not be conclusive. If the mere possession of birds during the time within which the taking or killing them is prohibited of itself constituted an offense under the previous sections of the statute, to say that such possession should be *prima facie* evidence would be superfluous, if not absurd." That court, Gray, C. J., delivering the opinion, further said: "The object of the statute is to protect these birds during the breeding season, and for such a reasonable portion of the year as may prevent them from being exterminated, or their numbers diminished, in this commonwealth. The mode in which the statute seeks to attain this object is by punishing the taking or killing such birds in this commonwealth during the times specified, or the buying, selling, offering for sale, or having in possession, in this commonwealth, during those times, of birds so taken or killed, and by enacting that the possession in this commonwealth, at such times, of any birds of the kinds specified, shall be *prima facie* evidence to convict, leaving it for the defendant to prove, if he can, that the birds found in his possession were not taken or killed in this commonwealth at a prohibited time. So construed, the statute is reasonably adapted to carry out its object, and is free from all constitutional difficulty." In *Allen v. Young*, 76 Me., 80, it was held that where a statute made it an offense to kill deer at a certain time, or to transport it from place to place during that time, it was not an offense to transport from place to place, during the prohibited season, deer killed before. Defendant had killed a deer before the season closed, and had the carcass and skin in his possession after it had closed. He then took them to a railroad station to be shipped to market, when they were seized by the game-warden. A section of the statute with reference to the possession of the carcass of a deer made the person in possession liable to a penalty, but contained the proviso that he should not be precluded from producing proof in his defense; but this proviso was not contained in the section relative to the carrying or transportation of the carcass or skin from place to place in the state, and the court held that it would apply the

same meaning to the latter section, and the defendant might show that the deer was not killed in violation of law. We think the conviction should be reversed, and the prisoner discharged.

SHERWOOD, C. J., and LONG, J., concur.

CAMPBELL, J. Concurring, as I do, in the meaning of our statute as explained by my brother Champlin, I do so for the further additional reason that I do not think it would be competent for our legislature to punish the possession of game which was lawfully captured or killed. Having become lawful private property, it cannot be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound. While in England the power of parliament cannot, perhaps, be questioned by courts, there is no such rule here, and I cannot see on what principle such decisions are maintainable. It is not competent for any American statute to raise conclusive presumptions of guilt in any case. This is well settled. When the possession is traced back of the time when it became unlawful to take game, the presumption has no further force as evidence, and what was then lawful cannot be made a crime by lapse of time only.

MORSE, J., concurs.

NOTE.—*Nature of offense.*—Such a statute is not unconstitutional as depriving one of his property without due process of law, or as in restraint of commerce. *Magner v. The People*, 97 Ill., 320. But under a statute prohibiting the offering for sale or having in one's possession within a certain time certain kinds of game, it was held, as in the main case, that one is not guilty who has in his possession or offers for sale such game if lawfully killed in another state. *Com. v. Hull*, 128 Mass., 410. And notwithstanding such statute, it is permissible to kill wild animals when they are causing damage to one's property. *Aldrich v. Wright*, 53 N. H., 398. The power of the legislature to enact laws of this character, and the right of the citizen to kill, capture or transport wild game, was recently passed upon by the supreme court of Illinois. The statutes of that state make it unlawful for any person, corporation or carrier to receive for transportation game killed during certain seasons. The defendant was accused of receiving and transporting such game, and insisted that the statute was invalid, but in determining the question the court says:

"A bare reference to the terms of sections 1 and 2 of the act is sufficient to show that the purpose the legislature had in view in passing the act was

to protect the game in the state. The hunting and killing of game was regulated for its preservation by the common law, and the control was predicated under the police power of the government. Bl. Comm., bk. 4, p. 174. Statutes in almost every state in the Union may be found enacted for the preservation of game. The text-writers, in treating of the power to legislate on this subject, place it under the police power inherent in each state. Tied. Lim., § 122*f*, ch. 10, p. 440, says: 'It is a very common police regulation, to be found in every state, to prohibit the hunting and killing of birds and other wild animals in certain seasons of the year; the object of the regulation being the preservation of the animals from complete extermination, by providing for them a period of rest and safety, in which they may procreate and rear their young. The animals are those which are adapted to consumption as food, and their preservation is a matter of public interest. The constitutionality of such legislation cannot be questioned.'

"In *Phelps v. Racey*, 60 N. Y., 10, the power of the state to legislate for the preservation of game was called in question, and in deciding the case the court said: 'The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food.' 'The means best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively, the proper remedy must be applied by that body. See, also, *Allen v. Wyckoff*, 48 N. J. Law, 93. In *Magner v. People*, 97 Ill., 333, the validity of the game law of 1879, to which the act in dispute is amendatory, was before this court, and it was then said: 'The ownership being in the people of the state,—the repositary of the sovereign authority,—and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as in the opinion of its members will best subserve the public welfare.'

"It is, however, argued that where quail have been killed the dead animals become property, and the taker becomes the absolute owner of such property, and an act to prevent a sale, or transportation for sale, within the state, would be an interference with private right amounting to a destruction of the right of property without due process of law. The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. In the *Magner Case, supra*, it was held, as has been seen, that no one had a property in animals and fowls denominated "game." The ownership was in the people of the state. This being so, it necessarily follows that the legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the legislature might confer. The legislature has never conferred an absolute property in quail upon the person who might kill the same. The killing of quail during the months of October and November was permitted, not for sale, not to go upon the market as an article of commerce, but for the mere use of the people who killed the birds. The person killing quail under this statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser

should take them from him, he might maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell, or the right to ship for the purpose of sale; and, when such person undertakes to ship for sale, he is undertaking to assert a right not conferred by law. The act, therefore, does not destroy a right of property, because no such right exists." *American Express Co. v. The People*, 24 N. E. Rep., 758.

STATE v. GILMORE.

(98 Mo. 206.)

GAMING DEVICE: *Ejusdem generis.*

1. Ordinary playing-cards, when used for playing any game for money or property, are not a gambling device within the meaning of the Revised Statutes of 1879, section 1547, as amended by the act of March 9, 1881, prohib ting the setting up or keeping of any "table or gambling device commonly called A, B, C, faro-bank, E, O, *roulette*, equality, keno, or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property."
2. The proprietor of a saloon who gives out cards and sells chips or checks to persons frequenting his dram-shop who call for the same for the purpose of playing seven-up, etc., with each other, on the tables in the bar-room, and who takes no part in the games so played by his customers, is guilty of the offense prohibited by the Revised Statutes of 1879, section 1549, and should be indicted and tried under that section.

Appeal from criminal court of Jackson county; Henry P. White, judge.

J. S. Brooks, *O. T. Knox* and *Traber & Gibson*, for appellant.

John M. Wood, attorney-general, for the state.

BRACE, J. The charge in the indictment in this case is that the defendant "did unlawfully and feloniously set up and keep a certain table and gambling device, to wit, a certain table and chips or checks commonly called 'poker-chips,' and certain cards commonly called 'playing-cards,' all the same being gambling devices, adapted, devised and designed for the purpose of playing a certain game of chance commonly called 'poker,' for money and property, and did then and there un-

lawfully and feloniously entice, induce and permit divers persons, whose names are unknown, to play at and upon said table and gambling device. On this indictment he was tried, convicted and sentenced to imprisonment in the county jail for six months, under the provisions of section 1547, Revised Statutes of 1879, as amended by the act approved March 9, 1881 (Sess. Acts of 1881), which reads as follows: "Every person who shall set up or keep any table or gambling device commonly called 'A, B, C,' 'faro-bank,' 'E, O,' '*roulette*,' 'equality,' 'keno,' or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property, and shall induce, entice or permit any person to bet or play at or upon any such gaming-table or gambling device, or at or upon any game played or by means of such table or gambling device, or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

The evidence tended to show that appellant was the proprietor of a saloon in Kansas City; that he furnished to persons who came to his saloon cards and chips or checks; that persons played in his saloon with the cards and chips, upon tables, such games as seven-up, euchre and poker, for drinks and money; that the tables used were the ordinary tables usually kept in saloons upon which to place lunches, and wine and beer glasses filled with wine and beer to drink, by persons who desired to sit while drinking in appellant's saloon; that the games were played in the same room where his bar stood, and not in another room; that appellant did not participate in such games nor play with nor bet against any of the players; that the players bet their money against each other, and not on the side of or against appellant, who took no part in the games, either directly or indirectly; that the cards and chips used were handed out from behind the bar only to such persons as requested them; that, after the cards and chips were thus given out, appellant had nothing whatever to do with them till they were returned to him; that appellant did not have the care, use or management of the

cards or chips, or of the games played, and had nothing to do with the cards or chips further than to give them to such persons as called for them, after which such persons alone had the use, care and management thereof; that he would sell the chips to the players at five cents each when they commenced the game, and when one or all quit he would redeem the chips which each one had at that rate; that there was a "take-off" in every game of so many chips for the highest or best hand,—as, for example, for "aces up" there was a "take-off" of one chip; for "threes," two chips, and so on; for "fulls," "flushes," etc., so many chips were taken off. These take-off chips were returned to the bar without redemption.

It will not be necessary to notice the instructions in detail. The court, in substance, instructed the jury that an ordinary pack of playing-cards and poker-chips are a gambling device within the meaning of section 1547, *supra*, provided such cards and chips are used for the purpose of playing any game of chance for money or property. Whether this construction of the law is correct is the controlling question in the case. The qualification contained in the proviso cannot have the effect of bringing the cards and chips mentioned within the meaning of said section; for, while the device therein prohibited must be adapted, devised and designed for playing a game of chance for money or property, the offense of him who sets up or keeps the prohibited device of this section is the same whether he permits others to bet money or property, or simply to play at a game played by means of such device for amusement only. So the section reads, and so it was held to mean, in *State v. Fulton*, 19 Mo., 680. This section of the statute is levied at certain gambling devices; section 1549, at one who permits such devices, or any gambling device, to be set up or used for the purpose of gambling on his premises, and section 1548, at any one who gambles at or by means of any gambling device.

The prohibition of section 1547 does not apply to games, but to devices, and is limited to devices adapted, devised and designed for the purpose of playing a game of chance. The chairs upon which the players sit, the ordinary table upon which they shuffle, deal, and throw the cards and chips, nickels,

pennies, or what not, for which they play in an ordinary game of cards, are adjuncts, conveniences and incentives to a game of chance, but neither one of these, nor all combined, is a device for playing such game. The pack of cards is the device adapted, devised and designed for playing the game of chance, the thing with which the game is played. It is the device that is prohibited. It matters not whether the game played is poker, euchre, whist, seven-up, or what the name of the game may be, or whether the stake played for is a dollar, a dime, a nickel, or an ivory chip, representing the value of either, or no value. The question, then, resolves itself into this: Is an ordinary pack of playing-cards a gambling device, within the meaning of section 1547, *supra?*

In prosecutions under the sections of the statute in previous revisions corresponding with 1548 and 1549, it has been held in several cases that playing-cards are a gambling device, within the meaning of such sections. *State v. Purdom*, 3 Mo., 115; *State v. Ellis*, 4 Mo., 474; *Eubanks v. State*, 5 Mo., 450; *State v. Bates*, 10 Mo., 166; *State v. Herryford*, 19 Mo., 377; *State v. Scaggs*, 33 Mo., 92. But we have failed to find a case prosecuted under the law contained in section 1547, which has been on the statute book, in terms substantially the same as in the present revision, since 1825, in which it has been held that such cards were a gambling device within the meaning of that section; and, it having never been so expressly ruled, we do not feel constrained in this case, in which we are called upon to pass upon this question directly, to follow conclusions that might be drawn from *dicta* in some of those cases in which this section was only indirectly considered, unless an independent examination of the statute will warrant it.

The application of a few familiar principles of interpretation ought to determine the question. Certain gambling devices are specially named in the section under consideration. Cards are not of the number. Following those specifically named are the general words, "or any kind of gambling device adapted," etc., under the rule that where general words follow particular ones they must be construed as applicable to things of the same general class. Cards are not included in this general designation, unless they are *ejusdem generis* with the devices specifically named in the section. That they are

so, even when used with chips to play a game of poker, we are not advised by any evidence in the record, or by any knowledge derived from other sources. That they are not, seems to appear from the nature of the particular devices, so far as we have been able to learn it from adjudicated cases in courts of states the manner and social customs of whose people most nearly resemble our own. *Nuckolds v. Com.*, 32 Grat., 884; *Com. v. Wyatt*, 6 Rand. (Va.), 694; *Ritte v. Com.*, 18 B. Mon., 35; *State v. Hawkins*, 15 Ark., 259; *Stith v. State*, 13 Ark., 680. The construction contended for is condemned by the rule of *ejusdem generis*.

Another rule of construction is "that every word and clause should, if possible, have assigned to it a meaning, leaving no useless words." The words, "or on the side or against the keeper thereof," in this section, are rendered useless, when it is attempted to be applied to cards used in playing a game of poker, or any other ordinary game of cards. So, if every kind of gambling device was intended to be included in the class of devices mentioned in this section, what was the necessity in section 1548, after providing a penalty for any one who shall bet upon any gaming table, bank or device prohibited by section 1547, of adding the words, "or at or upon any other gambling device?" Evidently they were used because in the mind of the legislature the general words in the preceding section, being limited to devices of the kind mentioned, it was necessary to use additional words to include devices not of the class mentioned; otherwise they are useless. When it is considered that section 1549 makes ample provision for the punishment of one who permits his premises to be used for the purpose of gambling by means of any device, and when looking further along in the statute, we consider the summary and stringent provisions made for the seizure and confiscation of the devices prohibited by the section under consideration, and their public destruction by fire, the conclusion that ordinary playing-cards are not within the terms of this section, reached from a consideration of the phraseology of the section in connection with that of the one immediately following it, would seem to be required, in order to render it harmonious with the general intent or the whole enactment, and thus another rule of interpretation leads to such a construction.

The gambling devices enumerated in this section are the same as those enumerated in the original act of 1825, except keno, which was added to the list in 1865, and the keepers of them have always been made obnoxious to severe penalties. In the original act they were liable to punishment, not only by fine and imprisonment, but by stripes and the pillory; and by the last amendment the offense is made a felony. The severity of the sentence in itself to some extent indicates the character of the devices aimed at; at least serves as a warning not to extend by construction the operation of the act beyond the requirements of its terms, while the serious consequences that might result from following the construction contended for by the state to its logical sequence add force to the warning. That ordinary playing-cards were not within the meaning of the law-maker in section 1547 as it appears in the original law covering this subject (R. S. 1825, p. 309, § 87), and that they were within his meaning in the two following sections (1548 and 1549, R. S. 1825, p. 310, §§ 88, 89), is clearly apparent; and, whatever obscurity may have been cast upon that meaning in subsequent revisions, a proper construction of these three sections (1547, 1548 and 1549), as they appear in the present one, discloses the same legislative intent. On the evidence in this case the defendant should have been indicted and tried under section 1549 for an offense under which he could have been legally convicted and punished. His conviction under section 1547 was not authorized by law; and, for the errors which lead to it, the judgment is reversed and the defendant discharged. All concur, except Sherwood, J., absent.

NOTE.— *Gaming, what constitutes.*— The vice of gaming has prevailed in all ages and among all people. It seems founded on the love of the marvelous, one of the properties inherent in the human mind. And so, like every other departure from the true rule of right, it is, in another view, but the action, wrongful indeed, of a faculty given to man by his Maker for good and valuable uses. The offense is not recognized under the ancient common law of England; consequently an indictment will not ordinarily lie here for an act of gaming not prohibited by some statute, English or American. 2 Bishop on Criminal Law, 570; 1 id., 949; *United States v. Willis*, 4 Cranch, C. Ct., 659.

As to the origin of the statutes against gaming, and as to the nature of the offense, Blackstone says: "Next to that of luxury naturally follows the offense of gaming, which is generally introduced to supply or retrieve the ex-

penses occasioned by the former; it being a kind of tacit confession that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offense of the most alarming nature, tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class, and among persons of a superior rank it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honor and virtue, and too often hath ended in self-murder. To restrain this pernicious vice among the inferior sort of people the statute 33 Hen. VIII., ch. 9, was made, which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions are specified, unless in the times of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. II., ch. 24, inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game as upon the servants themselves who are found to be gaming there." 4 Blackstone, 171.

While, as has been seen, gaming was not punishable by ancient common law, still the English statutes and those of the American states are now far-reaching and extend to almost every form of gaming, providing for the destruction of its instruments, the punishment of those who harbor the players, and even those who tolerate gaming in their houses. The enormity of the offense in the eye of the law varies from being a misdemeanor in some of the states to being a felony with severe terms of imprisonment in others. And the word gaming has been held to include physical contests of man or beast when practiced for the purpose of deciding wagers, or for the purpose of diversion, as well as to games of hazard or skill by means of instruments or devices. So horse racing is gaming. *Corson v. Neathy*, 9 Colo., 212; *Boughner v. Meyer*, 5 Colo., 71; *Totman v. Strader*, 23 Ill., 493; *Shopshire v. Glaswick*, 4 Mo., 536; *Boynton v. Curle*, id., 599. A bet is a wager, and the bet is complete when the offer to bet is accepted. The placing of money, or its representative, on the gaming table is such an offer; and, if no objection be made by the player or owner of the table or bank, it is an acceptance of the offer, and the offense is, as against the Alabama gaming statute, complete, although, from any cause whatever, the game should never be played out, and the stake be neither lost nor won. *State v. Welch*, 7 Port. (Ala.), 463.

It is interesting to observe how far the social habits of a community and the temperament of a people creep into and even influence the decisions of their courts. An illustration of this arises in the decisions of some of the courts upon the question of gaming. Thus it is held in several of the states that playing billiards or pool, where the losing party pays for the use of the table, is gambling. *State v. Book*, 41 Ia., 550; *Murphy v. Rogers*, 151 Mass., 118 and cases cited; *Ward v. The State*, 17 Ohio St., 32; *State v. Bishel*, 39 Ia., 42; *State v. Leighton*, 23 N. H. (3 Fost.), 167. While upon the other hand it has been held that "although persons using the billiard tables may have played for the purpose of determining who should pay the trifling sum for the use of the tables," this did not constitute the offense. *Harbaugh v. The People*, 40 Ill., 294; *Blewett v. The State*, 34 Miss., 606; *People v. Sar-*

gent, 8 Cow. (N. Y.), 139; *People v. Forbes*, 4 N. Y. S., 757; 52 Hun, 30. So, also, it is held that horse racing is not gaming. *State v. Hayden*, 31 Mo., 35; *State v. Rorie*, 23 Ark., 726.

Trotting or racing horses for a premium or reward is not illegal at common law, or under the statutes of Wisconsin, and the winner of such a race may sue for the premium. *Porter v. Day* (Wis.), 37 N. W. Rep., 259. Again, it is held in Indiana that horse racing is a game, and betting upon it is within the statute. *Wade v. Deming*, 9 Ind., 35. Also, that it is an offense to permit one's horse to run in a horse race, and a separate offense to act as rider in a race. *State v. Ness*, 1 id., 64; *State v. Shaw*, *infra*; *Corson v. Matheny*, 9 Col., 212. Playing at cards, the loser to pay for the liquor which is consumed, is gaming. *Bachellor v. The State*, 10 Texas, 260. Betting upon the result of an election was held not to be gaming. *State v. Henderson*, 47 Ind., 127. Prize-candy packages come within the inhibition in Tennessee. *Eubanks v. The State*, 3 Heisk., 488. And betting upon the uncertain result of any election, whether made before or subsequent to the time of holding such election, is indictable. *Miller v. State*, 33 Miss., 356. Also, to bet on a cock-fighting match. *Bagley v. The State*, 1 Humph. (Tenn.), 486. But game-cocks are not implements of gaming. *Coolidge v. Choate*, 11 Metc., 79. Playing billiards for checks, notes or instruments, understood by the parties to represent value, and by virtue of which the winner can, in fact, obtain value, whether they are collectible by law or not, is a violation of the statute against gaming. *Gibbons v. People*, 33 Ill., 442; *Porter v. The State*, 51 Ga., 300. If a party plays a game, although he have no stake upon it, and yet knows others are betting, he is guilty. *Smith v. The State*, 5 Humph., 561.

The jury on the trial of a defendant charged with gaming rendered the following special verdict: "We find that the defendant, with some six or more other gentlemen, played at a game called tenpins or handicap. In this game no one played to beat any other gentleman, but each one had assigned to him a certain number of pins to get with a certain number of balls, some more and some less, according as they were considered good or bad players. If the player did not get the number of pins assigned to him, he was to treat to a bottle of champagne. The defendant did play at this game in Murry county, in less than six months preceding this presentment, and did sometimes, on failing to get the number of pins allotted to him, treat to a bottle of champagne, and sometimes he did not. It was agreed by the parties, at the commencement of the playing that the treat was to be a voluntary thing, and no one need do so unless he was perfectly willing. The jury farther find that the defendant and the other gentlemen engaged in this play did not believe it to be gaming." *Held*, that these facts constituted the offense of gaming. *Walker v. State*, 2 Swan (Tenn.), 287.

A spectator, who is not interested in or connected with a faro-bank as owner or employee, may aid the dealer, so as to keep and exhibit it for the time being, under General Statutes of Kentucky, chapter 47, article 1, section 6. *Vowells v. Commonwealth*, 83 Ky., 193. One who has custody of a table, authority over its use, and supervision of the gaming, is within Code of Alabama 1876, section 4208, providing a penalty against "any person who keeps, exhibits, or is interested or concerned in keeping or exhibiting any table for

gaming." *Bibbs v. The State*, 84 Ala., 13. But a conviction for playing cards at a gaming house is not warranted by evidence that at intervals several games had been played at the house in question. *Anderson v. State* (Tex.), 12 S. W. Rep., 868; *Parks v. Same*, id., 869. It is not error, in the trial of a person accused of playing a certain game, *e. g.*, "tan," for money, for one witness to illustrate what game the accused was playing, and for another to testify that the game thus shown is "tan." *People v. Sam Lung*, 70 Cal., 515.

The question as to the rule of *ejusdem generis* cited above and as to what constitutes a gambling device was in a recent case before the supreme court of Kentucky. The defendant was accused of keeping a table upon which dice were thrown and bets made as to the combination of numbers which would be uppermost. The game was called "craps" or "oontz" and the table used was an ordinary table. The section of the statute under which the prosecution was had was as follows: "Section 1. Whoever, with or without compensation, shall set up, carry on, or conduct, or shall aid and assist in setting up, carrying on, or conducting, a keno-bank, faro-bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost, . . . shall be punished." The court then says: "We turn, then, to precedent and rules for the construction of statutes for guidance. The statute first enumerates a keno-bank and a faro-bank,—contrivances which are used notoriously and solely for gaming. It then adds, 'or other machine or contrivance used in betting.' It is a rule of construction that where a statute or any instrument enumerates certain things, and then uses a term which may be construed to include other things, it is generally to be confined to those of a like class or character. The term is to be restricted to those *ejusdem generis*. The general words following the particular ones must be construed as applying to things of the same general class. Here the statute first names certain machines or contrivances in well-known use for gaming. Keno and faro are banking games. Keno-banks and faro-banks are contrivances for gaming, in every sense of the word; so recognized and generally understood. This is not true of dice, which, while they may and often are used for gaming, as indeed almost anything can be, usually serve for amusement. Nor can it be said that the table or floor or whatever surface may be used constitute the machine or contrivance, within the meaning of the statute. Such things are not ordinarily used for gaming. Our law provides for the seizure and destruction of gaming implements, and this statute could not well be applied to the surfaces upon which this game might be played. As well might it be claimed that, if persons gamed by the throwing of coppers upon an ordinary table or floor, the money or table fell within the terms, 'other machine or contrivance,' used in the statute, and that the party suffering it to be done was liable to this severe penalty. The language of the act and the severity of the punishment makes it obvious that it was the intention of the legislature by means of it to suppress gaming with such contrivances as are ordinarily and notoriously used for such purpose. It must be a machine or contrivance constructed for such purpose, and not one ordinarily used for amusement or an innocent purpose. The 'machine or contrivance' referred to in the statute must, under the rule of *ejusdem generis*, be one similar in character to a faro or a keno bank. In the case of *State v. Gilmore*, 11 S. W. Rep., 620, a

statute of the state of Missouri, providing that "every person who shall set up or keep any table or gambling device commonly called 'A, B, C,' 'faro-bank,' 'E, O,' '*roulette*,' 'equality,' 'keno,' or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property," should be guilty of felony, was held not to embrace a case where a saloon-keeper furnished to his customers cards and chips, with which they played upon ordinary tables in his saloon for drinks and money. In the case of *Chappell v. State*, 27 Tex. App., 310, where a game like the one now under consideration was played upon an ordinary table with dice, it was held not to be a gaming table. It was in no way essential to the game. It could have been played, as the court says, upon any surface, and neither the table nor the dice were a requisite of the game. In *State v. Hardin*, 1 Kan., 474, the court decided that the general words 'gambling devices,' used in the statute, after mentioning certain implements or contrivances designed for gaming purposes, did not include a pack of cards. A keno or faro bank is the implement of a professional gambler. Our legislature was arriving at the suppression of the use of such devices and contrivances, and not at what is ordinarily used for amusement, although the article may be used or is in some sense adapted to gaming; as dominoes, checker-boards, chess-boards, and the like. The act specifically names certain of the most notorious and obnoxious implements used for the forbidden purpose, and the general words following were intended to include others of a similar character, and, like them, designed for gaming. The cases we have referred to and the views above expressed are supported by those of this court in the cases of *Ritte v. Com.*, 18 B. Mon., 35, and *Com. v. Monarch*, 6 Bush, 298. If the legislature intended by this statute to make one guilty of a felony, for any game of chance, without regard to how it might be played, or what might be used in doing so, it should, and doubtless would, have employed language more definite in character for such a purpose; and that it did not so intend is made plainer by the fact that we have another statute punishing one for permitting gaming upon his premises. Judgment affirmed." *Com. v. Kammerer*, 13 S. W. Rep., 108.

STATE v. SHAW ET AL.

(39 Minn., 153.)

GAMING: *Betting on horse race—What constitutes gambling device.*

1. A violation of section 294, Penal Code, which prohibits gambling with cards, etc., is a misdemeanor, and is punishable under section 13.
2. The risking of money between two or more persons on a contest of chance of any kind, where one must be the loser and the other the gainer, is gambling.
3. For such purposes a horse race is a game, and betting thereon is punishable under section 296.

4. The "boards and lists" described in the indictment, and alleged to be kept and used by defendants, and descriptive of horse races, and the times and places of such races, are not "gambling devices" within the intent and meaning of the statute. No additional element of chance is introduced thereby, and the determination of the alleged games are not affected by their use.

Appeal from district court of Ramsey county; Kelly, judge.

Indictment of Frank Shaw and Harry Brannigan for gambling and keeping gambling devices.

C. D. & Thos. O'Brien, for appellants.

Moses E. Clapp, attorney-general, and *J. J. Egan*, county attorney, for the state.

VANDERBURGH, J. This appeal involves the construction of sections 294, 295, Penal Code. As the code has abolished all common-law offenses except as defined and made punishable thereby (section 2), the indictment must stand or fall by the interpretation to be given to the sections named.

1. Chapter 9, title 10, Penal Code, is substantially a transcript of corresponding sections in chapter 99, General Statutes of 1878, except that section 12 of the last chapter, expressly declaring gambling to be a misdemeanor, and fixing the penalty, is omitted. But we are of the opinion that section 12 was omitted because the prohibited acts must, under section 6, Penal Code, be classed as misdemeanors, and the legislature intended to leave the punishment therefor to be inflicted under section 13. The prohibition makes the acts specified unlawful under the Criminal Code of this state, and, the offense not being expressly defined or made a felony, it must be intended to be made a misdemeanor under sections 3, 4 and 6. There are many offenses in the code which are expressly "declared" to be misdemeanors, and where no penalty is provided, and the punishment is left to be regulated under section 13; but it would be too narrow a construction to hold that the latter section is limited to cases in which the offense is in terms "declared" to be a misdemeanor, if the prohibited act must fairly be construed to be such under section 6.

2. The principal question involved in this case is the construction to be placed upon the term "gambling devices," used in section 294 and section 295, and this question is common to

all the counts in the indictment. The first count charges that the defendants did, at the time and place named, "for gain and reward, gamble with gambling devices, to wit, boards and lists containing the names of horses which were to race on a given day, at a time and place then and there named." The second count charges that "the defendants, for gain or reward, did unlawfully keep, maintain and control divers gambling devices, designed to be used in gambling, viz., boards and lists containing the names of horses which were to race on a given day within the United States, at a time and place then and there named, but a more particular description of which said devices, names of horses, places and times of races, is to this grand jury unknown, which said gambling devices were then and there designed by said Shaw and Brannigan to be used in gambling in the manner following, to wit: Said Shaw and Brannigan would then and there place on said boards and lists the names of certain horses which were to race at different places within the United States, on a day then and there named, and from said names of horses so placed, divers persons, to this grand jury unknown, would then and there select three horses from said boards and lists, each of which were in different classes or races, and each of which were to be winning horses in each of their respective lists, and designated by the persons so selecting them as the winning combination; and said unknown persons so selecting said combination of three horses would then and there bet and wager large sums of money with said Shaw and Brannigan that said three horses would be the winning horses in their respective races; and in case each of said horses won in their respective races, then said unknown person or persons would become the owner of the money bet and wagered as aforesaid; and if either or all of said three horses so selected failed to win in their said respective races, then said Shaw and Brannigan would become the owner of said money bet and wagered as aforesaid," etc. The third count charges that Shaw and Brannigan "did unlawfully maintain, keep and control divers gambling devices, to wit, boards and lists" described as in the second count, "to be used in gambling in the manner following," known as "auction pools," to wit: "A race being about to take place between the horses

named on said boards and lists in some place within the United States, but not within the state of Minnesota, at a time and place then named, the said Shaw and Brannigan would then and there announce that fact, and offer the first choice to the highest bidder, who would then, after his bid was accepted, select some horse from said boards and lists. Then second choice would be sold in the same way, also third choice, if there was any bidder for it, and then all the other horses, the names of which appeared on said boards and lists as taking part in said race, would be sold together, as the field, for one bid. The different purchasers would pay their money to the said Shaw and Brannigan, and would receive checks in return on which would be marked the amount bid, and the purchase made by him and the total amount in the pool. Upon the result of the race being announced, all the money in the pool would be delivered to the person who had named or purchased the successful horse, less a three per cent. commission retained by Shaw and Brannigan." The first count is evidently based on section 294, and the second and third on section 295, Penal Code. The statute enumerates cards, dice, gaming tables, which are well-defined devices used in gambling, and then follow the words "or any other gambling devices whatever." Gambling is defined to be "a risking of money or other property between two or more persons on a contest of chance of any kind, where one must be the loser and the other the gainer." A horse race may therefore be a game, and betting on a horse race is gambling, and undoubtedly the parties charged in the indictment were gambling, and it might well be held that persons betting on such games would be liable to prosecution under section 296 of the Penal Code, and that the house or place kept by defendants was a common nuisance, and the keepers might have been indicted under the common law for "keeping a common gaming house." But the offense here charged is gambling with "gambling devices," and "keeping gambling devices designed to be used in gambling." The term "device" has the same meaning in both sections. Though the words "any other gambling devices whatever" are doubtless intended to include any kind of apparatus, contrivance or instrument which may be used in games of chance, and upon the manipulation or operation of which the result of

the game is determined, yet these terms, "gambling devices," must be construed *ejusdem generis* with the particular devices which are described in the preceding portion of the same section in fixing the general character of such devices referred to in the statute. *In re Le Tong*, 18 Fed. Rep., 257. A horse race is not a gambling device, nor are descriptive lists of such races, or statements or announcements of the particulars thereof, from which those desiring to bet on the races may more conveniently obtain information in respect to the same, and we are unable to see that the boards and lists or records of the pools sold described in the indictment are anything more. There is no element of chance in their use, which we think is the test. The defendants' methods undoubtedly serve to facilitate gambling, and so does the fact that they keep open a place for gambling, and the same may be said also of the published schedules of races and games, and many other acts and things, which, however, cannot be denominated "gambling devices" within the meaning of the statute. The betting is on the races exclusively, and the result is in no way determined by the use of the instrumentalities in question, and no additional element of chance is introduced thereby. The cases of *Com. v. Moody*, 143 Mass., 177, and *People v. Weithoff*, 51 Mich., 203, are cited in support of this indictment, but they arose under entirely different statutes, and only serve to illustrate more fully the defects and omissions in the statutes of this state as respects the charges in question here. In *Com. v. Moody* the prosecution proceeded under a statute of Massachusetts (Acts 1885, ch. 342) which provides a penalty for buying or selling pools or keeping a place for such purposes. And in *People v. Weithoff* the indictment was under a statute prohibiting gaming rooms, and it was held that keeping a room where pools are sold was within the statute.

We are of the opinion, therefore, that under the statutes of this state the indictment cannot be sustained. It is accordingly directed to be quashed and the defendants discharged.

State v. Light.

(17 Oreg., 358.)

Gaming: *Indictment — Accomplice.*

1. In an indictment for betting at a game played with cards called "stud poker," it is not necessary to allege the names of other persons who bet at the game at the same time, or to allege that they are to the grand jury unknown.
2. The dealer of a game of stud poker is an accomplice with those who bet money or value at such game. Both are necessary to complete the offense, each performing a separate and necessary part in the violation of the statute.
3. In an indictment for a statutory offense it is generally sufficient to follow the descriptive words of the statute defining the crime.

Appeal from Lake county.

M. A. Kelton and *Cogswell & Cogswell*, for appellant.
W. M. Colvig, for respondent.

Strahan, J. The defendant was indicted for the crime of "wilfully and unlawfully playing at a certain game called 'stud poker,'—a game played with cards,—for money, and checks as representatives of money and value." The defendant demurred to the indictment for several reasons, which demurrer was overruled by the court, and upon a trial before a jury he was convicted, from which judgment this appeal is taken.

1. The first objection which will be noticed is one presented by the demurrer to the indictment. It is insisted that the indictment is bad for the reason that the names of the persons participating in the game at the time the defendant played are not set out in the indictment, nor is it alleged that they were unknown to the grand jury. The authorities cited by counsel for appellant certainly support his contention, if they are to be followed. *Jester v. State*, 14 Ark., 552; *Barkman v. State*, 13 Ark., 703; *Groner v. State*, 6 Fla., 39; *Butler v. State*, 5 Blackf., 280. But the later authorities are the other way. *Goodman v. State*, 41 Ark., 228; *Hinton v. State*, 68 Ga., 322; *State v. Pancake*, 74 Ind., 15; *Roberts v. State*, 32 Ohio St., 171. I think the better reason is with the later authorities. In an indictment for a statutory offense it is generally suffi-

cient to follow the descriptive words of the statute, which was done in this case. The particular facts and circumstances, who participated, etc., are matters of evidence and need not be pleaded.

2. It appears from the bill of exceptions that one McDonaugh, who was the dealer at the time the defendant is charged to have played, was the only witness introduced or examined on the part of the state. At the conclusion of his evidence the court charged the jury as follows: "There being no other evidence than that of witness McDonaugh, if you find that he was an accomplice you must acquit. To constitute him an accomplice he must have received a share of the profits or a compensation out of the game. If he was simply dealing the game to enable others to play, but was not betting in the game, nor receiving anything therefor, he was not an accomplice." To the giving of this instruction the defendant excepted. On the same subject the defendant asked the court to instruct the jury as follows: "If you find from the evidence that witness McDonaugh aided or abetted the playing of the game for which the defendant was indicted, he was an accomplice; and if you find that he was an accomplice you must acquit the defendant, as his evidence is uncorroborated." This instruction was refused, to which an exception was also taken. The witness McDonaugh was indictable, and liable to the same punishment for dealing the game, which was played for money, checks, credits or any other representative of value. Hill's Code, § 3526. The question presented for our consideration, therefore, is, Did McDonaugh become an accomplice by dealing stud poker at which the defendant bet money or representatives of value? In *State v. Roberts*, 15 Or., 187, this court quoted with approbation Whart. Crim. Ev., § 440, defining an accomplice as follows: "An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." Substantially the question presented by the instruction given and the one refused was before the court for determination in *Davidson v. State*, 33 Ala., 350, and under a statute the same as ours as to the corroboration of witnesses who were accomplices. In disposing of the question the court said: "An accomplice is defined to be 'an associate in a crime; a partner or partaker in guilt.' See Webst. Dict.; Bouv. Law Dict. In Foster's Crown

Law, 341, the word 'accomplice' is said to take in all *particeps criminis*. If, then, a person playing at a game with cards, adversely to the accused, and with him participates in the commission of the offense condemned by the statute, he is an accomplice." Further on the court remarks: "Our argument does not involve the position that adversaries in fact are accomplices in law. Antagonists in playing cards are not adversaries as to the thing which constitutes the offense. They agree together as to the playing at a game with cards, and each voluntarily contributes to that end; and they are adversaries to which one shall perform his part in the game with the highest skill. There is a perfect agreement among the players that each shall perform his part, and the strife between them is which shall do it most skilfully." No authority was cited at the hearing, and I have been unable to find any, that sustains that part of the court's instruction defining an accomplice as applied to the facts of this case. Participation in guilt is what makes an accomplice. The dealing of a game with cards at which others bet money or values constituted McDonaugh's guilt, and it in no manner depended on whether he received a share of the profits or a compensation out of the game or not. Nor was he guiltless "if he was simply dealing the game to enable others to play, but was not betting in the game nor receiving anything therefor." Dealing the game at which others bet made McDonaugh an accomplice with them in the violation of the statute, and his guilt did not depend upon his "profits" or "compensation." *Com. v. Burns*, 4 J. J. Marsh, 177; *Com. v. Drew*, 3 Cush., 279. The statute punishes the dealing of a game at which others bet money or value. Dealing is not sufficient to constitute a crime; there must be betting. The acts of at least two persons concurring together — one dealing and the other betting — are necessary to effect a violation of the statute, and I have no doubt there is such a connection between dealer and the party who bets as to constitute one the accomplice of the other. Both are necessary, and each performs his part of the acts which the law denounces as criminal, and the fact that each is punished for the part he performs can make no difference. The crime could not be committed without the concurrent acts of both. Let the judgment be reversed, and the cause remanded for a new trial.

STATE v. BILLINGS.

(77 Iowa, 417.)

GRAND JURY.

1. FREEDOM FROM BIAS — EXAMINATION.— One of the grand jurors who found an indictment for murder in the first degree against defendant was examined at length as to his freedom from bias, and the material part of his examination is set out in the opinion (which see), from which it appears that he had engaged in some talk of lynching the defendant; but held that the examination evidenced a state of mind reasonably free from any prejudice or conviction that should disqualify him, and the court did not err in allowing him to sit on the case.

2. NUMBER NECESSARY TO INDICT.— In a county where, under the present statute, the grand jury consists of five members, and a challenge is sustained as to one and his place is not filled, the remaining four may, if they all concur, find a valid indictment. *State v. Shelton*, 64 Iowa, 333, followed in principle.

3. CHANGE OF VENUE — PREJUDICE OF JUDGE — DUTY OF COURT.— Where a change of the place of trial of a criminal case is sought on the alleged ground of the prejudice of the presiding judge, the judge is not at liberty to avoid the embarrassment of a trial in the face of such objections by granting a change, but must rule upon the application, when fully advised, "according to the very right of it" (Code, sec. 4374); and this ruling will not be disturbed on appeal unless it is shown that he has abused his discretion, and no such showing is made in this case.

4. PREJUDICE OF PEOPLE — SHOWING AND COUNTER-SHOWING — ABUSE OF DISCRETION.— The application for a change of venue in this case, involving a charge of murder in the first degree, was supported by the affidavits of some forty or fifty persons, showing a high state of feeling among the people, and at least some prejudice against defendant, and that there was some talk of lynching him. It also appeared that many other persons applied to to make like affidavit, would have done so but for prudential reasons. This showing was opposed by the affidavits of some eight hundred persons, which did not controvert the facts of excitement and prejudice, but did controvert the claim that the excitement and prejudice were so great as to prevent a fair and impartial trial. *Held* (all concurring), that to have granted the change upon the showing made would have been in accord with the general practice in such cases, and (Granger, J., dissenting) that it was, under all the circumstances, an abuse of discretion for the court to deny the change. Compare *State v. Read*, 49 Iowa, 85, and *State v. Perigo*, 70 Iowa, 657.

5. INSTRUCTIONS — CREDIBILITY OF DEFENDANT'S WIFE AS AFFECTED BY HIS CHARACTER AND MOTIVES.— On the trial of defendant for the murder of one Kingsley, the court instructed the jury as follows: "Even though you may believe from the evidence before you that the defendant has been of base and degraded life, and that he was, from sordid motives of

personal gain, pressing a false charge against Kingsley, or even that defendant and his wife had conspired together to extort money from him, or that the evidence shows that defendant was guilty of other crimes not charged in this indictment, none of such considerations will warrant you in convicting the defendant on this indictment; nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive toward the deceased." Defendant's wife was a very important witness in his behalf. *Held*, that the instruction was erroneous, because though it was designed to express the correct rule of law, and would readily be so understood by the professional mind, yet its language permitted the jury to consider the acts and misconduct of the defendant, in regard to which his wife had no part or connection, as affecting her credibility, on the single condition that "she participated in any improper motive towards the deceased."

Appeal from district court, Bremer county; G. W. Ruddick, judge.

The defendant was indicted for murder of the first degree. Upon the trial of the indictment the defendant was convicted of murder of the second degree, and from a judgment on the verdict he appeals.

W. L. Eaton, *C. Wellington*, *E. M. Billings* and *M. E. Billings* (*pro se*), for appellants.

John Y. Stone, attorney-general, and *E. A. Dawson*, for the state.

GRANGER, J. 1. At the impaneling of the grand jury that returned the indictment one Bockhouse was examined as to his qualifications, and error is assigned as to the rulings of the court in permitting him to remain as a member of the panel. The juror is of foreign birth, and it is evident he did not at all times fully understand the import of the questions, and in some cases, we think, his answers did not exactly express his purpose. He resided some seventeen or eighteen miles from Waverly, where the homicide occurred, and where the court was sitting. The material part of his examination is as follows: "*Counsel for defendant. Question.* Mr. Bockhouse, isn't it a fact that you have said frequently, at your own town of Tripoli, that you believed Mr. Billings to be guilty of murder? *Answer.* I have said like this: If he done the shooting,

of course he was guilty. *Q.* That is not an answer to my question. *A.* That is the only thing that I remember that I have said. *Q.* Isn't it a fact that you have said, and said frequently, in your own town, you believed Mr. Billings was guilty of murder? *A.* I don't know how to answer that. I don't know that. I couldn't said that he was. *Q.* Haven't you said that you believed he was? *A.* Why, I might have said so on the first, by the saying that some talked. I might have said that. I don't know, though. *Q.* Haven't you said besides, frequently, that in your opinion he ought to be hung? *A.* No; I don't think I have. Don't remember of as I have said that. Don't know as I have said any more than any man that murdered in such a way as that, I thought ought to be hung. I think that is the way I have said it. Don't think I said that frequently. Never talked with people over there very much in regard to this matter. *Q.* Haven't you said that you would be glad to help hang him? Said it in your own town? *A.* No more than just what I say. If he was the man that shot Mr. Kingsley, that he ought to be hung. I don't know but I would help hang him if I was right there. Some such remark. *Q.* You have said you would help hang him if you were right there? *A.* Yes, sir; if he was in the wrong. *Q.* Haven't you said you believed he was in the wrong, and you would be glad to help hang him, or that in substance? *A.* I never said I would be glad to help hang him. Don't remember that I said I was going to help hang him. Don't think I ever said that. I won't swear to it; but don't think I ever said that. Don't think there has been much talk over at Tripoli about hanging him. I believe some talk in regard to lynching him. Think I heard such talk. Think I have talked with others. *Court.* In your talk with others there, did you say that you would participate in any attempt to lynch him? Did you say you would do anything of that kind? *A.* No; no, sir; no; I don't think I ever said any such thing. *Court.* Do you mean to say that you have formed no opinion upon the question of guilt or innocence of Mr. Billings on the charge of murder? *A.* I say that I have formed no opinion. *Q.* Do you mean to say that you have expressed no opinion upon that question? *A.* I haven't formed any opinion. *Court.* I ask you about your expression now. Have you expressed

any opinion of that character? *A.* You mean whether I expressed my opinion whether he was guilty? *Court.* Yes, sir; guilty or innocent. *A.* I don't know that I have said that he was guilty; not that I remember. *Court.* You don't remember that you have made any such expression? *A.* I don't remember that I made any such expression, that he was guilty. *Court.* Is your state of mind such that you could investigate the charge for which he is held here with entire candor and fairness? *A.* Well, it is so I want to hear a good deal more about it than I have before. *Court.* No; but would you investigate it fairly, candidly and impartially? Of course, it is here for the purpose of investigation. *A.* I mean, before I could pass my opinion, I would want to hear a good deal more than I have. *Court.* I want to know whether or not you can take part in that investigation impartially, for the purpose of determining from the evidence the fact, free from any prejudice that you have had heretofore, if you ever had any. *A.* Yes, sir; free from any prejudice, I could take part."

It is true the juror had been in the midst of strong excitement, and where there was evidently a conviction as to the guilt of the defendant, as must be the case where there is talk of lynching. One expression of the juror, as, "Think I talked with others," in the connection in which it appears, tends to show that he talked with others of lynching. If satisfied of the fact that he counseled or favored such a proceeding, we should hesitate much before allowing an indictment found by the vote of such a grand juror to stand. From all the testimony of the grand juror we do not think that such is the fact. He was undoubtedly present when there was talk on that subject, and talked himself; but the evidence does not show that he counseled any such step or favored it. His examination by the court evidences a state of mind reasonably free from any prejudice or conviction that should disqualify him from acting as a grand juror. As to the juror's having formed an opinion that would disqualify him, the action of the court in overruling the challenge has strong support in the case of *State v. Shelton*, 64 Iowa, 333, and we think the holding correct.

2. One Wile, upon examination as to his qualifications as a grand juror, was challenged by the defense and the challenge sustained, and, under instructions from the court, took no part

in the case, but his place on the panel was not supplied, and the failure to supply his place is assigned as error. Under the present law a grand jury for Bremer county is composed of five members, and the concurrence of four is necessary to the finding of an indictment. Hence, as to this case, but four of the five members of the grand jury took part, all of whom must concur to legally present the indictment, and it is urged to us that the defendant was entitled to the presence and deliberations of a full panel. Inasmuch as we regard the question as settled upon authority, our reasoning upon it would be of little, if any, practical utility. Prior to January 1, 1887, a grand jury was composed of fifteen members, and the concurrence of twelve was essential to the validity of an indictment. The same reasoning that would entitle a defendant to a full panel under the law as it now is would have entitled a party under the law as it then was to a full panel; the line of argument being that it cannot be known what would have been the effect of the influence and deliberations of the absent members as to those present, and that with a full panel an indictment might not have been found. The argument is not without force, but in the case of *State v. Shelton*, *supra*, three of the fifteen members of the panel were excused from acting in the case because of challenges, and only twelve members took part, all of whom must concur to the present indictment. In that case this court held that the defendant was not entitled, as a matter of right, to the full panel in his particular case; that, the grand jury being legally impaneled, its organization was not affected by the absence of the three; and the indictment was sustained. We think that case ample support for the ruling of the district court in this case.

3. At the term at which the indictment was returned the defendant filed his motion to change the place of trial, on the ground of the prejudice of the judge. The defendant is a lawyer of many years' practice in Bremer county, which is and has been for many years the home of the presiding judge. The petition for the change is quite elaborate, describing with considerable minuteness many instances of defendant's experience in cases before the court, and his treatment by the court. Without any reference whatever to the merits of these particular complaints, we think the defendant believed there

was prejudice against him, and that he could not have an impartial trial unless his application was granted. It is, perhaps, unfortunate that any person should be put on trial for his life or liberty with such a belief. This is the most objectionable feature of this particular branch of the case, for an examination of the record, both as to this showing for a change and the trial of the indictment, nowhere impresses us with a belief, or even a doubt, but that the utmost fairness was manifested by the court in all departments of the trial as to the defendant. Owing to the peculiar provisions of our statute, the trial judge experiences his most delicate and embarrassing duty in passing upon the question of his own impartiality or want of prejudice for the trial of causes. The statute, in terms, is a restriction upon his inclinations or promptings to grant the change, and thus avoid comment and the embarrassments that necessarily follow his sitting for the purpose of trial after such objections are interposed. When a petition is filed, averring his prejudice, his duties are prescribed by Code, section 4374, in these words: "The court, in the exercise of a sound legal discretion, must decide the matter of the petition, when fully advised, according to the very right of it." He is not to give judgment as to his preferences or as to the beliefs of the applicant for the change, but as to the fact of the prejudice as it appears to him. This court has frequently said that it can only interfere in such cases where the trial judge has abused the discretion with which he is invested. *State v. Mewherter*, 46 Iowa, 88; *Same v. Ray*, 50 Iowa, 520.

4. At the time of presenting the petition for a change of venue on account of the prejudice of the judge, a petition was also presented for a change of venue because of prejudice and excitement against the defendant in the county, and the application also asks that the cause be not sent to Butler or Floyd county, because of such excitement and prejudice there. This application is supported by the affidavits of some forty or fifty persons residing in such counties, a large majority of the affiants being residents of Bremer county, and their affidavits have reference only to that county. Some of these affidavits state facts showing the grounds for the belief of the affiants as to such prejudice and excitement, and they unmistakably show a high state of feeling among the people, and at least

prejudice to some extent as against the defendant, and the facts undisputed show that in some instances there was talk of lynching the defendant. The affidavits of some who endeavored to get signatures to affidavits for a change of venue show that, of those approached and who refused to sign, many expressed themselves that there should be a change of place of trial, but that to make the affidavit would prompt the accusation that they were taking sides with Billings, or it would hurt them in their business. Other and particular facts are disclosed by the affidavits for the change, which need not be stated further than that they show an intensely strong feeling against the defendant in and for miles about Waverly. This feeling was augmented by reports, and to some extent a belief, that in many respects the defendant was a dangerous and bad man. Opposed to this showing for a change of venue are the affidavits of some eight hundred residents of the three counties named, most of them, however, being residents of Bremer county. The affiants reside in the different townships in the county, and represent nearly all the business interests, and among them a large number of farmers residing outside of the villages. The substance of these affidavits is that the affiants are well acquainted with the general feeling and sentiment of the people of the county towards the defendant, and that they know of no prejudice or excitement that would prevent the defendant from having a fair and impartial trial in the county. These affidavits do not controvert the particular facts stated in the affidavits for the change, nor do they deny the facts of excitement and prejudice; but they do controvert the claim that the excitement and prejudice is so great as to prevent a fair and impartial trial. On the trial before us this point was urged by appellant with much apparent confidence, and the members of this court are agreed that the granting of the change under the showing made would have been in accord with the general practice in such cases, and saved from the record of the case at least the question of doubt, if the defendant had been accorded a trial under such circumstances that the verdict was not influenced by the excitement or prejudice surrounding it. While agreed as to this fact, there is not a unanimous conviction that the refusal of the court was an abuse of its discretion. A majority

of the members think the facts of this case distinguish it from other cases wherein this court has held that the refusal of the district court to grant the change was not an abuse of discretion, and they believe and hold that it was error to refuse the change under the showing herein made. The writer of the opinion does not concur in this view, and believes that the action of the district court does not involve an abuse of discretion, if we are to be guided by the former holdings of this court. In the opinion of the writer, the case of *State v. Read*, 49 Iowa, 85, presents a state of facts equally as strong, if not stronger, against the action of the district court than this, and its action was sustained on the ground that it had not abused its discretion. That case has strong support in the case of *State v. Perigo*, 70 Iowa, 657, and, in my judgment, those cases should control our action on this question.

5. Error is assigned to the giving of the nineteenth instruction by the court in these words: "The jury must not be drawn away from the proper consideration of the charge in the indictment. The defendant is not charged in this indictment with presenting to Kingsley an infamous and false charge of seducing his wife for the purpose of extorting money, but the charge is that he fired the shot that caused the death of Kingsley; and, even though you may believe from the evidence before you that the defendant has been a man of base and degraded life, and that he was from sordid motives of personal gain pressing a false charge against Kingsley, or even that defendant and his wife had conspired together to extort money from him, or that the evidence shows that the defendant was guilty of other crimes not charged in this indictment, none of such considerations will warrant you in convicting the defendant of the charge in this indictment. Nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive towards the deceased. Nor have you anything to do or consider with reference to what has been said about public opinion on this case, and you must give it no consideration, but confine your investigations to the charge presented by this indictment, namely: 'Did the

defendant fire the shot which caused the death of Willis S. Kingsley.' To the solution of this question, under the evidence before you in this case, you must bring your cool, deliberate and dispassionate judgment, uninfluenced by other consideration than the evidence before you and the law as given to you in the charge." Mrs. Billings was a very important witness for the defendant, and the criticism upon the instruction is that, if the jury should find that Mrs. Billings had participated in any improper motive toward Kingsley (the man alleged to have been murdered), then the jury might consider the character and conduct of Mr. Billings as to his having committed other crimes, or having been a man of base and degraded character, etc., as affecting her credibility as a witness. In argument to us it is not questioned but that, if such is the proper construction to be given the instruction, it is erroneous, and to the extent of being prejudicial, and should reverse the judgment. The only point urged is that it should receive a different construction, and the claim in that respect is that, properly understood, the instruction means that only the conduct of Mrs. Billings could be considered as affecting her credibility. We can readily understand that such was the purpose of the learned judge who wrote the instruction, because, thus understood, it is in harmony with a familiar rule of law; but such an understanding does not come from the language used. It is not for us to give to the language that construction which the professional mind may assume the court intended, but we must give it that meaning which the language used would reasonably convey to the jury, for it is its guide to the law of the case. It was evidently the design of the instruction as a whole to guard the jury against any considerations which might prejudice the rights of the defend ant. The part of the instruction relative to the credibility of the defendant and his wife is in the nature of an exception to the restrictions urged upon the deliberations of the jury; and hence it has special prominence in the instruction. It could not be questioned that all the acts of misconduct referred to in the instruction, and the base and degraded life of the defendant, as believed by the jury, could, under the instruction, be considered as affecting the credibility of the defendant, and the language is identically the same

as to the credibility of the wife, if she participated in any improper motive towards the deceased. The instruction says: "None of such considerations will warrant you in convicting the defendant of the charge in this indictment, nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive towards the deceased." No reasonable transposition of the terms employed aids appellee's claims for construction. The pronoun "them" refers for its antecedent term to the word "considerations," being plural in form, and but a single instance of misconduct of the wife is referred to in the instruction. With the fact established that the wife had participated in an improper motive towards the deceased, the instruction allowed the jury to consider the acts and misconduct of the defendant in regard to which she had no part or connection as affecting her credibility. There is no claim that such is the law, nor could there well be, and the error is certainly prejudicial to the defendant. On account of the errors in giving the instruction and refusing to grant the application for change of place of trial from Bremer county, the judgment is reversed.

PEOPLE v. NORTHEY.

(77 Cal., 618.)

GRAND JURY.

1. BIAS OF JURORS — FORMATION OF PREVIOUS OPINION.— The previous opinion which disqualifies a grand jury is one formed from mere hearsay, without the sanction of an oath. The formation of an opinion of the guilt of a party indicted by the grand jury, from his testimony under oath given before them, upon a similar charge against another person, is no disqualification.
2. SAME — SCOPE OF INQUIRY OF GRAND JURY — BIAS.— A grand jury has, within the scope of its inquiry, all public offenses committed or triable within its county; and though it takes up a charge against one person, if it appears from the testimony taken on such examination that sufficient reasons exist for putting another person on his trial, they can and should find an indictment against such person. An opinion

of the guilt of such person so formed involves nothing of bias or prejudice, though the indictment against him be not directed on the same day. Nor does the calling of other witnesses, before finding such indictment, indicate bias or prejudice of the jurors.

3. SAME — PRESENCE OF GRAND JURY IN COURT. — The fact that two of the grand jurors were in court when another person was on trial for the same offense, and heard the defendant plead his constitutional privilege as a witness, is of no significance, if it does not appear that it had any effect upon the indictment of the defendant.

4. SAME — MOTION TO SET ASIDE INDICTMENT — CUMULATIVE PROOF OF BIAS — CONTINUANCES. — The court may properly refuse to delay the hearing of a motion to set aside an indictment for bias of the grand jurors when it appears from the statement of counsel asking the delay that he expects to prove the same sort of prejudice, partiality or bias of another grand juror, on the same facts as existed and were proved in regard to other jurors, which facts were no legal indication of bias or prejudice.

5. INDICTMENT — INDORSEMENT OF NAME OF DEFENDANT AS WITNESS. — If the defendant has testified before the grand jury, it is not necessary to indorse his name upon the indictment as a witness; and the failure to do so is not ground of motion to set aside the indictment.

6. SAME — DEPOSITION — NOTES OF SHORT-HAND REPORTER. — The notes of a short-hand reporter of testimony given orally upon a trial and read to the grand jury by the reporter are not a deposition, within the meaning of the statute requiring the name of a witness, whose deposition was given to the grand jury, to be inserted at the foot of the indictment or indorsed thereon.

7. TRIAL — IRREGULARITY — REMARKS OF JUDGE — INSTRUCTIONS CURING ERROR. — A remark of a judge, during a criminal trial, that he thought "the prosecution in criminal cases was too much handicapped," is not ground of reversal, if the judge subsequently instructs the jury to disregard the remark, and so cautions them as to remove all apprehension that the remark would have any effect on the mind prejudicial to the defendant.

8. CRIMINAL LAW — BRIBERY — DOCUMENTARY EVIDENCE. — On the trial of an indictment for offering a bribe to a juror who served in a civil action, the complaint, answer and minutes of the court in such action are admissible in evidence to prove the allegation of the indictment, and to show that the juror to whom the bribe was offered served as a juror on the trial of such action, and it is proper to read them to the jury.

9. TRIAL — READING DOCUMENTARY EVIDENCE TO JURY. — Whatever documentary evidence is admissible may be read to the jury, without regard to the purpose for which it is offered.

10. SAME — INSTRUCTION LIMITING EFFECT OF EVIDENCE. — If evidence is offered for a special purpose, which the party against whom it is offered fears may operate prejudicially if not limited in its scope to such purpose, he must request an instruction so limiting it, or he cannot assign the failure of the court to instruct on such point as error.

11. OMISSION OF COURT TO INSTRUCT JURY.— It is a general rule in all cases that an omission of the court to instruct the jury on any point is not error, unless a proper instruction is asked by counsel and an exception taken to the refusal of the court to give it.
12. SAME — ADMISSIONS OF DEFENDANT — APPEAL — OBJECTIONS FOR FIRST TIME.— A written statement of the evidence given by the defendant before the grand jury, which he has admitted to be correct, is admissible in evidence against him. The objection that the evidence was not shown to have been voluntarily given, or that the admission was made while in prison, cannot be raised on appeal for the first time.
13. BRIBERY — ACCOMPLICE — EVIDENCE.— When counsel for defendant informs the court that he is going to contend that a juror to whom a bribe was offered was an accomplice with the defendant accused of offering the bribe, it is admissible for such juror as a witness to testify upon such collateral issue, and to illustrate his conduct, that he was advised by a third person, whom he had informed of the offer, to hear all that was to be said, and to seemingly acquiesce, so as to prevent the defendant from approaching other jurors, and that he acted in pursuance of such advice. (PATTERSON, J., dissenting.)
14. GRAND JURY — OBLIGATION OF SECRECY.— The rule of secrecy of the proceedings before a grand jury is intended only for the protection of the grand jurors, and the witnesses before them cannot invoke it, and the fact that a person was called, sworn and examined as a witness before the grand jury does not come within the rule of secrecy, and a grand juror may testify to such fact.
15. BRIBERY — OFFERING BRIBE OF THIRD PERSON.— The conveyance to a juror of an offer of a third person to bribe such juror is the offering of a bribe by the person conveying the offer, and is no less an offer to bribe because the money to be paid was not to come from his pocket.
16. REHEARING.— The court will not consider, upon petition for rehearing, any point waived, either expressly or tacitly, upon the argument by not being then urged or suggested; and this rule applies to criminal cases, and will not be dispensed with except in a case of peculiar or real hardship. Technical points urged on petition for rehearing, for the first time, will not be considered.

In bank. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, judge.

Indictment against F. T. Northey for offering to give a bribe to H. F. Woods, a juror in a civil case. Defendant was convicted, and sentenced to imprisonment for nine years. From the judgment and order denying a new trial defendant appeals.

Geo. A. Knight, for appellant.

Attorney-General Geo. A. Johnson, for the people.

THORNTON, J. The defendant Northey was accused by indictment of wilfully, corruptly and feloniously offering to give a bribe to H. F. Woods, a juror on the trial of the action of *Wright et al. v. The Geary-Street Park & Ocean Railroad Company*, pending in the superior court (department 6 thereof) of the city and county of San Francisco, and in which an issue of fact had been joined, with the corrupt and felonious intent to corruptly influence the vote, opinion, verdict and decision of Woods as juror, in favor of the defendant in the action above named. The defendant was convicted and sentenced to imprisonment in the state prison for the term of nine years. A motion for a new trial was made by defendant, and denied, and he prosecutes this appeal from the judgment and order denying a new trial. The defendant, not having been held to answer before the finding of the indictment, when called on to plead, moved to set aside the indictment. *First.* "Because Stewart Menzies, Patrick Connolly, W. H. Coddington, Charles F. Doe, J. J. Donovan, Charles Holbrook, A. P. Hotaling, Patrick Lynch, P. V. Merle, Samuel Pollack, F. G. Wagner, Louis Abrahams, H. Brandt, A. R. Kelly, Sol. Kahlman, George C. Shreve, William Wolf and Jacob Greenbaum, members of the grand jury which found the said indictment against defendant, were at the time they were impaneled as grand jurors on said grand jury, and at the time they found the said indictment, incompetent to act as grand jurors in the finding of said indictment, for the reason that there existed a state of mind in each of them in reference to the above-entitled case, and this case, and in reference to this defendant, which prevented them, and each of them, from acting impartially, or without prejudice to the substantial rights of defendant, in the finding of said indictment." *Second.* "That the names of all witnesses and persons appearing before said grand jury are not and were not inserted at the foot of said indictment or indorsed thereon."

It appears from a bill of exceptions found in the record that Patrick Connolly and Stewart Menzies, on their examination, on the hearing of the motion above stated, testified that they were members of said grand jury that found the indictment against the defendant Northey, and that they voted for the finding of the indictment. Twelve grand jurors, including

them, voted for the finding of the indictment. They were present in court when the case of *People v. Robert F. Morrow* was on trial for procuring Frank T. Northey to approach and offer to give a bribe to H. F. Woods, in the cause of *Florence M. Wright et al. v. Geary-Street Park & Ocean R. Co.*, wherein defendant here was called as a witness for the prosecution, and declined to answer all questions put to him relating to the charge against Morrow, on the ground that they would have a tendency to convict him of a felony; and were present in the grand jury room when the charge against Morrow was examined, and when Northey testified, and heard defendant Northey then testify.

Connolly further testified that, after hearing the testimony of Northey given before the grand jury in the *Morrow Case*, he had formed an opinion that Northey was guilty; that that opinion was a fixed and decided opinion, and founded on Northey's own statement before the grand jury; that this opinion was formed before the finding of the indictment against Northey, and that he had this opinion when he went to examine the charge against Northey. Menzies was also called, and testified that he formed the opinion after hearing Northey's testimony on the examination of *Morrow's Case* before the grand jury; that Northey admitted his guilt in this testimony; that the opinion was decided as to his guilt; that he voted for the indictment against Northey; that it was founded on the testimony of Woods; that the indictment against Northey was found after the finding of the indictment against Morrow; that he acted fairly and impartially, and without prejudice, in finding the indictment under consideration. John T. Wagner, Alfred R. Kelly, F. G. Wagner, Charles F. Doe, William H. Coddington, Samuel Pollack and Jacob Greenbaum, who were members of the same grand jury, and acted on the indictment against Northey, and voted for it, also testified that they heard Northey's testimony before the grand jury above mentioned, and on this testimony formed a fixed and decided opinion that Northey was guilty. Patrick Lynch was one of the same grand jury, and testified that the short-hand reporter's notes of Northey's testimony on the trial of the indictment against Morrow were read to the grand jury while it had *Northey's Case* under discussion. It appears, further, by the bill of exceptions, and is also stated

therein, "that each and all of said above-named grand jurors testified, upon their examination on said motion, that, when they acted upon the case of defendant, and considered and found said indictment, they had no bias or prejudice against defendant and acted without regard to any prior opinion of his guilt, and without prejudice, and were not influenced in any manner against defendant, or his substantial rights, but acted impartially and fairly upon the evidence introduced before them in the grand jury room on the hearing of the charge against the defendant, and not from comments in public journals, or public rumor, or common notoriety."

In connection with this inquiry, the counsel for defendant asked for a subpœna to procure the attendance of A. P. Hotaling, one of the members of the grand jury who had acted on and voted for the indictment against Northey. A subpœna had been regularly and with diligence issued for Hotaling, and placed in the hands of the sheriff, who returned that Hotaling was absent from the county and could not be found, but that he would return in two days. The court inquired of counsel what he expected to prove by Hotaling, to which he replied that he proposed to show by Hotaling substantially the same facts as testified to by the other grand jurors,— that he had formed a fixed and decided opinion as to the guilt of Northey, from Northey's testimony before the grand jury above stated, and that opinion was that he was guilty. The court required of counsel to make his statement by affidavit, which counsel refused to make, and thereupon the court refused to grant further time to subpœna grand jurors. The court refused to set aside the indictment, and defendant excepted. It is argued that the indictment should be set aside for the reason that it appears from the testimony of the grand jurors examined that a state of mind existed on the part of each of them, when they found these indictments against Northey, in reference to Northey and his case, which prevented them and each of them from acting impartially, or without prejudice to the substantial rights of the defendant in finding the indictment herein. The partiality and prejudice here charged against each grand juror is based on the fact that, in examining, in their capacity as grand jurors, a case against Robert F. Morrow, Northey was called as a witness before the grand jury,

and on such examination testified that he was guilty of the offense charged in the indictment, and that in this testimony each of them had formed the opinion that he was so guilty. It clearly appears from the testimony of one of the grand jurors examined that Northey in his testimony admitted his guilt, and, as they all say that they formed their respective opinions on this testimony, the inference is irresistible that such was the character of Northey's testimony. It is admitted by each of these grand jurors that their opinion, formed on such testimony, was fixed and decided. Now, conceding that an indictment can be vitiated by the participation of a grand juror in finding it, who had formed, before entering on its examination, an unqualified, fixed and decided opinion that the defendant so indicted was guilty, and for that reason should be set aside, can it be that an opinion formed under the circumstances in evidence herein is of that character? The facts upon which the opinion of each grand juror was formed herein came to his knowledge in the discharge of his duty as a grand juror, when the grand jury was engaged in the discharge of its official duties, in inquiring into a public offense against the people of the state, triable within the county of their impanelment. Northey is called as a witness before them, and testifies under oath, in the presence of the jury, to facts which inculpate him in a public offense, within the scope of their inquiry. In effect, the witness admits his guilt. The grand jurors hear his sworn statement, and conclude that he is guilty. Can such an opinion — is it possible that an opinion so formed can — be disqualifying as to any member of the grand jury to act upon an indictment of the witness for the offense of which he admits his guilt? The opinion which disqualifies is one formed from something heard outside which has none of the sanction of an oath, and is merely hearsay. It might as well be charged against a judge that he is partial, or biased or prejudiced against a person tried for a public offense before him, when, on a motion for a new trial of the cause, on the ground that the verdict is contrary to the evidence, he states, in denying it, that he has heard and considered the evidence, and formed the opinion when he heard it, and was still of opinion, that the defendant was guilty and the verdict correct.

The counsel speaks of *Morrow's Case*, and the grand jury having under consideration *Morrow's Case* when Northey gave his testimony, and he seems to regard the grand jury as resembling a petit jury, and, like the latter, restricted to the examination of a particular case. We do not think this is a proper or reasonable view. The grand jury has within the scope of its inquiry all public offenses committed or triable within its county (Penal Code, § 915); and though it takes up for examination a charge against one person, if it should appear from the testimony taken on such examination that sufficient reasons exist for putting another person on his trial, they can and should find an indictment against such other person. Suppose, in such a case, they should conclude that both persons should be indicted on an opinion formed, when the charge against one only was specially under examination. Both indictments might not be directed by the same order. The indictment against the witness might be ordered on a day subsequent to the order of the other. Could it, with any justice or propriety, be said, under these circumstances, that a grand juror was not impartial, or was prejudiced, because when the matter of directing an indictment against the witness was taken up he had already formed an opinion on evidence regularly heard that the witness was guilty? Can bias or prejudice or partiality be charged against members of a grand jury because, having already formed an opinion of a party's guilt on testimony regularly and lawfully heard, they hear the testimony of another witness before ordering an indictment to be drawn up against such party? The foregoing questions can be answered in only one way, and that relieving a grand juror so acting from every imputation of bias or partiality. We see nothing of bias or prejudice in an opinion so formed. It is not a prejudgment at all. The opinion is formed on evidence coming regularly before the grand jury in the discharge of its lawful functions, and does not indicate a state of mind in reference to the case or the party indicted which will prevent a grand juror from acting impartially, and without prejudice to the substantial rights of both parties. We see no reason why this grand jury should not have indicted Northey on his own testimony, as given before it. If it saw proper to call a witness (Wood), as was done in this case be-

fore ordering the indictment, we see no reason why it could not do so. Such a course indicated no bias or prejudice on the part of the grand jury, or any member of it. In fact, *Northey's Case* may be said to have been under consideration from the time that he gave his testimony in relation to Morrow until the indictment against him was found. The disqualifying state of mind referred to in the statute must have existed when the examination of *Northey's Case* was commenced, when he was called before them as a witness, and it is not contended that any such state of mind existed at that time.

The fact that two of the grand jurors were in court when Morrow was on trial, and heard Northey plead his constitutional privilege when he was there called as a witness, is of no significance. It does not appear to have had anything to do with their voting for Northey's indictment. The contention as to bias or prejudice of the grand jurors, or either of them, cannot be sustained. We fail to see that Northey suffered any prejudice as to any substantial right, or any right whatever. The court committed no error in refusing a delay to procure the attendance of Hotaling. From the statement of counsel when he made the motion for delay, it appears that he expected to prove the same sort of prejudice, partiality or bias, on the same facts as existed in regard to the other jurors, which we have held was no indication of bias or prejudice. It is further argued that the indictment should be set aside because the name of a witness whose deposition was read to the grand jury was not inserted at the foot of the indictment, or indorsed thereon. It appears that the notes of the short-hand reporter of Northey's testimony on Morrow's trial were read to the grand jury when considering the case against Northey, and it is said this was Northey's deposition, and that Northey's name should have appeared on the indictment in one of the modes above stated. The testimony of Northey was given orally on Morrow's trial, and the short-hand notes of such testimony were not a deposition. Code Civil Proc., §§ 2004, 2005. "The object of requiring the names of the witnesses to be thus indorsed upon the indictment is twofold: *First*, to inform the party who are his accusers; and *second*, to inform the prosecutor who are the witnesses." *People v. Freeland*, 6 Cal., 99. It would be useless to inform the party that he was him-

self an accuser. If it was material or important that he should be informed of it, he already had that information. As to his being informed of the names of those who had testified before the grand jury, and might be called to testify on his trial on behalf of the prosecution, this could only refer to such witnesses as could be called by the prosecutor, and could be compelled to testify, or, at least, to be sworn. It could not refer to the party indicted, who could not, in any event, be called for the prosecution. We cannot see that the law required Northey's name, in any view, to be placed on the indictment in either of the modes above pointed out. It follows from the above that the court below properly refused to set aside the indictment. We do not think that there should be a reversal on account of the remarks made by the judge of the court below as to the law, and that he thought "the prosecution in criminal cases was too much handicapped." The court, in consequence, no doubt, of the importance attributed to these remarks by counsel for defendant, and an apprehension on the part of counsel that they might have an effect on the eight jurors present in the jury-box when the remarks were made, prejudicial to his client, took occasion, in delivering its charge to the jury, to make to them the following observations: "You are the exclusive judges of all matters of fact, but must be guided by the law as laid down for you by the court, independently of any preconceived notions of your own, or of anything that counsel may have said, and of anything that may have been said in your presence or hearing as to the propriety or policy of any provision which the law may have laid down for the conduct of criminal cases. During the examination of Mr. Kohler as to his qualifications to serve as a juror, some language was used by the court to which defendant's counsel took exception. I instruct you that it is your duty to ignore in your deliberations the remarks then made by the court, and that you must deal with the case on the law as it exists, and as the court states it to you, irrespective of your own opinion, or any opinion the court might have, as to the wisdom of the law." We think that these observations to the jury, made to them by the court when giving them directions by which to guide their conduct in the consideration of the case, were sufficient to remove all apprehension that the remarks of the

court, above referred to, would have any effect on their minds prejudicial to the defendant. To hold otherwise would be to attribute to the jurors a lack of ordinary intelligence; and this, we are bound to presume from their selection to try the cause, they possessed. To hold that the members of the jury in whose presence the remarks were made could not lay them aside as something irrelevant to the business they were charged with, and disregard them entirely in the discharge of their functions, would be irrational and incredible. If men of ordinary intellectual endowments are incapable of such a mental operation, trial by jury may justly be regarded as a failure. In view of all the circumstances, we see no ground justifying a reversal in this matter, the discussion of which here comes to an end.

The complaint and answer and the minutes of the court in the case of *Florence N. Wright et al. v. The Geary-Street P. & O. R. Co.* were properly admitted in evidence to prove the allegations of the indictment in regard to that case, and the fact that the Woods who was named in the indictment as the person to whom a bribe was offered by defendant was a juror, and acted as such on the trial of the case. If these documents were admissible in evidence, it was proper to read them to the jury. Counsel for defendant contends that the complaint and answer were admissible only to show that there was an issue of fact pending in the case referred to, for trial before a jury; that it was error to permit them to be read to the jury against his objection; and further, that, as the evidence was admitted for a special purpose, it was the duty of the court to have limited, by its instruction to the jury, the evidence to such special purpose, and that the failure to do so was error. We have already disposed of the objection to reading the above papers to the jury. What portion of this evidence would or could have operated to the prejudice of defendant we cannot see, nor has counsel pointed it out. If there was anything of the character above referred to in the papers, not relevant to the issue joined herein, and which counsel apprehended might operate prejudically to the defendant, he should have requested an instruction limiting the evidence so as to restrict its scope to the purpose for which it was offered. Not having done so, he cannot here assail the failure of the

court so to limit the evidence. That the court failed to instruct on such point is not error, conceding that such instruction should have been given if asked for. We think it may be stated, as a general rule in all cases, that, if the court in its charge has failed to direct the jury on any point, its failure to do so is not error; and if counsel desires an instruction to be given, proper in itself, and which should be given, he should ask for it, and on his omission to ask for it the omission of the court to give it is not error. To entitle counsel to assail the action of the court for error, under such circumstances, a proper instruction must have been requested by counsel, refused by the court, and an exception reserved by counsel to the ruling.

The defendant excepted to the ruling of the court admitting Woods' testimony as to his conversation with Gamage. Woods stated that he had told Gamage what had occurred between him and Northey as to the offer of Northey to pay him money to favor the defendant as a juror in rendering a verdict in the case of *Wright, etc., v. The Geary-Street Park & Ocean Railroad Company*, and that Gamage had advised him to hear all there was to be said on the subject, and to seemingly acquiesce, because if he did not do so he might approach some other juror, and that, in pursuance of such advice, he had answered Northey, on his third conversation with him, that it was all right. The counsel for defendant had informed the court that he was going to contend that Woods was an accomplice with Northey. On this issue, collateral to the main one, the evidence was admitted by the court. We think there was no error in this ruling. The testimony related to an occurrence which tended to illustrate the conduct of the witness Woods in his dealing with Northey, and was admissible on the issue above mentioned. The admission of the written statement of Northey's evidence before the grand jury, which Northey admitted to George Flournoy to be substantially correct, was not error. The objection here made, that it was not admissible because it was not affirmatively shown by evidence to have been voluntary on the part of Northey, cannot be now urged. No such objection was ever made to it in the court below. The objection then made was that it was irrelevant and immaterial, and not permissible under section 926 of the Penal

Code. The objection now urged was made for the first time in this court and cannot be considered. When the admissions of Northey were made he was in prison, detained there as a witness in the case of *People v. Morrow*, and this is urged as a ground why they were not admissible. This point does not seem to have been urged in the court below, and cannot be urged or considered here. Indeed, the fact of Northey's imprisonment related to the voluntary character of the admissions, and, as we have seen, no objection as to their voluntary character was made when the testimony was offered and admitted. The ruling on that point covers this. Section 926 of the Penal Code, and the provisions therein contained, relate to a grand juror, when called as a witness, and provide that a grand juror may be required by any court to disclose the testimony of a witness examined before the grand jury in the cases mentioned in the section. Granting that a grand juror can only be compelled to disclose the testimony of such witness in the cases mentioned in the section referred to, it will be observed that no grand juror was called here to make any disclosure whatever. The only witness called in relation to this matter was Flournoy. It may be further remarked that it seems that the rule of secrecy set forth in the statute is intended only for the protection of grand jurors, and not of the witnesses before them, and that the witnesses cannot invoke it. See *People v. Young*, 31 Cal., 564, 565. Stewart Menzies, foreman of the grand jury, testified: "Know Frank Northey. He was examined before the grand jury,—sworn and examined." To the above testimony counsel for defendant made no objection and reserved no exception. He cannot then assail it here as error. We may add that the evidence was clearly admissible, within the rule laid down in *People v. Young*, *supra*. The fact that a person was called, sworn and examined as a witness before a grand jury does not come within the rule of secrecy. If it did, it is violated whenever an indictment is returned with the names of the witnesses indorsed on it or inserted at its foot. Publicity is thus given to the fact, and a publicity, too, that is required by the statute. We think the verdict is sustained by the evidence. It would be an absurd refinement to hold that the defendant did not offer to give a bribe to Woods. When he conveyed Morrow's

offer to Woods to bribe him he was offering himself to give a bribe. It was no less an offer to give a bribe on his part because the money to be paid was not to come from his pocket. We find no error in the record. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J., SHARPSTEIN, J.

PATERSON, J. I concur. I think, however, that the admission of Woods' testimony as to the conversation he had held with Gamage was error. I agree in saying that the error was not prejudicial on the grounds: *First*, that no objection was made to it because incompetent; and *second*, that it is of such a character it did not tend, in my opinion, to prejudice the defendant before the jury.

EX PARTE FRIDAY.

(43 Fed. Rep., 916.)

HABEAS CORPUS: *Sentence — Entry at subsequent term — Imprisonment in state penitentiary — Length of term — Hard labor — Penitentiary offense.*

1. The terms of the supreme court of the District of Columbia are appointed by the court in general term, pursuant to 25 Statutes at Large, 749, to begin on the first Tuesdays of January, April and October. The rules of the court provide for the prolongation of a term only for the purpose of signing and settling bills of exceptions. *Held*, that one term could not be continued after the commencement of the next succeeding term, and a judgment entered in July, under the heading "January term, 1890, continued," by which a sentence pronounced at the January term, 1890, is set aside as invalid, and a new sentence pronounced, is void.
2. Revised Statutes of the United States, section 5541, provides that when a person convicted of an offense against the United States is sentenced to imprisonment "for a period longer than one year the sentence may be executed in a state penitentiary." *Held*, that a sentence in such case of imprisonment "for one year" in a state penitentiary is not void, but, if objectionable at all, is merely irregular, in that imprisonment in a state penitentiary for a period "not longer than one year" is imposed.

3. Revised Statutes of the United States, section 5541, provides that when "any person convicted of an offense against the United States is sentenced to imprisonment for a period not longer than one year" the sentence may be executed in a state penitentiary. Section 5542 provides that "in every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement at hard labor," the sentence may be executed in a state penitentiary. *Held*, that section 5541 applies to cases where the punishment is imprisonment only, while section 5542 applies to cases where the punishment is imprisonment at hard labor; and where a person is convicted of an offense against the United States, punishable by imprisonment at hard labor, the sentence may be executed in a state penitentiary, though it is not "for a period longer than one year."
4. Revised Statutes of the District of Columbia, section 1141, provides that a person convicted, among other offenses, of larceny, shall be imprisoned "in the penitentiary" for a certain period. Section 1158 provides that a person convicted of grand larceny "shall be sentenced to suffer imprisonment and hard labor for a period not less than one year." *Held*, that where a person is convicted of grand larceny sentence can be executed only in a penitentiary.

At law. Application by Kate Friday for a discharge on a writ of *habeas corpus*. Sections 5541 and 5542 of the Revised Statutes of the United States are as follows:

"Sec. 5541. In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose.

"Sec. 5542. In every case where a criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose."

Chas. A. Talcott, for the petitioner.

D. S. Alexander, United States district attorney, and *John E. Smith*, assistant United States district attorney, for the government.

COXE, J. The petitioner was, in 1889, indicted for larceny at the October term of the supreme court of the District of Columbia, holding a criminal term. The indictment contained three counts. At the January term, 1890, the petitioner was tried and convicted upon all the counts. A motion for a new trial was made and denied, and on the 15th of March, 1890, still of the January term, she was sentenced on the first count to be imprisoned at labor in the Albany county penitentiary for one year; on the third count to be imprisoned at labor in the same penitentiary for one year additional, and on the second count to be imprisoned in the jail of the District of Columbia for thirty days.

Notice of appeal to the court in general term was thereupon given. The duly certified records of the court, presented upon the argument, show that on the 9th of July, 1890, under the heading "January term, 1890, continued," the defendant was brought into court and the sentence previously pronounced on the 15th of March was set aside as invalid, and one that could not be carried into effect in view of the decision of the supreme court in *In re Mills*, 135 U. S., 263; 10 Sup. Ct. Rep., 762.

A new sentence was thereupon pronounced, like the first in every particular, except that the terms in the penitentiary were increased, being for a year and a day in each instance. The terms of the criminal court for the District of Columbia for the year of 1890 began on the first Tuesdays of January, April and October. The superintendent of the Albany penitentiary attaches to his return what purports to be a certified copy of the record of the supreme court of the District of Columbia, and he states that this is his sole authority for holding the petitioner. This record is dated July 9th, and recites that the petitioner was indicted, tried, convicted and sentenced to imprisonment for one year and one day upon the first and third counts, respectively. The petitioner asks to be released for the following reasons:

First. The sentence, being cumulative, is erroneous.

Second. The sentence was partially executed by imprisonment from March 15th to July 9th in the district jail, and could not thereafter be changed even at the same term.

Third. The January term, 1890, expired upon the com-

mencement of the April term, and a sentence imposing additional penalties could not be pronounced after the term at which the petitioner was convicted and first sentenced.

The proposition that the court, on the 9th of July, had no jurisdiction to expunge the sentence of March 15th, and pronounced one imposing a longer imprisonment, states, in my judgment, the petitioner's strongest ground of relief. In opposition to this position, two conflicting stories are advanced. The district attorney maintained at the outset that the first sentence was absolutely void, and the case should be treated as if it had been continued upon the verdict until July 9th, the sentence then pronounced being the only valid sentence.

Subsequently the conflicting theory was advanced that the first sentence was in no way affected by the *Mills Case;* that it was valid and is now being executed; and the proceedings of July 9th, being at a subsequent term, were beyond the jurisdiction of the court and should be treated as null. In answer to the latter view it is deemed sufficient to say that the return of the superintendent of the penitentiary only authorizes him to hold the petitioner under the second sentence. No reference is made in the return to any proceedings prior to July 9th. The prison authorities cannot hold her upon a sentence delivered four months before, of which they have never heard, even though the sentence were valid. If the sentence of July 9th is void, the petitioner must be released. So the question is, Had the court jurisdiction to pronounce the sentence of that date? In a paper submitted by the United States district attorney for the District of Columbia, it is apparently conceded that the second sentence was not pronounced at the same term as the first, for he says: "On the 9th of July (in the April term), the sentence of the previous term was set aside in consequence of the decision of the United States supreme court in the *Mills Case.*"

It is thought that this view is the correct one. The January term could not have been kept alive after the commencement of the April term for the purpose of revoking sentences theretofore given and pronouncing new ones. The rules of the court provide for the prolongation of the term for the purpose of settling and signing bills of exceptions, and for this purpose only.

The terms of the supreme court of the District of Columbia are appointed by the court in general term, but this is done pursuant to statute (25 Stat. at L., 749), and the terms when thus fixed have the same stability as if designated by an act of congress. Section 845 of the Revised Statutes relating to the District of Columbia provides not for a suspension of the sentence, but for a postponement of the execution of the sentence, to enable the convicted party to apply for a writ of error, and the postponement shall in no case exceed thirty days after the end of the term. Clearly this section in no way aids the validity of the second sentence. The proposition that when a term of court begins the prior term ends is firmly established, and I see nothing in the statutes relating to the supreme court of the District of Columbia to take it out of the general rule. As was said by Mr. Justice Clifford in the dissenting opinion in *Ex parte Lange*, 18 Wall. (U. S.), 192: "Every term continues until the call of the next succeeding term, unless previously adjourned *sine die;* and until that time the judgment may be modified or stricken out. *Noonan v. Bradley*, 12 Wall. (U. S.), 129; *King v. Justices*, 1 M. & S., 442."

As the January term could not be continued till July 9th, it follows that the sentence of that date, under which the petitioner is held, was pronounced at the April term, three months after its commencement. I do not understand that it is now contended that a valid sentence made at one term can be set aside and a different and more severe sentence pronounced at a subsequent term. The rule that this cannot be done is unquestioned. 1 Bish. Crim. Pro., § 1298; *Commonwealth v. Weymouth*, 2 Allen (Mass.), 144; 1 Stark. Crim. Pl., 262; *Miller v. Finkle*, 1 Park. (N. Y.) Cr., 374; 2 Hawk. P. C., p. 634, ch. 48, § 20; *Rex v. Price*, 6 East, 327; *Commonwealth v. Mayloy*, 57 Pa., 291. It is suggested, however, that the proceedings of May 15th were absolutely void under the decisions in the *Mills Case*, so that the court was justified in treating the case as one standing on the verdict where the sentence had in the meantime been suspended. As a matter of fact, the case was not continued upon the verdict under a suspended sentence. This would seem sufficient, but various other answers suggest themselves. Three only will be considered: 1. Assuming, for a moment, that the doctrine of

the *Mills Case* is applicable, it is thought that the first judgment was not absolutely void. It was irregular, but it was not a nullity. A wrong place of imprisonment was designated. But this was not necessarily a part of the sentence, and the judgment would have been perfectly regular if at any time during the January term the place of imprisonment had been changed from the penitentiary to the jail. *Ex parte Waterman*, 33 Fed. Rep., 29. So, too, an amendment increasing the term of imprisonment, if made at the same term, would probably have cured the defect. The language of Mr. Justice Miller in the *Lange Case*, *supra*, is applicable. He says (page 174): "And so it is said that the judgment first rendered in the present case, being erroneous, must be treated as no judgment, and therefore presenting no bar to the rendition of a valid judgment. The argument is plausible but unsound. The power of the court over that judgment was just the same whether it was void or valid. If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated the judgment during the term, and rendered a judgment for one year's imprisonment, or, if no part of the sentence had been executed, it could have rendered a judgment for $200 fine after vacating the first.

"Nor are we prepared to say, if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held; so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force, whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no such case before us. The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense on a valid verdict."

It seems very clear that in no aspect of the case can the judgment of March 15th be treated as so absolutely invalid that it could be wholly ignored.

2. Was the first judgment even irregular; was it in any manner affected by the decision of the *Mills Case*? I think

not, and for the following reasons: Mills was imprisoned for one year under section 3242 of the Revised Statutes, as amended February 8, 1875 (18 Stat. at L., 307), which provides for imprisonment (not at hard labor) for not less than thirty days or more than two years. The court decides that "a sentence simply of imprisonment in the case of a person convicted of an offense against the United States, where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary, cannot be executed by confinement in a penitentiary except in cases in which the sentence is for a longer period than one year."

It is thought that the supreme court did not intend this decision to apply to a sentence under a section of the statutes making it the imperative duty of the court to impose hard labor. To hold that it does apply makes the enforcement of some of the most important sections of the Revised Statutes simply impossible. Very many of these sections require imprisonment at hard labor, leaving the term entirely in the discretion of the court. "At hard labor for not more than three years, or not more than five years, or not more than ten years," is the language of the law. Cases constantly arise under these sections where the court is of the opinion that the ends of justice are fully met by an imprisonment at hard labor for less than a year or often for less than six months. Other sections fix the term absolutely at less than a year. Take section 5471, for instance: "And any person who shall take or steal any mail or package of newspaper from any postoffice, or from any person having custody thereof, shall be imprisoned at hard labor for not more than three months." If the view which induced a change of the March judgment in this case is correct, how can a sentence under these sections be executed? Certainly not in a penitentiary, for the judge is precluded, in the one case by his conscience, and in the other by the express language of the law, from making the term of imprisonment longer than a year. And not in a county jail, surely, for the statutory condition of hard labor cannot be executed in a jail. But an additional, and to my mind unanswerable, argument is found in section 5542 of the Revised Statutes, which is the section immediately following the one considered in the *Mills Case*. It provides: "In every case where any criminal con-

victed of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state jail or penitentiary within the district or state wherein such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose." This has been the law since March 3, 1825 (4 Stat. at L., 118).

Section 5541, passed forty years later, applies to cases of imprisonment only, and such imprisonment can be in a penitentiary only when the sentence is for a longer period than one year.

Section 5542 relates to crimes requiring imprisonment at hard labor, and provides for the execution of the sentence in a penitentiary without any reference to the length of the imprisonment. It is difficult to see how language could be selected more clearly emphasizing the evident distinction in the minds of the law-makers between imprisonment only and imprisonment at hard labor. In the one case the imprisonment may be in a penitentiary if longer than one year; in the other the imprisonment, whether for six years or six months, may be in a penitentiary or state prison.

Turning now to the record in the case at bar, there can be little doubt that it was one requiring imprisonment in a penitentiary. The petitioner was convicted of grand larceny, an infamous offense, and a felony at common law. Section 1144 of the Revised Statutes of the District of Columbia provides than any person convicted in any court in the District of any of a number of offenses, larceny being one, shall be sentenced to suffer punishment by imprisonment in the penitentiary for the periods respectively prescribed in the chapter relating to crimes and offenses. Section 1158, id., provides that every person convicted of grand larceny shall be sentenced to suffer imprisonment and labor for a period not less than one year or more than three years. From these sections it would seem clear that the court was entirely correct, if he thought the punishment sufficient, in fixing the term at one year, and that, under the language "at labor" and "in the penitentiary," just quoted, he was compelled by law to order the sentence executed in a penitentiary. The case would seem to be

directly within the exception pointed out in the *Mills Case*, where the statute prescribing the punishment does require that the accused shall be confined in a penitentiary.

3. In view of the foregoing, I have not deemed it necessary to inquire whether the imprisonment prescribed by the first sentence was not for a period longer than one year. The term of imprisonment was *de facto* for two years — one year on each count. There was but one indictment, one trial and one judgment. Did the fact that the judgment required two terms of one year instead of one term of two years preclude the court from considering it as one case? *Carlton v. Commonwealth*, 5 Metc. (Mass.), 532. Was it not "a case" where the person convicted was sentenced to imprisonment for a period longer than one year within section 5541? An affirmative answer would seem to be a common-sense answer. An interpretation of the law should be sought which will permit the courts charged with the practical execution of the criminal law to administer it, not only with a due regard for the interests of the public, but for the benefit of the criminal as well.

Every reasonable construction should be adopted which enables the courts to send convicted criminals to the penitentiaries, where they are taught habits of industry and are surrounded by salutary influences, rather than to those hot-beds of idleness and crime, the county jails.

To recapitulate. It is thought that the following propositions are established: First. The court had no power to continue the January session until the 9th of July — long after the April term had commenced — for the purpose of vacating the March sentence and pronouncing a new one. Second. The first sentence was vacated and the second sentence passed, not at the January, but at the next term — the April term — of the court. Third. The first sentence was valid, and the court had no power at the April term to pronounce a new sentence increasing the term of petitioner's imprisonment. Fourth. The second sentence being invalid, and the superintendent of the penitentiary holding the petitioner upon no other judgment, it follows that she is entitled to a release.

Discharge granted.

NOTE.— *Nature of the writ.*— "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal lib-

erty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. . . . The writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by the prisoner to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. . . . Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. It was said by Chief Justice Marshall, speaking for the court, as long ago as *Ex parte Bollman & Swartwout*, 4 Cranch, 75–101: 'The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.'" *Ex parte Tom Tong*, 108 U. S., 556.

Used alone, its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and, if the alleged cause be unlawful, it must discharge the prisoner. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may become subjects of relief by the writ. But something more than moral restraint is necessary; there must be actual confinement or the present means of enforcing it. *Wales v. Whitney*, 114 U. S., 571–72, Miller J. It is the best and only sufficient defense of personal freedom. *Ex parte Yerger*, 8 Wall., 95.

Jurisdiction of the federal court.— Justice Sawyer, in *Re Neagle*, discussing the power of the federal judiciary in the issuance of this writ, said:

"Upon the question of jurisdiction, section 751, Revised Statutes, provides that 'the supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus;*' and section 752 further provides that 'the several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.' There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But section 753 prescribes some limitations, among which is 'that the writ shall not extend to a prisoner in jail, . . . unless he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court thereof, or in custody in violation of the constitution or of a law or treaty of the United States,' and this legislation, in the language of the chief justice, in *McCardle's Case*, 6 Wall. (U. S.), 325, 326, in commenting upon the same

provisions in a prior act, 'is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court, and of every judge, every possible case of privation of liberty, contrary to the national constitution, treaties or laws. It is impossible to widen this jurisdiction.' And again, in *Ex parte Royall*, 117 U. S., 249, the supreme court says:

"'As the judicial power of the nation extends to all cases arising under the constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended unless when, in cases of rebellion or invasion, the public safety may require it; and as congress has power to pass all laws necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof,— no doubt can exist as to the power of congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under the authority of a state cannot affect the question of the power or jurisdiction of the circuit court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the state could not release them, to respect and obey the supreme law of the land, "anything in the constitution and laws of any state to the contrary notwithstanding," and that equal power does not belong to the courts and judges of the several states; that they cannot, under any authority conferred by the states, discharge from custody persons held by the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the constitution and laws of the United States. *Ableman v. Booth*, 21 How. (U. S.), 506; *Tarble's Case*, 13 Wall. (U. S.), 397; *Robb v. Connolly*, 111 U. S., 624. We are therefore of opinion that the circuit court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the constitution.'

"In the exercise of this jurisdiction there is no conflict between the authority of the state and of the United States. The state in such cases is subordinate, and the national government paramount. 'The constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity.' *Siebold's Case*, 100 U. S., 392. See, also, *Tennessee v. Davis*, id., 257, 258. The exclusive authority of the state to determine whether an offense has been committed against the laws of the state is now earnestly pressed upon our attention. In *Siebold's Case* the court says:

"'It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper

sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties than is proper to be exercised towards the state governments. Its powers are limited in number and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and state governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.' 100 U. S., 394. See id., 266, 267.

"This court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be 'in custody for an act done or omitted in pursuance of a law of the United States,' then he is in custody in violation of the constitution and laws of the United States, and he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued — the constitution, and laws of the United States made in pursuance thereof, being the supreme law of the land.

"The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the state of California, and the state, only, can deal with it *as such or in that aspect.* It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle was an 'act done . . . in pursuance of a law of the United States,' within the powers of the national government, then it *is not*, and *it cannot* be, an offense against the laws of the state of California, no matter what the statute of the state may be; the laws of the United States being the supreme law of the land. A state law which contravenes a valid law of the United States is, in the nature of things, necessarily void — a nullity. It must give place to the 'supreme law of the land.' In legal contemplation there can no more be two valid laws, which are in conflict, operating upon the same subject-matter at the same time, than in physics two bodies can occupy the same space at the same time. But, as we have seen by the authorities cited, it is the exclusive province of the judiciary of the United States to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the national courts to conclusively construe the national statutes and determine whether the homicide in question was the result of an 'act done in pursuance of a law of the United States,' and, when that question has been determined in the affirmative, the petitioner must be discharged and the state has nothing more to do with the matter. All we claim is the right to determine the question, Was the homicide the result of 'an act done in pursuance of a law of the United States?' and if so, discharge the petitioner. As incidental to, and involved in, that question, it is necessary to inquire whether the act of the petitioner was performed under such circumstances

as to justify it. If it was, then he was in the line of his duty. If not, then he acted outside his duty. We do not make the inquiry at all for the purpose of determining whether the act was an offense or justifiable under the statutes of the state. We do not assume to consider the case in that aspect at all. We simply determine whether it was an act performed in pursuance of a law of the United States. Nor do we act in this matter because we have the slightest doubt as to the impartiality of the state courts and their ability and disposition to ultimately do exact justice to the petitioner. We have not the slightest doubt or apprehension in that particular, but there is a principle involved. The question is, Has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority and duty, a *further right* to be protected by that sovereignty whose servant he is and whose laws he was executing. If he has that right, then there is no encroachment upon the state jurisdiction, and this court must necessarily entertain his petition and determine his rights under it and under the laws of the United States. It has no discretion. It cannot decline to hear him without an utter disregard of one of the most important duties imposed upon it by the constitution and laws of the United States. What the state tribunals might or might not do in this particular instance is not a matter for a moment's consideration.

"The question is, what are the rights of the petitioner as to having his case heard and disposed of in the courts of the sovereignty whose servant he is, and whose laws he was employed in executing. If he has a right to be heard in this court, then we must hear him, willing or unwilling. There is no alternative. Whether the writ should issue in this case was not a question of 'expediency,' and whether the petitioner shall be discharged or remanded is not a question of 'policy,' or 'comity,' as suggested in some quarters. It is a question of *personal right and personal liberty*, arising under the constitution and laws of the United States, which the court cannot ignore. There is a class of cases, of which *Ex parte Royall* is an example, in which the court may exercise a discretion as to the *time* of interference, but, in our opinion, this is not one of them. *Ex parte Royall*, 117 U. S., 251. But if it rests in our discretion to discharge or remand the petitioner to the state courts, to be there first tried for an offense against the state, while we are satisfied that he is entitled to be discharged, to what useful end would he be sent back, since, upon being tried and convicted, he would still be discharged by the national courts on *habeas corpus*, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be but to put the state to *great, useless expense*, and subject the petitioner, if guilty of no offense, to unjust imprisonment, in violation of his legal rights, until his trial could be had and his writ of *habeas corpus* afterwards again sued out, heard and decided, when the result, in all probability, would at last be the same. Evidently public justice demands that the case should be 'summarily' decided now, as required by section 761, Revised Statutes. The court has no right to trifle with the petitioner's constitutional rights by unnecessarily subjecting him to unjust imprisonment, great expense and vexatious delays. In case of a remand and conviction, the national courts must hear and decide the case at last. Far better for all concerned that they should decide it now, and forever end it. We have

no desire to usurp a jurisdiction that does not belong to us. We have enough to do in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular, but we must perform our duty as we understand it, be the consequences what they may.

"The statutes of the United States also make ample provision for giving full effect to the jurisdiction of this court, in cases where the petitioner alleges that he is restrained of his liberty in violation of the constitution or of a law of the United States, in section 766." *In re Neagle*, 39 Fed. R. 833. Affirmed, 135 U. S., 1.

When writ will issue.— For full discussion as to when writ will issue, see note to *Lowery v. Harwood*, 5 Am. Cr. R., 273.

People v. Lake.

(110 N. Y., 61.)

Incest: *Between father and illegitimate daughter.*

1. Under Penal Code, section 302, providing that "persons, being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, . . . who shall commit adultery or fornication with each other, shall, upon conviction, be punished," etc., a father who has sexual intercourse with his illegitimate daughter is guilty of incest.
2. An indictment for incest described the female as "Georgiana Towne, commonly known as 'Georgiana Lake.'" It appeared that her real name was Georgiana Jeanette Lake, and that she was generally spoken of as "Nettie Lake." *Held*, no variance, there being no question as to the identity of the female.

Appeal from general term, supreme court, second judicial department.

G. Arnold Moses, for appellant.
Geo. Gallagher, for respondent.

Finch, J. The prisoner was convicted of incest. To linger over the facts, or repeat the details of the proof, would peril the calmness and cleanness which belong to a judicial record, and we should therefore touch the disgraceful history only at points where necessity compels. The evidence was claimed to be insufficient, but it fairly established the prisoner's guilt, and fully justified the verdict of the jury. If some of it was

open to objection, at least no objection was made, and the inference of the defendant's guilt was an easy deduction from the proof. The principal ground of defense asserted is that the victim of his lust, although his own daughter, was illegitimate; and so, whatever his depravity, it was not the crime of incest. He seduced that daughter's mother; abandoned her and the child for some years; then, returning, took the daughter, just grown into womanhood, for his book-keeper, as he said; seduced her in turn; and now pleads her illegitimate birth, the disgrace which she inherited from her cradle, and inherited from him, as a defense to the charge of which he stands convicted. The law draws no such distinction. If it did, we should be ashamed of it, for the offense, although committed with a daughter born out of wedlock, is not by that fact mitigated or condoned. She stood related to him by consanguinity within the forbidden degrees. That she had no inheritable blood for the purposes of descent and distribution does not alter the actual and natural relation. Kent says, while speaking of the general legislation relative to bastards: "This relaxation in the laws of so many of the states of the severity of the common law rests upon the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity." 2 Kent, Comm. *213. It was early held to be unlawful for a bastard to marry within the Levitical degrees (*Hains v. Jeffell*, 1 Ld. Raym., 68); a doctrine which of necessity recognized relationship and consanguinity. But our statutes leave no room for any reasonable doubt. The Penal Code enacts (sec. 302) that "persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall upon conviction be punished," etc. This enactment is taken from the Revised Statutes (part 4, ch. 1, tit. 5, art. 2, § 12), and its reference is to the provisions as to marriage (part 2, ch. 8, tit. 1, art. 1, § 3). That declares marriages between parents and children incestuous and void, and especially includes illegitimate as well as legitimate children. Since, therefore, the consanguinity between father and daughter, although the latter be illegiti-

mate, is by law declared to make their marriage incestuous and void, the provision of the Penal Code applies to the same relation and describes the crime of incest. Beyond its utter want of merit the defense has no foundation in the law.

A technical variance between the indictment and proof was asserted to exist and pressed upon our attention. The indictment gave the name of the daughter as "Georgiana Towne, commonly known as 'Georgiana Lake.'" There was no question of her identity, for she was present during the trial, and was identified by the witnesses. The proof shows that she was named "Georgiana Jeanette," and by an abbreviation of the middle name was generally spoken of as "Nettie Lake." It was no misnomer to describe her as "Georgiana Lake." Her name was Georgiana, and she was commonly called "Lake." Her father acknowledged her as his daughter, and she commonly bore his name, so that her true name in full was Georgiana Jeanette Lake, and it was no variance to describe her as Georgiana Lake, and the question of identity was put at rest by her presence.

Other technical variances were urged and complaints of the character of some of the testimony. They are not founded upon any exceptions taken by the prisoner, and do not seem to us to justify a conclusion of error in the proceedings. The judgment should be affirmed.

All concur.

NOTE.— *Incest.*— When the parties to an act, or series of acts, of unlawful carnal intercourse are related to each other within the degrees of consanguinity or affinity wherein marriage is prohibited by law, their offense is called incest. 2 Bishop, Cr. Law, p. 24; *Daniels v. People*, 6 Mich., 386; *Com. v. Lane*, 113 Mass., 463; *Ter. v. Corbett*, 3 Mont., 55. It has been held in Alabama as well as in New York that the offense can be committed with an illegitimate child. *Morgan v. The State*, 11 Ala., 289; *Barker v. The State*, 30 id., 521. So the words brother and sister mean offspring of the same parents and do not necessarily imply legitimacy of birth. *State v. Schaunhurst*, 34 Iowa, 547. In Mississippi it is not incest for a man to cohabit with his stepdaughter. *Chancellor v. The State*, 47 Miss., 278. The relation of stepfather and stepdaughter ceases to exist upon death of either of the parents, or upon divorce. *Noble v. The State*, 22 O. St., 541. A brother-in-law and a sister-in-law are nearer of kin by affinity than cousins. *Stewart v. The State*, 39 O. St., 152.

STATE v. JARVIS.

(18 Oreg., 360.)

INCEST: *Accomplices — Evidence — Description of offense — Indictment.*

1. A wrong name given to the crime in the preliminary part of an indictment is an irregularity only and not fatal. The charging part of the indictment must be looked to, to determine the character of the offense.
2. An indictment which charges more than one crime under our code is bad, and, if the objection be taken by demurrer at the proper time, it must prevail, but if the objection be not thus taken it is waived.
3. In a trial for the crime of incest, the party to the crime not on trial is an accomplice, and the other party cannot be convicted on her evidence, unless she be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission.
4. The declarations contained in an impeaching question, when contradicted, only tend to impeach the character of the witness attacked for truth and veracity, and are not evidence of the facts recited in such declarations.
5. Correct practice in preparing a case for this court suggested.

Appeal from circuit court, Multnomah county; L. B. Stearns, judge.

The defendant was convicted of the crime of incest, under an indictment the charging part of which is as follows: "The said Frank Jarvis, on the 1st day of April, A. D. 1889, in the county of Multnomah and state of Oregon, was the father of one Josephine Ross; and so being and knowing himself to be the father of the said Josephine Ross as aforesaid, and for that reason, and on account of that relationship, prohibited by law to intermarry with her, the said Josephine Ross, he, the said Frank Jarvis, did then and there unlawfully, feloniously, forcibly, incestuously and violently, in and upon her, the said Josephine Ross, his said daughter as aforesaid, make an assault, then and there unlawfully, feloniously, forcibly, incestuously and violently, against the will of her, the said Josephine Ross, did ravish and carnally know her, the said Josephine Ross; the said Josephine Ross then and there was a woman of the age of twenty years." Having been sentenced to the penitentiary for the term of three years under this conviction, the defendant has appealed to this court.

Alfred F. Sears, Jr., and *E. Mendenhall*, for appellant.
Henry E. McGinn, district attorney, for respondent.

STRAHAN, J. The name given to the crime with which the pleader sought to charge the defendant in the indictment is "rape," but it seems a mistake in this particular, is an irregularity, and is not fatal. The charging part of the indictment must be looked to, to determine the character of the offense. *People v. Cuddihi*, 54 Cal., 53.

2. This indictment seems to embrace the main elements mentioned in three sections of the Criminal Code. Section 1733 defines the crime of rape as follows: "If any person shall carnally know any female child under the age of fourteen years, or shall forcibly ravish any woman of the age of fourteen years or upwards, such person shall be deemed guilty of rape, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than three, nor more than twenty, years." Section 1734 punishes the offense with imprisonment not less than twenty years in the penitentiary, or during life, if the outraged female was the sister of the whole or half blood, or the daughter of the defendant or of his wife. Section 1873 defines and punishes incest as follows: "If any persons, being within the degree of consanguinity within which marriages are prohibited by law, shall intermarry with each other, or shall commit adultery or fornication with each other, such persons, or either of them, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year, nor more than three years, or by imprisonment in the county jail not less than three months, nor more than one year, or by a fine not less than two hundred, nor more than one thousand, dollars." The facts alleged in this indictment evidently constitute two separate and distinct offenses, namely, rape and incest, and this is contrary to section 1273, Hill's Code, which says that the indictment must charge but one crime, and in but one form only. This objection is ground of demurrer (Id., § 1322), and it is an objection that, if not so taken, is waived (Id., § 1330). No objection was taken in the court below to the indictment on this ground, and none can be raised here. The rulings of the court on the defendant's request to give one instruction presents the only matter necessary for us to consider.

3. At the conclusion of the evidence, counsel for the defendant requested the court to charge the jury, in effect, that there was not sufficient evidence before them to authorize a conviction of the defendant, and that he must be acquitted, both on the charge of rape and incest, and that the evidence was not sufficient to sustain a conviction for either crime; but the court refused to give this charge, to which ruling the defendant excepted. Hill's Code, § 1371, provides: "A conviction cannot be had on the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission." This section of the code and the request present two questions: *First*, was Josephine Ross an accomplice in the commission of the crime of which the defendant stands convicted? and, *second*, was she corroborated?

And, first, was Josephine Ross an accomplice? If the rule announced by this court in *State v. Roberts*, 15 Oreg., 187, is applied to this case, the question must be answered in the affirmative. The definitions there given apply generally to every crime, and it is not perceived on what ground the one under consideration could be excepted. The case of *State v. Dana*, 10 Atl. Rep., 727, was a prosecution for incest committed by parties within the prohibited degrees, in which the court advised the jury very fully that they ought not to convict upon the uncorroborated evidence of an accomplice, unless the testimony of the accomplice obtain full credit with the jury and they were fully convinced of its truth, in which event they should give the same effect to his testimony as should be allowed to an unimpeached witness who is in no way implicated in the offense. In passing upon an exception to this charge the court said: "There is no rule of common law, nor of the statute law of this state, that a person shall not be convicted on the testimony of an accomplice unless corroborated by other evidence. In some states such rule may exist, either from a code or statute law." Because there was no such law in that state, the court refused to sustain the exception. But in this state such rule does prevail, and the court has no discretion in its application in every case where the testimony of

an accomplice is relied upon. In California, where a similar statute is in force, speaking of the anomalous fact that the common law did not require that an accomplice be corroborated to authorize a conviction, and yet the court always advised the jury to acquit if he was not corroborated, said: "The apparent anomaly is done away with by section 1111 of our Penal Code. Under it, although the jurors are the sole determinators of the facts proved by the evidence, yet if there is no evidence, other than the testimony of the accomplice, tending to connect the defendant with the commission of the offense, the judge may direct an acquittal. This, however, simply because the statute prohibits a verdict based upon testimony of an accomplice alone, even although the jury may believe such testimony to be entirely true, and that it establishes the defendant's guilt beyond a reasonable doubt; not because the jurors are prohibited from believing the testimony of the accomplice in the absence of the corroboration mentioned in the statute. *State v. Light*, 17 Oreg., 358; *Blakely v. State*, 74 App., 616; *State v. Zollifer*, 16 Tex. App., 312; *Robinson v. State*, 16 Lea, 146; *People v. Courtney*, 28 Hun, 589; *Martin v. State*, 67 Ala., 55; *Merritt v. State*, 12 Tex. App., 203; *Craft v. The Commonwealth*, 80 Ky., 349; *Freeman v. State*, 11 Tex. App., 92. In this latter case the charge was incest. The court held her to be an accomplice, and reversed a conviction had on her uncorroborated testimony.

At common law, and in the absence of any statute governing the subject, it was the practice of judges to tell juries that they might legally convict on the evidence of an accomplice alone if they thought they could safely rely on his testimony; but at the same time, to advise them never to act on the evidence of an accomplice unless he be confirmed as to the particular person who was charged with the offense. 1 Wharton, Cr. Law, § 785. And Baron Parke said that it had always been his practice to tell the jury not to convict the prisoner unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner. 1 Wharton, Cr. Law, § 787, and authorities there cited. Many authorities on this subject are collated in note 2 to § 381, 1 Greenleaf, Ev. Speaking of the evidence of an accomplice, it is there said: "But the source of this evi-

dence is so corrupt that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the court will even consider it their duty to advise a jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice." And this principle is sustained by numerous common-law citations. In such case the common law practically required an acquittal if the accomplice was not corroborated; our statute has made it imperative. The guilty may sometimes escape punishment under the operations of such a statute, and the innocent might be convicted under the operations of the common-law rule, if the jury saw proper to disregard the charge of the court. But the statute has made corroboration of an accomplice necessary, so that the court has no control over the subject except to apply the statute.

The court has no discretion, but is bound to apply the statute, indiscriminately, to all cases wherever an accomplice appears as a witness and the state's case depends solely upon his uncorroborated testimony. If we were now engaged in making the law, no doubt we would declare a different rule; but the principle is already established and fixed by the authorities, and we could only add to the uncertainty of the law by disregarding them, a thing which we have no right to do. This point plainly marks the distinction between legislative and judicial power. The binding force of the authorities on this subject is fully recognized by the able editor of the Albany Law Journal, who says: "It might be well to provide for the case of incest as *sui generis*, but we think accomplices, in general, should be corroborated, as provided for in this section."

The legislature might have declared an accomplice incompetent to be a witness; but he may be a witness, and the legislature has not said that he shall not be believed if uncorroborated, but that a conviction shall not be had upon his testimony unless there is other evidence tending to prove the defendant's complicity in the offense charged." *People v. Clough*, 73 Cal., 348; *People v. Thompson*, 50 Cal., 480; *People v. Moore*, 45 Cal., 19. And such is the ruling of this court. *State v. Odell*, 8 Oreg., 31–34.

And now as to the second question above suggested. The

state introduced only two witnesses in chief, Josephine Ross and her husband. The details of Josephine's evidence are too revolting a character to be recapitulated here; but, briefly, it was to the effect that she and the defendant had, during the last five years, whenever occasion permitted, indulged in sexual intercourse with each other; but she was not corroborated in any manner. All her husband knew on the subject was what she told him. Under the authorities cited this would not be sufficient to authorize a conviction. Something was said upon the argument as to the effect to be given to the evidence of Bessie Smith. She was called to impeach Hattie Felder. Hattie Felder claims to be the wife of the defendant, and testified very fully in his behalf, contradicting the testimony given by Josephine Ross. On her cross-examination the district attorney asked her this impeaching question: "Did you not say to Mrs. Bessie Smith, at their house at Rooster Rock, in the latter part of August or September of last year, Mrs. Smith and yourself being present, words to the following effect: 'I am sick at heart. I have been living and putting up with Mr. Jarvis' abuse as long as I propose to. I have been abused by him. His relations with Josephine are scandalous. He takes her and throws her on the bed, and treats her in such a way. I tell you, Mrs. Smith, I know enough to send Jarvis to the penitentiary. Don't ever say anything about this to anybody. I am going to live with him until I get my share of what is honestly mine and then I propose to leave him, and you may make this public;' or words to that effect?" Mrs. Bessie Smith, being called as an impeaching witness, had this language repeated to her by the district attorney, and she was asked if it was uttered by the witness in her presence on the occasion referred to, and she said: "Yes; words to that effect." It was thought upon the argument that this statement of Hattie Felder, sworn to by Mrs. Smith, might in some way aid the state. But this cannot be. Such evidence only tends to impeach the character of the witness for truth and veracity, but is not evidence of the fact stated in such declarations. *State v. Fitzhugh*, 2 Oreg., 227.

Before concluding this opinion, it is proper to add that the bill of exceptions is in a most unsatisfactory form. It is, in effect, a transcript of the reporter's notes taken upon the trial.

It embraces all of the evidence and the charge of the court; but the exceptions to the general charge are too uncertain to be noticed. Counsel must not expect to prepare a bill of exceptions in this way, and then ask this court to sift out the alleged errors by separating the part of the charge excepted to from that part to which no exception is taken. Counsel for the appellant must do that. Where, for any cause, counsel deem it proper that all the evidence should come before this court, I think the better practice would be to annex the same as an exhibit to the bill of exceptions, carefully marking it so it could be readily identified, and then let the bill of exceptions contain only such exceptions as were taken upon the trial and upon which the party relies in this court. This would enable the appellant to present in the clearest manner the rulings which he claims were erroneous. If instructions were asked which he contends should have been given, they should appear in the bill of exceptions, and, if parts of the charge actually given are claimed to be erroneous, those parts only should be separated from the general charge, leaving such general charge, as a whole, to be annexed to the bill of exceptions, if in writing. But for the error of the court in refusing to give the charge asked by the appellant, and which does clearly appear from the record, the judgment of the court below must be reversed and a new trial awarded.

STATE v. BROWN.

(47 Ohio St., 102.)

INCEST: *Indictment — Description of offense.*

1. (*a*) In a prosecution instituted and conducted under section 7019, Revised Statutes, it is not necessary to aver or prove more than a single sexual act.

(*b*) The kinship of the parties sufficiently appears by an averment that the sexual act was committed by persons who bore the relation of uncle and niece to each other; that kinship being, by law, nearer than that between cousins, it is unnecessary to expressly allege that it is so.

(c) An averment that the parties were not husband and wife is not necessary; for the statute (sec. 7019) prohibits sexual commerce between persons "nearer of kin . . . than cousins," whether they have gone through the form of marriage or not.

2. Where the evidence is excluded from the jury upon a motion of the defendant in a criminal trial on the ground that the indictment charges no offense against him, the jury should be discharged without rendering a verdict, there being no offense of which to acquit him, and no evidence for them to consider.

Exceptions to court of common pleas, Lake county.

At the May term, 1886, of said court, an indictment was found against the defendant, Brown, charging him, in five several counts, with incest committed with Rose Cramer, his niece, each count charging the act to have been done on a different day from that named in the other counts. In the first and second counts the defendant is alleged to be unmarried and the act denominated "fornication," while in the third, fourth and fifth counts he is alleged to be married and the act is called "adultery." None of the counts aver that Rose Cramer was not the wife of the defendant when the sexual intercourse was had, nor does it appear whether or not she was then the wife of any one. A motion to quash the indictment was interposed upon the grounds, among others, that the indictment did not state whether or not Rose Cramer was married, and did not state that she was not the lawful wife of the defendant when the alleged acts of sexual intercourse occurred. A general demurrer was also filed by the defendant on the ground that the indictment did not charge an offense. The motion and demurrer were both overruled. The prosecuting attorney then, pursuant to an order of the court made at the request of defendant, elected to proceed to trial on the second and fifth counts of the indictment, and a *nolle prosequi* was entered as to the other counts thereof. Upon the jury being impaneled and sworn, the state proceeded to offer its evidence, to which counsel for the defendant objected upon the ground that no offense was charged by either of the counts upon which the state had elected to proceed; and on that ground the court refused to permit any evidence to be given by the state, and, upon motion of defendant, ordered the jury to return a verdict of not guilty, which was done, and the defendant discharged. To all which action and rulings of the

court the prosecuting attorney excepted, and, embodying the proceedings in a bill of exceptions, has brought them to this court for review.

Homer Harper, prosecuting attorney, for the state.

BRADBURY, J. The counts of the indictment held to be insufficient to charge an offense read as follows: "Second count. The jurors of the grand jury of the state of Ohio, within and for the body of the county of Lake, impaneled, sworn and charged to inquire of crimes and offenses committed within said county of Lake, in the name and by the authority of the state of Ohio, on their oaths do further find and present that Benjamin Robert Brown, late of said county, on the 8th day of November, in the year of our Lord 1885, with force and arms, in said county of Lake, and state of Ohio, being then and there an unmarried man, did commit fornication with Rose Cramer, by then and there unlawfully and feloniously having sexual intercourse with the said Rose Cramer, the said Benjamin Robert Brown being then and there the uncle of the said Rose Cramer, and the said Rose Cramer being then and there the niece of the said Benjamin Robert Brown, and the said Benjamin Robert Brown and the said Rose Cramer then and there having knowledge of their relationship, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio. . . . Fifth count. The jurors of the grand jury of the state of Ohio, within and for the county of Lake, impaneled, sworn and charged to inquire of crimes and offenses committed within said county of Lake, in the name and by the authority of the state of Ohio, on their oaths, do further find and present that Benjamin Robert Brown, late of said county of Lake, on the 6th day of January, in the year of our Lord 1886, with force and arms, in said county of Lake and state of Ohio, being then and there a married man, did commit adultery with Rose Cramer, by then and there unlawfully and feloniously having sexual intercourse with said Rose Cramer, the said Rose Cramer being then and there the niece of the said Benjamin Robert Brown, the said Benjamin Robert Brown and the said Rose Cramer being then and there per-

sons nearer of kin by consanguinity than cousins, the said Benjamin Robert Brown and the said Rose Cramer then and there having knowledge of their relationship, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio." The offense intended to be charged by each of these two counts is a violation of section 7019, Revised Statutes. That section provides: "Sec. 7019. Persons nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, who commit adultery or fornication together, shall be imprisoned." . . .

The court of common pleas held that neither count charged an offense under this section. The particular averment or averments the omission of which, in the opinion of that court, were fatal to these counts, have not been pointed out to this court, no brief having been filed in support of the rulings of which complaint is made; but we are not left to conjecture, wholly, respecting them, for the propositions combated by the prosecuting attorney in his brief indicate at least his understanding of what they were, though he fails to state them in direct terms. However, after a careful examination of this brief, and the record in the case, we yet have some doubts respecting the particular defects or omissions which the court of common pleas held to be fatal, and therefore have carefully examined the two counts in question, with a view to ascertain what, if any, necessary averment or averments were omitted. From the argument submitted by the prosecuting attorney, it seems some doubt was entertained by the court of common pleas respecting the sufficiency of a single adulterous act to constitute the offense of incest, one act only being charged in each of the counts. That one such act is sufficient is established, we think, by the case of *Barnhouse v. State*, 31 Ohio St., 39. It is true, the statute in force when that case arose prohibited "sexual intercourse" between parties within certain degrees of kinship (Swan. & C. St., p. 405, § 8), while the statute in force when the offense charged against the defendant was committed prohibits "adultery or fornication" within the prohibited degrees (sec. 7019, R. S.); but there is nothing in this change of phraseology to indicate a purpose to require a series of acts or cohabiting together to constitute

incest. A single act of unlawful sexual intercourse falls within the definition of "adultery" or "fornication," according as the party is married or not. 1 Bouv. Law Dict., 126, 682; 1 Amer. & Eng. Cyclop. Law, 209, and cases there cited. And that the words were used in this sense by the legislature, in declaring what should constitute incest, clearly appears when section 7019 is compared with section 7020. The latter section prescribes in direct terms that the party shall "cohabit" with another in a state of adultery or fornication to constitute an offense under it; but in the section now under consideration (7019) no such word is found. The two sections are in immediate juxtaposition, were passed at the same time, and are nearly allied. This makes the omission of the word "cohabit" from the section under consideration the more significant. It evinces a purpose to prohibit in the one case an act in its very nature repulsive and shocking to every sense of decency; while by the other section a demoralizing condition, a living together in an unlawful connection, is the thing to be prohibited, and appropriate language was adopted by the legislature in each section to attain the object in view.

The first count under consideration (No. 2 in the indictment) avers that the defendant and Rose Cramer, with whom he committed the sexual act, were uncle and niece respectively to each other, but does not aver in direct terms that that relationship is nearer than that between cousins, nor does it show whether they were related by blood or affinity. Is it necessary to aver in express terms that the kinship is nearer than that between first cousins; or will it suffice if the degree of it is averred, and it is one necessarily nearer than cousins? While the statute (sec. 7019, R. S.) in general terms prohibits the sexual act between persons "nearer of kin . . . than cousins," it may well be doubted whether a general averment in the words of the statute would be definite enough to satisfy the rules of criminal pleading. It would remain uncertain which of the several degrees of kinship nearer than that between cousins was intended to be charged. Where, however, the precise degree of kinship is averred, all indefiniteness disappears. Nor is it for the jury to determine in such particular case whether the kinship between the parties to the act, be they father and daughter, brother and sister, or uncle and

niece, is or is not nearer than that between cousins. This is matter of law, determinable by fixed principles, applicable alike to every case. The kinship being averred to be that of uncle and niece, it was unnecessary to aver in addition, that which was matter of law, that they were nearer of kin than cousins. The authorities in support of this principle are innumerable. One only will be referred to. Bishop says, quoting from Buller, J.: "'It is one of the first principles of pleading that you have only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it.'" 1 Bish. Crim. Proc., § 329. That the kinship between an uncle and his niece is nearer than that between cousins within the meaning of this statute is clear, notwithstanding that by the rules of the common law both were considered as standing in the same degree. The rule of the common law which accomplishes that result relates to the descent of property only; for, notwithstanding this rule of the common law, sexual commerce between uncle and niece in England is incestuous, while that between cousins is not. The law respecting incest, from the nature of the mischief to be prevented, necessarily regards the actual kinship of the parties as the predicate for its prohibitory enactments. *Griffiths v. Reed*, 1 Hagg. Ecc., 195; *Woods v. Woods*, 2 Curt. Ecc., 516; Story, Confl. Laws, 114, 208. And the kinship between an uncle and niece is double that between cousins. We hold, therefore, that within the meaning of section 7019, Revised Statutes, the kinship between uncle and niece is nearer than that between cousins.

While the question whether kinship by affinity should be protected equally with that by consanguinity is one about which different opinions may be held (Story, Confl. Laws, 114, 115), yet it falls within the province of the legislature to determine it, and that body having in the same section, and by the same words, prohibited the sexual act and prescribed the same penalty for its commission, whether the kinship be of the one class or the other, it is evident that no distinction was intended to be made between them, and that under the statute (sec. 7019), if the parties are nearer of

kin than cousins, it is immaterial whether it be by consanguinity or affinity. *Stewart v. State*, 39 Ohio St., 152. The supposed hardship of the law is much mitigated by the circumstance that kinship by affinity of the husband and wife respectively with the family of the other terminates with the dissolution of the marriage. *Noble v. State*, 22 Ohio St., 541.

The count now under consideration avers that the defendant is not married, so that, if the indictment must show affirmatively that he and the woman with whom the sexual act was committed were not husband and wife, it sufficiently does so; not, it is true, by a direct averment, but by one from which the fact appears by necessary implication. The averment that he was unmarried is equivalent to one that she was not his wife. The fifth count of the indictment differs from the second in that it avers the defendant to be married, the sexual act to be adultery, and, in addition to averring that the defendant and Rose Cramer were uncle and niece to each other, directly averred that they were "nearer of kin by consanguinity than cousin."

The only question necessary to be determined in connection with this count that has not been decided in passing upon the sufficiency of the second count is the necessity of the count negativing the marriage of the defendant and Rose Cramer. By referring to the statute (sec. 7019, R. S.) it will be observed that it contains no exception in favor of parties who are intermarried. The language is general, and comprehends them as well as the unmarried. Upon what principle, then, can an exception be engrafted in this section by judicial construction? We know of none. By the law of England the intermarriage of the parties did not render the connection the less incestuous. *Blackmore v. Brider*, 2 Phillim. Ecc., 359; *Woods v. Woods*, 2 Curt. Ecc., 516. Bishop defines it as follows: "Incest, where statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between two persons too nearly related in consanguinity or affinity to be entitled to intermarry." Bish. St. Crimes, § 727. The act is little, if any, less repulsive to a correct sense of decency, and no less a violation of sound public policy, because it is perpetrated by persons living together publicly under the form of marriage,

than if done by them clandestinely and occasionally only. We hold, therefore, that by section 7019, Revised Statutes, sexual commerce as between persons nearer of kin than cousins is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound upon principles of comity to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based on principles of sound public policy, because they have assumed in another state or country where it was lawful the relation which led to the acts prohibited by our laws.

After the jury was impaneled and sworn and the trial begun, the defendant's counsel objected to the introduction of any evidence by the state on the ground that the counts of the indictment upon which the state had elected to proceed did not charge an offense. The court, adopting that view, refused to permit any evidence to go to the jury, and, upon motion of defendant's attorney, ordered the jury to return a verdict of not guilty, and thereupon discharged him from custody. To all which the prosecuting attorney excepted. If the view taken by the court was correct, and no offense was charged, there was nothing of which he could be acquitted, and the verdict would be of no benefit to him. He could not plead it in bar of a subsequent prosecution. It would only benefit him in case the court had erred and the indictment did charge an offense. As the case stood upon the holding of the court no offense was charged against the defendant, and under those circumstances the state had a right to require the jury to be discharged. There was nothing for them to do. The defendant was not charged before them with any offense, nor had any evidence against him been submitted for their consideration. The party was liable to be re-indicted and again put upon trial; and if, upon the subsequent trial, the first indictment was held good upon a plea of former acquittal, the verdict would be an absolute bar. True, the defendant upon the subsequent trial, if the jury had been discharged at the first one without rendering a verdict, might plead his former jeopardy, and if, upon that plea, the former indictment should be held good, it might avail him as effectually as a verdict of

not guilty. Of this we express no opinion; for whether or not the discharge of a jury, so made necessary by a ruling of the court had on the defendant's own motion, would, in case the first indictment upon a plea in bar should be held good, be a bar to a subsequent prosecution, it was the right of the state under the circumstances to prevent the rendition of a verdict of not guilty, which would be an undoubted bar, whatever effect might be given to the other. Exceptions sustained.

STATE v. WEST.

(39 Minn., 321.)

INDECENT ASSAULT: *Conviction of lesser offense.*

1. Under section 245 of the Penal Code, the taking of indecent liberties with or on the person of a female child under the age of ten years, without regard to whether she consents to the same or not, constitutes an assault.
2. Under an indictment for an assault with intent to carnally know and abuse the child, the defendant may be convicted of taking indecent liberties with her person, if within the allegations of the indictment.
3. A verdict of "guilty of an indecent assault" sufficiently describes the offense.

Case certified from district court, Hennepin county; Hicks, judge.

Moses E. Clapp, attorney-general, and *F. F. Davis*, county attorney, for the state.

C. F. Baxter, for E. S. West, appellant.

MITCHELL, J. This case is certified to this court for its opinion upon two questions of law: *First*, whether under an indictment for an assault upon a female under the age of ten years, with intent to carnally know and abuse her, if the intent alleged be not proved, the defendant may be convicted, under section 245 of the Penal Code, of taking indecent liberties with the person of the child; and, if so, *second*, whether a verdict of "guilty of an indecent assault" sufficiently describes the offense. No question is raised as to whether an

indictment will lie for an assault with intent to carnally abuse a female under the age of ten years, nor as to the form of the allegations of the indictment in the present case. The point made is that in no case under an indictment for assault with intent to ravish or carnally abuse can a defendant be convicted, under section 245, of taking indecent liberties with the person of the female, the latter being, as is contended, a separate and independent crime — not a part of or included in the crime charged. The last clause of section 19, chapter 114, General Statutes 1878, provides that "in all other cases [those not within the preceding provisions of the section] the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment." This provision, which is but declaratory of the common law, is not repealed by the Penal Code. There can be no question, therefore, but that, under an indictment for an assault with intent to commit a crime, the defendant may be convicted of an assault (if within the allegations of the indictment) because necessarily included in the crime charged. Section 245 of the Penal Code, which is entitled "Indecent assault," provides that "a person who takes any indecent liberties with or on the person of any female, not a public prostitute, without her consent expressly given, and which acts do not in law amount to a rape, an attempt to commit a rape, or an assault with intent to commit a rape, or any person who takes such indecent liberties with or on the person of any female child under the age of ten years, without regard to whether she consents to the same or not, is guilty of a felony." The taking of indecent liberties with the person of a female without her consent would at common law amount to an assault. In view of the aggravated nature of such an assault, the evident intention of the legislature was to raise it from the rank of misdemeanor to that of felony, so that it might be more severely punished. And as by another statute a female under the age of ten years was incapable of consenting to carnal intercourse, or at least her consent void, so by this section the incipient advances, in the way of indecent liberties with her person, are placed on the same footing as the principal crime. What in the case of a female over the age of ten would amount to an assault because

done without her consent, would, in the case of a child under that age, in any case, be an assault, because she is deemed incapable of consent, and therefore the act must, in contemplation of law, be deemed as done without her consent. So, although the legislature have not in the body of the act given the crime a distinctive name, they have in the title designated it an "indecent assault." If an indictment charged a defendant with taking indecent liberties with the person of a female under ten years, with intent to carnally know and abuse her, we think clearly this would amount to a charge of an assault with the intent alleged. If so, then it would seem to follow that, under an indictment for an assault with intent to carnally know and abuse her, the defendant might be convicted of taking indecent liberties with or on her person, if within the allegations of the indictment.

The second point raised is that the verdict does not state any crime known to the law; that the words "indecent assault" are no part of the statute, but merely "catch words." We think this objection is not well taken. The crime as defined by the statute is, in its legal tenor and import, an indecent assault. "Indecent liberties" with or on the person of a female without her consent, and an "indecent assault" upon her, are in effect convertible expressions. The term "indecent assault" is but the statutory definition of the crime epitomized. Judgment affirmed.

QUEEN'S BENCH DIVISION.

(Before Lord Coleridge, C. J., and Lord Esher, M. R.)

COTTERILL v. LEMPRIERE.

(17 Cox, C. C., 97.)

INDICTMENT AND INFORMATION: *Alternative offenses — Validity of conviction.*

A driver of a steam tram-car was prosecuted and convicted for having permitted smoke to escape from his engine, "contrary to the by-laws of the board of trade, made for the regulation of traffic on the said company's lines." The by-law in question provided that "no smoke

or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," under a penalty. *Held*, that the by-law created offenses in the alternative, and that, as the information and conviction did not set forth distinctly with which of these alternative offenses the defendant was charged, the conviction was bad.

This was a case stated by justices for the county of Stafford, under the statute 42 and 43 Vict., ch. 49, sec. 33.

The facts of the case were, so far as material, as follows:

An information was, on the 8th day of November, 1889, preferred by the respondent against the appellant, for that the appellant, on the 5th day of November, 1889, at the parish of Handsworth, in the county of Stafford, he then being the driver of a certain engine attached to a tram-car, the property of the South Staffordshire & Birmingham District Steam Tramway Company, Limited, did then and there permit smoke to escape from his said engine, contrary to the by-laws of the board of trade, made for the regulation of traffic on the said company's lines there situate.

On the above-mentioned date, the appellant was driver of the engine of the tram-car in question in the Holyhead road, in the parish of Handsworth, when smoke was emitted from his engine. The by-law of the board of trade, under which the proceedings were taken, is as follows:

"No smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or to the public."

The penalty provided for such offenses is one not exceeding 40*s*. A copy of the said by-law is thereby directed to be placed in a conspicuous place inside each carriage in use on the tramways. The said information was objected to on behalf of the appellant, on the ground that it did not allege that the smoke was emitted so as to constitute any reasonable ground of complaint to the passengers or public, or to which of them, but the justices overruled the objection.

It was proved to the satisfaction of the justices by several witnesses that the emission of the smoke in question was offensive, and they considered that it formed a reasonable ground of complaint to the public.

On the part of the respondent it was contended that the

information and conviction were respectively good in point of law, and that the offense with which the appellant was charged was completely disclosed and correctly set out, and that the appellant was in no way prejudiced or misled as to the nature of the offense with which he was charged.

The justices being of opinion that the appellant was not prejudiced or misled by the said information and summons as to the nature of the charge to be preferred against him; that the same were respectively good in point of law, and that the offense charged against the appellant was completely disclosed; and being also of opinion that the appellant was guilty of the offense charged against him, convicted him thereof.

The conviction, so far as material, was as follows: Samuel Cotterill (hereinafter called the defendant) is this day convicted before this court for that he, on the 15th day of November, 1889, at the parish of Handsworth, in the county of Stafford, then being the driver of a certain engine attached to a tram-car, the property of the South Staffordshire & Birmingham District Steam Tramway Company, Limited, did then and there permit smoke to escape from his said engine, contrary to the by-laws of the board of trade made for the regulation of traffic on the said company's lines there situate, and contrary to the statute in such case made and provided; and it is adjudged that the defendant for his said offense do forfeit and pay the sum of 20*s.*, and to also pay to Frederick Lempriere, the prosecutor, the further sum of 14*s.* 6*d.* costs.

The question for the opinion of the court was whether, as it was not alleged by the said information and summons, and did not appear upon the said conviction, that the smoke was emitted so as to constitute a reasonable ground of complaint to the passengers or the public, or which of them, the said information, summons and conviction respectively disclosed an offense against the said board of trade by-laws, for which the appellant might be so convicted, and were respectively right in point of law, or were erroneous.

McIntyre, for the appellant. The information and conviction are too vague, and do not disclose the offense with which the appellant was charged. They should have stated that the emission of smoke was such as to afford a reasonable ground

of complaint to passengers or to the public, whichever may have been the case. The by-law provides a penalty for alternative offenses, and it has been frequently held that the particular offense must be specified for which the penalty is inflicted. The mention of the alternative offenses is not sufficient. *Rex v. North*, 6 Dowl. & Ryl., 143; *Rex v. Pain*, 7 Dowl. & Ryl., 678. Lord Esher, M. R., referred to *Rex v. Sadler*, 2 Chitty's Rep., 519.

Johnson Watson, for the respondent. The justices have found that the appellant was in no way prejudiced or misled by the form in which the information was laid. In these days the courts do not insist upon such strict compliance with form unless it appears that some one has been prejudiced.

Lord Coleridge, C. J. I yield to the objection taken in this case with reluctance, because I think, as Abbott, C. J., said in *Rex v. Pain*, 7 Dowl. & Ryl., 678, that it is a nice and subtle one, and quite beside the merits. But we cannot overrule the authorities cited, which are decisions of judges entitled to the greatest possible deference. It is true that the principles of construction upon which the courts act at the present time have been relaxed to a certain extent, yet, in the interest of justice, it is still necessary to see that statements in such proceedings as this are definite and specific. Further, where two constructions of what is in effect a penal statute are offered to us, it lies upon the person seeking to inflict the penalty to show that the construction which he asks us to adopt is the right one. Now in this case we have to deal with a by-law which has to be construed in the same manner as an act of parliament. This by-law provides that no smoke or steam shall be emitted from the engines, so as to constitute any reasonable ground of complaint to the passengers or the public, under a penalty. It is true that there may be many cases in which smoke may be emitted by engines, so as to constitute a ground of complaint to only one of these bodies of persons. The same penalty is, indeed, provided in both of these possible cases, but the courts have held, in a series of cases extending over a long period of time, that where an act of parliament created offenses in the alternative, and inflicts a penalty for the offense so created, the conviction

and other proceedings must state for which of the offenses the defendant has been proceeded against. The information in this case merely states that the defendant permitted smoke to escape from his engine contrary to the by-laws, and the conviction proceeded in the same terms. Therefore in both documents the offense is stated in general terms, but on reading the by-law itself we find that there are two alternative offenses. It is contended that, owing to the offense being stated in these general terms, the conviction is bad. I think that even now, notwithstanding the broader principles of construction to which we have become accustomed, we should hold that this conviction should have been more specific. In the cases to which we have been referred — which appear to me to be undistinguishable from the present case — convictions not distinguishable in principle from this have been held bad on the same ground as those contended for in the present instance. In *Rex v. Saddler*, 2 Chitty's Rep., 519, decided in the time of Lord Mansfield — where the offense was the killing or attempting to kill fish, and one penalty was specified — a conviction, in which the offense was described in the language of the act of parliament was quashed because it did not state of which offense the defendant had been found guilty. In 1825 the case of *Rex v. North*, 6 Dowl. & Ryl., 143, was decided by judges of the very highest authority, and it was held that a conviction for selling "beer or ale" without a license, for which offense the same penalty had been provided, was bad. The case was followed the next year by the case of *Rex v. Pain*, 7 Dowl. & Ryl., 678, in which a conviction for having attached to a vessel casks "of the sort and description used or intended to be used for the smuggling of spirits," offenses for which the same penalty was provided, was held bad on the same objection being taken. Lord Tenterden there says: "Now, this act of parliament mentions three sets or descriptions of casks, which, if found on board or attached to a vessel, will render it liable to forfeiture. . . . The conviction should have set forth under which of the three the casks in question fell." It is impossible to refuse to recognize such authorities as these; the conviction, therefore, must be quashed.

Lord Esher, M. R. This case must be decided upon that governing principle of the common law of England that those who charge one of the queen's subjects with an offense for which a penalty is provided must prove their charge clearly and in form. The prosecutor in this case was bound to prove, not only that the defendant had rendered himself liable to a penalty according to the facts, but also strictly according to law. Even if the cases which have been cited had never been decided, I should, nevertheless, think that the offense had not been strictly charged, and as it stood might have an injurious effect upon the person accused. If the offense was that of constituting a reasonable ground of complaint to the passengers to support his case, if the offense was to the public the evidence of some of the public would have been necessary to him. It is therefore important to him to know clearly with which offense he was charged. It is true that the same penalty is provided for both these offenses, but in the information, summons and conviction there is a defect apparent which might have caused a hardship to the party charged. The authorities cited are all strictly in point, and unless we could come to the conclusion that they were all wrongly decided, which we cannot do, we could not uphold this conviction.

Conviction quashed.

Note.— *Duplicity and uncertainty.*— The decision in the foregoing case is consistent with well-established rules of construction respecting pleading, but it ought not to be confounded with the rule applicable to the construction of statutes which create cumulative offenses. The by-law in question constitutes the act prohibited an offense against either one of two separate and distinct classes, and every principle of good pleading requires, in a case of that nature, that the defendant should be informed, before going to trial, as to which class he is accused of offending against. A similar rule in respect to the construction of indictments or informations prevails when a statute prohibits the doing of certain acts, either one of which, if done, would constitute a complete offense. For example: It is provided in the criminal code of Mississippi that "it shall not be lawful for any person to sell or retail any vinous or spirituous liquors in less quantities than one gallon, nor suffer the same or any part thereof to be drank or used in or about his or her house;" and the court of that state, in construing this statute, held that "the second member of this section made it unlawful for the person selling the spirits to suffer the same to be used about his house, whatever may be the quantity which is sold," thereby creating an offense distinguishable in a marked degree from the offense or offenses designated by the first member of the stat-

ute. Therefore it was adjudged in *Miller v. State*, 5 How. (Miss.), 250, that a count covering the entire section was bad for duplicity.

It is an established rule in respect to the statement of the offense in the indictment, says Chitty, "that it must not be stated in the *disjunctive* so as to leave it uncertain what is really intended to be relied upon as the accusation. Thus an indictment stating that the defendant murdered, or caused to be murdered, or that he murdered or wounded, is bad because uncertain. So to say that the defendant forged, or caused to be forged, an instrument; that he erected, or caused to be erected, a nuisance; that he carried and conveyed, or caused to be carried or to be conveyed, two persons having the small-pox, so as to burden the parish of Chelmsford, is not sufficiently positive." 1 Chit. Com. Law, 231; *People v. Hood*, 6 Cal., 236; *State v. O'Bannon*, 1 Bailey, 144.

A common application of the distinction to the rule announced in the above case occurs in indictments upon statutes making the keeping with intent to sell, the selling or giving away, etc., intoxicating liquors, a crime. And when a statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment may, as a general rule, embrace the whole in a single count; but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective as being uncertain. Thus, where an indictment, drawn according to this rule, alleged that the defendant "did play and bet at cards for money, at a game of poker, faro, seven-up, three-ups and other games played with cards," following the words of the statute except that it substituted "and" for "or," the court held it to be good. *Wingard v. State*, 13 Ga., 396. In this case Lumpkin, J., observed: "True, the offense is constituted by playing and betting at one of them. But we apprehend that playing and betting at the whole at the same sitting and between the same parties would constitute but a single offense." Under a statute of Massachusetts which provides that, "if any person shall sell or offer for sale, or shall advertise or cause to be advertised for sale," any lottery ticket, "he shall forfeit," etc., it was alleged that the defendant "did unlawfully offer for sale and did unlawfully sell," etc. Upon demurrer on account of duplicity, the indictment was held to be sufficient, since offering to sell and actually selling were together but one offense. "It is true," says Wilde, J., "that an offer to sell without selling a ticket is an offense by the statute; but an offer to sell and actually selling is but one offense. A sale *ex vi termini* includes an offer to sell." *Com. v. Eaton*, 15 Pick., 273. And in *State v. Adams*, 7 Me., 486, it is held that a complaint is not bad for duplicity which sets out the unlawful using of a fish-net and also the illegal killing of fish. The latter allegation, in the opinion of the court, may be deemed an aggravation, or, no venue being laid, may be rejected as surplusage; and in *State v. Haskell*, 76 Me., 399, it is held that a count charging two offenses is not double if one is adequately and the other inadequately alleged. A similar rule is adopted in *State v. Henn*, 39 Minn., 464. In *State v. Pearson*, 44 Ark., 265, an indictment for "carnally knowing a female child of the age of twelve years and under the age of puberty" is held to be contradictory although it follows the language of the statute. In this state the common-law rule which fixes the age of puberty at twelve years has not been changed. In *State v. Kennedy*, 63 Iowa, 197, an indictment charging

a conspiracy and also the offense of burning property is held bad for duplicity; but in *State v. Potts*, 78 Iowa, 656, an indictment for bribery containing two counts; one charging that defendant received money from C. for releasing liquor held by him as an officer; the other charging the same thing, and alleging that the crime was committed by means of a conspiracy between defendant and one H. and one W., and further stating that the two counts described but one transaction and charged but one offense, is held not bad for duplicity, as section 4300 of the code allows the same offense to be charged in different forms to meet the testimony. See, also, *State v. Baldwin*, 78 Iowa, 714; *Bradley v. State*, 20 Fla., 738; *Johnson v. State*, 75 Ala., 7; *Fahnestock v. State*, 102 Ind., 156; *Slicker v. State*, 13 Ark., 397; *State v. Ringer*, 6 Blackf. (Ind.), 109; *Comer v. State*, 26 Tex. App., 509; *People v. Aikin*, 66 Mich., 460, and *People v. Van Alstine*, 6 Am. Cr. R., 272, and note.

STATE v. O'DONNELL.

(81 Me., 271.)

INDICTMENT: *Allegation of time.*

1. An indictment must allege a particular day on which the offense was committed, even if it be set out with a *continuando*.
2. Where an indictment, found on the first Tuesday of May, 1888, was rendered defective by charging the offense to have been committed, with a *continuando* on a date practically impossible (May 15, 1807), the entering a *nol. pros.* to acts prior to May 15, 1887, will not cure the defect.

Exceptions from superior court of Cumberland county.

Indictment against Peter O'Donnell for a liquor nuisance. By clerical error the allegation of time covered by said offense was made to read, "on the 15th day of May, in the year of our Lord 1807, and on divers other days," etc., when it should have read, "on the 15th day of May, A. D. 1887." Testimony was limited to the period of time from the 15th day of May, 1887, to the time of the finding of said indictment; a *nol. pros.* having been entered as to all time prior to the 15th day of May, A. D. 1887. At the request of the defendant, the case was withdrawn from the jury after the government testimony had been put in, and the court allowed him to file a demurrer.

W. H. Looney and *C. W. Goddard*, for defendant.
G. M. Seiders, county attorney, for the state.

VIRGIN, J. An indictment must allege a particular day on which the offense was committed, even if it be set out with a *continuando*. *Wells v. Com.*, 12 Gray, 326; *Shorey v. Chandler*, 80 Me., 409; *State v. Small*, 80 Me., 452. The indictment in hand fixes the day at date thirteen years before Maine became a sovereign state, and more than forty years before the enactment of the statute which created the offense charged, and is practically an impossible date, hence no date. Moreover, the *nol. pros.* struck out the allegation of any date except these days named in the *continuando*, which leaves the indictment fatally defective on demurrer, as was decided in the cases above cited. Exceptions sustained.

NOTE.— See *Dixon v. State*, 5 Am. Cr. R., 297; *Williams v. State*, 4 id., 292 and note; *State v. Folason*, 7 id., 495 and note.

COMMONWEALTH v. GREEN.

(126 Pa. St., 531.)

INDICTMENT PREFERRED EX MERO MOTU: *Motion to quash — Orders of different judges.*

1. If an indictment is preferred by a grand jury *ex mero motu*, not based on their personal knowledge, an investigation of some general or public evil to which their attention has been called by the charge of the court, or a bill sent in by the prosecuting attorney, and no preliminary hearing of the charge has been had by the accused, it is in the discretion of the court in which it is found to quash it; and when no extraordinary circumstances to justify such hasty procedure are shown, such as danger of escape, etc., it is not an abuse of such discretion to quash an indictment so found for keeping a disorderly house.
2. It is immaterial that the indictment was sent in by leave of the court after the grand jury had returned a presentment on which the indictment was framed by the prosecuting attorney, as such leave could be revoked after the court learned of the unauthorized manner in which the jury acquired knowledge of the offense.
3. Though such leave was granted by one judge, the motion to quash could be passed on and granted by another judge.
4. A member of the grand jury is competent to testify as to the manner in which the jury acquired information of the alleged offense.

STERRETT, J., dissenting.

Error to court of quarter sessions, Northampton county; Hon. W. W. Schuyler, judge.

Lizzie Green was indicted for keeping a disorderly house. The indictment was quashed, and the commonwealth brings error.

R. C. Stewart, district attorney, for the commonwealth.
P. C. Evans, for defendant in error.

CLARK, J. The indictment in this case was for keeping a disorderly house. It was based upon a presentment of the grand jury, the indictment having been prepared in pursuance thereof, and sent to a subsequent grand jury, with the permission of the court. A rule was taken to quash the indictment, upon the ground that the presentment was not made upon the knowledge and observation of the grand jury, but upon evidence taken before them on another complaint. At the hearing of the rule, a member of the grand jury was called to testify as to what influenced the grand jury in making the presentment, and it appeared that the presentment was made upon the testimony of certain witnesses, examined upon a charge of assault and battery, against some other persons than the present defendant, under investigation by the grand jury, and not from their personal knowledge and observation. That the grand juror was a competent witness for this purpose cannot be doubted. See *Gordon v. Commonwealth*, 92 Pa. St., 216, and cases there cited. He did not testify as to his own counsels, or to those of his fellow-jurors, or to any other matters which he was sworn to keep secret, but merely to the nature of the issue or question under investigation, and to the fact that the jury acted upon the testimony, and not upon their own knowledge or observation, in making the presentment. If such testimony were not admissible, it would be impossible, in most cases, to ascertain the sources of information from which a presentment was made; and although the charge may be wholly groundless, originating in a mere popular clamor, or in the malice of an unknown accuser, not only the accused, but the court itself, would be powerless to develop the facts, for the presentment, although made in good faith, may disclose nothing to indicate the source from which the information came. We can discover no rule of evidence or of

public policy which would exclude the evidence of a grand juror in such case.

We are equally clear that the testimony of the witness was brought upon the record under the exception taken at the hearing, according to the provision of the first section of the act of 19th May, 1874 (P. L., 219). The offer of the witness was to establish the matters alleged as grounds for quashing the indictment, and the testimony was in accordance with the offer. The only question is upon the sufficiency of the evidence, and of this there can be no doubt. The fact therefore must be taken as established, that the presentment was made upon the testimony of witnesses examined before the grand jury, and not upon the knowledge and observation of the grand jurors.

Criminal actions are usually instituted upon complaint under oath, before a magistrate or other proper officer, upon which, if it appear that a criminal offense has been committed within the jurisdiction, a warrant is issued, and the defendant arrested and brought before the magistrate for a hearing. If upon the hearing there be a probable case of guilt, the prisoner is held for trial in the court having jurisdiction of the offense. Whilst this is the usual method pursued in criminal procedure, there are certain exceptional or extraordinary modes of preferring criminal charges, well recognized in practice. These extraordinary modes of criminal procedure are very fully defined and set forth in the foot-notes to Wharton's Criminal Law, page 458, in a charge of the late Judge King, which has in a number of cases received the approval of this court. Three exceptions to the general method of procedure are there recognized. The first of these is "where criminal courts, of their own motion, call the attention of grand juries to and direct the investigation of matters of general public import, which, from their nature and operation in the entire community, justify such intervention." This power of the court, it is said, will only be thus exercised, however, in the investigation of general and public evils, such as great riots, general public nuisances, and flagrant vices; it will not be applied in cases of ordinary crime. The second exception is "where the attorney-general *ex officio* prefers an indictment before a grand jury, without a previous binding over or commitment of the ac-

cused." This power is properly exercised where there is occasion for great haste in applying the machinery of the law, or where the exigencies of the case and the public interests may reasonably require such action to be taken. The procedure in such cases, however, is under the supervision of the court, and if the process and power is misapplied the court will vindicate itself in restraining its exercise. The third exception is that which is originated by the presentment of a grand jury. A presentment, properly speaking, says the learned judge, is the notice taken by the grand jury of any offense, from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth. This is the definition given in the law dictionary by Bouvier, and by Blackstone (4 Bl. Comm., 301), and is the definition recognized and adopted by this court.

It is true that in some of the earlier cases in the federal courts, and in some of the states, it has been held that it was within the province and power of the grand jury to call witnesses, and to institute prosecution of their own motion, and the definition given by the late Dr. Wharton is therefore more comprehensive (Whart. Crim. Law, § 212); but he admits that in Pennsylvania the law is now somewhat narrowed (section 455), and that the view which may be considered as accepted in the United States courts and in most of the states is that the grand jury may act upon and present only such offenses as are of public notoriety, and within their own knowledge, such as nuisances, seditions, etc., or such as are given to them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate. Whart. Crim. Law, § 457. "In this state," says Mr. Justice Agnew in *McCullough v. Comm.*, 67 Pa. St., 33, "the power of the grand jury is more restricted, and the better opinion is that they can act only upon and present offenses of public notoriety, and such as are within their own knowledge; such as are given to them in charge by the court; and such as are sent up to them by the district attorney; and in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the bill of rights. 1 Whart. Crim. Law (ed. 1868), § 458, and note. It has therefore been held not to be allowable for individuals

to go before the grand jury with their witnesses, and to prefer charges. Such conduct is looked upon as a breach of privilege on part of the grand jury, and as a highly improper act on part of such volunteers. Its effect is to deprive the accused of a responsible prosecutor, who can be made liable in costs, and also to respond in damages for a false and malicious prosecution. It is in violation of the act authorizing the defendant to refuse to plead until the name of a prosecutor be indorsed on the bill of indictment. The usual course, where a presentment is thus surreptitiously procured, and bill founded upon it, has been to quash the indictment on motion and before plea pleaded." The presentment, therefore, as a basis for the indictment, was wholly insufficient, for the reason that it was not found by the grand jury upon their own own knowledge and observation.

It has been suggested, however, that if the presentment of the grand jury was not authorized by law, it may be treated as a mere suggestion, by which the attention of the court was called to the commission of the crime, and that the district attorney having, with leave of the court, sent up an indictment, the proceeding may be sustained under the other exceptions to the usual mode of criminal procedure, already specified. As we understand the practice, the presentment of a grand jury is *ex mero motu*, and is rarely, if ever, presented in technical form. Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. 2 Hawk. P. C., ch. 25, § 1; 2 Bouv. Law Dict., 452. Upon a presentment the proper officer of the court must frame an indictment before the party accused can be put to answer it. Story, Const., 657; 1 Whart. Crim. Law, § 212. What was done in this case is just what is done in all cases of a presentment by the grand jury. The presentment was placed in the hands of the district attorney by the court, with instructions to put it in the technical form of an indictment, signed by the commonwealth's officer, for the formal action of the grand jury, and upon return thereof the defendant was liable to process, and was required to plead. It is certainly true, however, as we have said, that the district attorney in an exigency, or when the occasion seems to require,

may prefer an indictment before a grand jury without a previous binding over or commitment, but this power is only to be exercised under the circumstances stated, for the public good, and then the proceeding is always under the supervision and control of the court. "In practice," says Judge King, "however, the law officer of the commonwealth always exercises this power cautiously,— generally under the direction of the court, and never unless convinced that the general public good demands it." "It is to be exercised in the ordinary case," says Mr. Justice Woodward in *Rowand v. Comm.*, 82 Pa. St., 405, "under the supervision of the proper court of criminal jurisdiction, and in all cases its exercise is subject to their revision and approval. The action of the officer and the court could be brought here for purposes of review only when the abuse of their discretion should be found to have been both manifest and flagrant. Cases can be conceived where the ends of justice would be defeated by the delay and publicity of a motion in open court for leave to send up an indictment, and in such cases it would be the duty of the prosecuting officer to act promptly, and upon his own responsibility. . . . While, however, the possession of this exceptional power by prosecuting officers cannot be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity it is the duty of the quarter sessions to set the officer's act aside."

It is plain that the exigency of this case did not require, or even appear to require, this extraordinary exercise of power on the part of the district attorney. There was no emergency, no demand of haste, no effort to escape, not even any appearance of an escape. There was no public good to be subserved. Indeed, there was absolutely nothing to call for this unusual method of procedure, and it is not pretended there was. It is true that in this case the indictment was prepared and sent to the grand jury "with leave of the court," but the court, upon being informed that the presentment was not made upon the knowledge and observation of the grand jury, and was therefore no presentment at all, had a right to revoke that leave, and to quash the bill, which was done.

It was stated at the argument that the indictment was sent

to the grand jury with leave of one judge, whilst the order to quash was made by another judge of the same court; and the suggestion carries with it the intimation that the discretion of the court having been exercised by one judge, it was not an appropriate act of discretion for the other to set the previous action aside. It is sufficient to state in reply to this, that the record does not disclose the fact that the orders were by different judges of the same court; and it would avail nothing if it did, for this court takes cognizance of the orders, decrees and judgments of a court of record as such, no matter how, for the time being, it may be constituted. Although the judges holding it may from time to time differ, it is at all times the same court here. With the amenities and courtesies which may be supposed to be due between judges of the same court we have nothing to do. But there is not necessarily any conflict of opinion shown upon this record. The sending of the bill to the grand jury was undoubtedly right as the matter then stood, and the order quashing the bill was certainly right when the facts appeared. If the court in the exercise of its discretion had sustained this indictment and brought the defendant to trial and conviction upon it, it is quite improbable that this court, on a writ of error, would have disturbed the judgment. It is only for a flagrant abuse of this discretion, as we have said, this court would interfere. But the same court, which in the exercise of its discretion directed the indictment to be sent to the grand jury, upon being informed as to the illegality of the presentment, in the exercise of the same discretion, afterwards quashed the bill. We think that discretion was properly exercised and the proceedings of the quarter sessions are affirmed.

STERRETT, J., dissents.

NOTE.— *Motion to quash sundry matters.*— The requirement of the statute that the names of the witnesses on whose testimony an indictment is found shall be indorsed on its back is directory merely. *State v. Enoch*, 26 W. Va., 253; *Walker v. State*, 19 Tex. App., 176. The indorsement, "a true bill," by the foreman on the back of an indictment raises a presumption that every member of the grand jury concurred in the finding. The point that all did not concur must be pleaded in abatement and proved. *State v. McNeill*, 93 N. C., 552. An indictment is not invalid because not signed by the foreman of the grand jury. *Weaver v. State*, 19 Tex. App., 547. Under Missouri Re-

vised Statutes, section 1802, providing that "when an indictment is found by the grand jury the names of all the material witnesses must be indorsed on the indictment," a failure to make such indorsement is ground for quashing the indictment (*State v. Roy*, 83 Mo., 268); but the failure to name the state in the margin is not. *State v. Blakely*, 83 Mo., 539. But it is error to quash an indictment because the foreman's name was indorsed preceding the words "a true bill" instead of after them and on a line with "foreman." *State v. Bowman*, 103 Ind., 69. Under Indiana Revised Statutes 1881, section 1669, providing that an indictment "must be signed by the prosecuting attorney," the printing of the attorney's name and title, with his sanction, at the bottom of the indictment is sufficient. *Hamilton v. State*, 103 Ind., 96. An indictment found after Colorado became a state for a murder committed before, concluding, "against the peace and dignity of the people of the state of Colorado," is not objectionable. *Packer v. People*, 8 Col., 361. If no return be duly entered upon the minutes of the court at the term when the presentment or indictment is found, there is no presumption that the return was duly made. An entry at a subsequent term without an order to make the entry *nunc pro tunc* will not cure the omission to enter the return at the proper time. *Bowen v. State*, 81 Ga., 432.

Starr & Curt. St. Ill., ch. 37, § 238, provides that when the grand jury of a circuit court shall indict for an offense cognizable in the county court the circuit court may certify the indictment to the county court. Section 239 prescribes a form of certificate and permits either party to obtain a rule on the clerk of the circuit court for a complete record properly certified. *Held*, that a defendant tried on an indictment certified as prescribed, and who was not asked for such rule, cannot after conviction object that the record does not show that the indictment was properly returned by a grand jury duly selected and sworn and having authority to find it. *Kammann v. People*, 26 Ill. App., 48.

An objection that an indictment was not presented to the court by the foreman of the grand jury is untenable where the record shows the indictment to have been presented in open court and ordered filed. *State v. Freeze*, 30 Mo. App., 347. Where the record shows that the grand jury came to the bar of the court and made certain presentments, and that thereupon a certain indictment was filed in the clerk's office, it is sufficiently shown that the indictment was returned in open court. *Kelley v. People*, 132 Ill., 363. And the fact that there is no record entry of the filing of an information does not render it invalid. It is sufficient if the date of filing is properly indorsed and signed by the clerk on the back of the information. *State v. Derkum*, 27 Mo. App., 628. Upon a motion to quash an indictment on the ground that twelve of the grand jury did not vote for or concur in the finding thereof, six of the grand jurors deposed that only seven voted in favor of finding the indictment, and the remaining fourteen either refrained from voting at all, or voted against such finding. The bailiff deposed, with qualification, that the remaining fourteen voted against such finding. The record showed that the grand jury appeared in open court, and returned an indictment indorsed, "A true bill," and no member was shown to have dissented or made objection. *Held*, that the motion was properly denied. *Manion v. People*, 29 Ill. App., 532.

An indictment will not be quashed after plea, nor the judgment arrested after verdict, because it does not appear from the indorsement on the indictment that the witnesses before the grand jury were sworn. *State v. Sheppard*, 97 N. C., 401. The allegation that "the jurors of and for the county of ——, aforesaid, on their oaths present," *held*, sufficient, this being of the caption, and the county having been named in the heading. *State v. Moore*, 24 S. C., 150. And the county being named, it is immaterial that the court-house is not. *Ibid.* An indictment indorsed on the back in printing the words, "A true bill," which indorsement is signed by the foreman of the grand jury as such foreman, is a compliance with the statute in that respect. *Tilly v. State*, 21 Fla., 242. An indictment which omits the words, "on their oaths present," and which contains no equivalent words, is fatally defective. *Vanvickle v. State*, 22 Tex. App., 625. The courts take judicial notice of the proper officer to prefer indictments, and when it appears that he intended to sign officially, will disregard the omission of any, or the adding of an improper, official designation. *State v. Myers*, 85 Tenn., 203. Where the foreman of the grand jury has noted the names of a certain number of witnesses on the indictment, the presumption is that he did his duty by noting the names of all who testified, and this, although he adds, "See, for other witnesses, Off. C. and P." *Andrews v. People*, 117 Ill., 195.

PEOPLE v. GARRETT.

(68 Mich., 487.)

INTOXICATING LIQUORS: *Sales to minors — Minor buying as agent.*

A statute which forbids the sale, giving or furnishing of liquor to a minor is violated although the liquor delivered to the minor be intended for the use of an adult, the infant being only an agent in making the purchase.

CAMPBELL, J., dissenting.

Error to circuit court, Eaton county; Frank A. Hooker, judge.

Complaint against James Garrett for selling liquor to a minor. Defendant, being convicted, brings error.

Dean & McCall, for appellant.

Moses Taggart, attorney-general, and *J. M. C. Smith*, for the people.

MORSE, J. My reasons for affirming the conviction in this case are these: The undisputed facts are that the defendant

sold, gave and furnished to a boy fourteen years old a bottle of beer, which the boy with other boys afterwards drank. The order for the beer, which purported to be signed by one William F. Mayer, cuts no figure in the case. The defendant knew the boy was a minor, and gave him the liquor. The intent is plain from this fact. There then could be no mistake about the boy's age. It cannot be considered that the defendant supposed the boy was twenty-one. The statute is not only aimed at the selling, but prohibits also the giving or furnishing of liquor as a beverage to a minor. The defendant must have known that the boy might taste or drink of the beer before he got across the street if he so desired. It must be held that the legislature intended to prevent the delivering of liquor to children; that they should "touch not, taste not, handle not." It is not an uncommon thing in cities for parents and others to send children of tender years into dram-shops after liquor. It makes no difference, in my opinion, under the law, whether the liquor thus procured is to be used by the adults or the children. It is within the statute which prohibits the sale, giving or furnishing of liquor to minors. Any other holding must subject children to the temptations that surround and abound in the saloons without remedy. The present case is a good illustration of the results that would necessarily follow a refusal of this court to affirm the conviction of this defendant. One Bill Badger, the boy says, gave him this order. Mayer, whose name was signed to it, and who had before sent to the defendant's place for liquor, never saw the order, and did not authorize it. The boy, on this forged order, with money given him by another boy, gets a bottle of beer of the defendant, and he and the other boys drink it up. We ought not to acquit the defendant of a violation of this statute, and thus encourage transactions of this kind. The only safe rule is to hold that a child cannot be made an agent to purchase or get liquor. And this I think is the plain intent of the law.

SHERWOOD, C. J., and CHAMPLIN and LONG, JJ., concurred.

CAMPBELL, J. (*dissenting*). Respondent was complained of and convicted for furnishing liquor to a minor. A boy came to his place of business with a written order from a grown-up

person in these words: "Please let the boy have one bottle of beer, and oblige WILLIAM F. MAYER." He asked the lad if the beer was for Mr. Mayer, and he answered it was. He thereupon sold him the bottle. Defendant testifies that he had frequently sold and sent beer to Mr. Mayer, who was in the habit of sending for it, and supposed he had done so in this case. The order was not signed by Mayer in fact, and the boy really wanted the beer for himself. It was written and given the boy by another person. The court charged the jury that they should find defendant guilty on the facts, and that it made no difference that he acted honestly, without criminal intent, and that the sale should be regarded as one made to the boy, and therefore within the statute against sales to minors. A majority of the court think that every sale where the delivery is to one known to be a minor comes within the law, and that no intoxicating liquor can be furnished where a minor is to receive it, whether intended for himself or not, without a violation of the statute, which in their view covers every dealing in which a minor has the liquor delivered to him. The statute declared it unlawful "to sell, furnish to or give any spirituous, malt, brewed, fermented or vinous liquors," etc., "to any minor," etc. Laws 1882, p. 351, § 2. The same section goes on to provide as follows: "The fact of selling, giving or furnishing any of said liquors to any minor," etc., "shall be a *prima facie* presumption of an intent on the part of the person so selling, giving or furnishing such liquor to violate the law."

I do not myself think that any criminal statute can be fairly construed as including acts done with a reasonable and honest belief that the facts are not such as are specified in the law. It is a principle which is practically universal that there must be a criminal mind to make a crime. It is quite possible for a minor to have all the appearance of a grown-up person, and to be so reputed, and it would be a very harsh construction to hold a person criminally liable for being deceived in his age. And it is certainly not only possible, but common, for persons under age, and known to be so, to be sent on all sorts of household errands, and where a sale would be lawful to the adult members of a family. I can see no reason why they may not purchase beer or other liquors by servants or agents

as innocently as by themselves. This, I think, is evidently contemplated by the statute, which declares such delivery to a minor *prima facie* evidence of a criminal intent. This necessarily assumes that the presumption is disputable, and liable to be overthrown by facts to the contrary. In my view, the statute itself forbids holding the presumption conclusive, and does not propose to violate the general maxims of criminal jurisprudence, which punish none but those having guilty intent. The jury might very likely have found a wrong intent, but I think it was for them to say.

NOTE.—The doctrine of the majority opinion is also maintained in *Siceluff v. The State*, 52 Ark., 56.

A different view of the law from that of the majority opinion above has been taken in the case of *People v. McMahon*, reported in 53 Conn., 407. In that case a bottle of liquor was sold to a minor child upon the order of her father to be delivered to the latter, and the court says:

"The statute is a penal one and is to be strictly and fairly construed, and not to be extended beyond cases clearly within both its letter and spirit. This rule is well settled: 'A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers.' 4 Bac. Abr., 'Statutes,' § 45. 'Penal statutes are always to be strictly construed for the benefit of the citizen. Nothing more is to be deduced from the words than they expressly warrant, and they are not to be extended by implication.' 1 Swift, Dig., 13; 1 Bl. Comm., 61.

"In *French v. Gray*, 2 Conn., 113, Hosmer, J., says: 'Instances of restrictive legislation, narrowing the liberal operation of a statute, have been frequent; and criminal laws of the most comprehensive expression are not considered as including idiots or madmen. . . . By 1 Edw. 2, the breaking of a prison by a prisoner confined for felony is made a felony; but if the prison is on fire, and in order to save his life the prisoner breaks it, this act, though directly contrary to the letter, is deemed to be no violation of the statute.' *Reniger v. Fogossa*, Plowd., 13.

"In prosecutions under the same statute that we are now considering, for keeping open places where liquors are sold on Sunday, we have recently held in *State v. Ryan*, 50 Conn., 411, that a literal keeping open of such a place for the ordinary use of the family and boarders of the keeper was not a violation of the statute. Applying the rule we have stated, a majority of the court are of opinion that the facts of this case do not bring it within the intent and spirit of the act, although it may come within its letter, and that there has not been a violation of the statute.

"The facts show no purpose on the part of the defendant to practice any subterfuge or attempt to evade the law; nor do they show in themselves any dishonest purpose. If any offense was committed, it consisted solely in the handling of the bottle containing the liquor to the child; for unquestionably the sale was in law to the father, the child having disclosed her agency and stated the errand upon which she was sent by her father. The

sale to the father was a legal sale, the defendant being a licensed vendor, unless the act of passing the bottle into the hands of the child made it illegal. It does not seem reasonable to suppose that it was the intention of the legislature to make an act innocent as this was in itself, a crime, when no injury to the child could result; for the bottle of liquor, so long as it was not opened, was as harmless as a package of tea or any other article that children are so frequently and so properly sent to purchase."

A similar doctrine was announced by the Texas court in a late case. A minor purchased from the defendant whisky, falsely representing that his mother was very sick, and that his father, who could not leave her, had sent him there for the whisky for her immediate use. The statute required written consent in writing from the parent or guardian before one was authorized to sell liquor to a minor. The defendant was convicted below, but upon appeal the court says:

"Was the defendant guilty of violating the statute? We are of the opinion that he was not. The letter of the law was violated, but not its spirit. We think that the familiar principle which runs through all criminal jurisprudence, that the mind must be guilty, applies in this case. It is true that defendant sold the whisky to a minor, without the written consent or order from either of his parents, but he believed he was making the sale to the parents of the minor. Let it be supposed that what the boy told had been the truth. Would defendant have been guilty? We think not. Was he cautious in his transaction? He was; using every reasonable means to prevent deception, but was foiled by the falsehoods of the boy. Is there any reason tending to show that defendant knew or even suspected that the boy was lying? There is not. Mr. Bishop says: 'Criminal statutes may be either expanded or contracted in their meaning by interpretation, so as to exempt from punishment those who are not within their spirit and purpose. Otherwise expressed, whenever the thing done is not within the mischief evidently intended by the statute, though within its words, the deed is not punishable.' Bish. St. Crimes, 230. He further says: 'Whatever may be said of any particular application of the doctrine, the doctrine itself, when properly applied, is highly just and beneficial. Criminal punishment should be kept within the conscience of mankind, and be withheld where it refuses assent. In the nature of things, statutes cannot be so framed as to meet every possible unforeseen and foreseen case thereafter to arise, which, while within the terms of their main provisions, is still outside of their spirit and purpose. All that cannot be done the court should understand as not having been attempted. Therefore, though a case in judgment is within the letter of the statute, if they can see that it is exceptional to its spirit and purpose, and so the law-makers did not mean punishment for it, they ought not to inflict the punishment. Let the result of an action be what it may, we hold a man guilty simply on the ground of intention, or on the same ground we hold him innocent. The calm judgment of mankind keeps this doctrine among its jewels.' *Ibid.*, § 235. Under an ancient law, whoever drew blood in the streets should be punished. This statute did not apply to a surgeon who opened the vein of a person who fell down in the street in a fit. In that case the surgeon violated the letter, but not the spirit, of the statute. So in this case. Let us suppose that the

boy had told the truth. Would not the defendant, by refusing him the whisky because no written order from the parent was forthcoming, have shown himself destitute of the ordinary principles of humanity? He would have been a brute, without a conscience, and mankind would have justly held him in contempt. Believing the boy, he acted as any gentleman would have acted, and his act should be commended and not punished. To sustain this conviction would render the law contemptible in the estimation of all honorable men. It would be an embargo upon humane conduct. The judgment is reversed and the cause remanded." *Woldstein v. The State*, 14 S. W. Rep., 394. If the minor have no parent or guardian the mandate of the statute requiring written permission is not dispensed with.

In the case of *Blair v. The State*, 81 Ga., 629, the court says: "The statute (Code, § 4540*a*) makes no exception as to minors whose parents are dead, and who have no guardians. It was suggested in the brief of counsel that this minor was his own guardian. If that be true in a legal sense, and his own act as guardian would be equivalent to that of any other guardian, he should have given himself permission in writing. Perhaps, if he had taken time to prepare such writing, he would have concluded not to make the purchase, and in this way the law and the public would have had the benefit of his deliberation."

Knowledge of minority.— In very many cases where the law positively prohibits the sale to a minor or to a drunkard, it has been held that an honest belief that the purchaser was of full age or that he was not an inebriate constitutes no defense. This is the rule in Iowa. *State v. Ward*, 75 Ia., 637; *State v. Thompson*, 74 Ia., 119; *Dudley v. Soulbine*, 49 Ia., 650. It has been so held, also, in the late cases of *State v. Farr*, 11 S. E. Rep. (W. Va.), 737. *Draper v. Fitzgerald*, 30 Mo. App., 518; *State v. Bruder*, 35 Mo. App., 475; *In re Carlson*, 127 Pa. St., 330. And in these cases the earlier decisions upon the question are cited and discussed. It is held, also, that the owner of the place is guilty even if the sales were made by his bar-keeper without his knowledge and against his express directions. *Magler v. The State*, 47 Ark., 109; *State v. McGinnis*, 38 Mo. App., 15; *State v. Bruder, supra; Green County v. Wilhite*, 29 Mo. App., 459. See, also, *Page v. The State*, 7 Am. Cr. R., 297, and note.

Carl v. State.

(87 Ala., 17.)

Intoxicating Liquor: *Illegal sale — Bitters.*

1. Whether the sale of "bitters," consisting of twenty per cent. alcohol, and the remaining eighty per cent. water, herbs, barks, roots, etc., is a violation of a prohibitory liquor law, depends upon the question whether in such article the distinctive character and effect of intoxicating liquor are present, so that it may be used as an intoxicating beverage, notwithstanding the other ingredients. If it cannot be so used, if the other

ingredients are medicinal, and the alcohol is a necessary preservative or vehicle for them, the sale is lawful.

2. It was competent to prove the intoxicating character of the bitters in question by the experimental effect of their use, or by the opinion of a witness not an expert, but who had had personal experience or observation such as to enable him to form a correct opinion.

3. It was also proper to prove that the bitters were bought and used for a beverage, and drunk as such by many persons in the community or elsewhere.

Appeal from circuit court of Escambia county; John P. Hubbard, judge.

H. C. Carl was indicted for selling intoxicating liquor as a beverage, and from a judgment of conviction he appeals.

John Gamble, for appellant.

W. L. Martin, attorney-general, for the state.

SOMERVILLE, J. The defendant, being indicted, was convicted of selling spirituous liquors without a license and contrary to law. The article sold was labeled "Elixir Cinchona, or Cinchona Bitters." The evidence on the part of the state tended to prove that it contained spirituous liquor sufficient to make it intoxicating in its ordinary use as a beverage, and that it was frequently sold and used as a beverage in the community, especially since the enactment of a local law prohibiting the sale of spirituous liquors in Escambia county, and that it was sold by the defendant more as a beverage than as a medicine. The testimony offered by the defendant, on the contrary, tended to prove that the decoction contained twenty per cent. of proof spirits, or only enough to prevent it from fermentation, and no more; that it was manufactured in good faith as a medicine, and that it was a valuable tonic and stimulant, and not an intoxicant in its ordinary use; that it contained barks and herbs of known medicinal qualities, and was sold in good faith as a medicine and not as a beverage.

The purpose of prohibitory liquor laws is to promote the cause of temperance and prevent drunkenness. The mode adopted to accomplish this end is the prevention of the sale, the giving away, or other disposition of intoxicating liquors. The evil to be remedied is the use of intoxicating liquors as a beverage rather than as an ingredient of medicines and arti-

cles for the toilet or for culinary purposes, and the object of the law in this particular must not be lost sight of in its interpretation. It is true, and we have so held in *Carson's Case*, that if the article sold was spirituous or other intoxicating liquor, the fact that it was sold for medicine would be no defense, unless there was an express exception in the statute. But we observed in that case as follows: "We are not to be supposed as intimating that physicians or druggists would be prohibited, under such a statute as the one in question, from the *bona fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by such a prohibitory enactment, nor even within the strict letter of the statute." *Carson v. State*, 69 Ala., 235, 241; *Woods v. State*, 36 Ark., 36. We again said, in discussing this same subject, in *Wall v. State*, 78 Ala., 417: "There may be cases, perhaps, where the *bona fide* use of a moderate quantity of spirituous liquor in a medicinal tonic would not alone bring a beverage [or decoction] within the statute."

This question is exhaustively discussed in the *Intoxicating Liquor Cases*, 25 Kan., 751; 37 Am. Rep., 384 (decided in the year 1881). The Kansas statute prohibited the sale of "all liquors and mixtures, by whatever name called, that will produce intoxication." It was held not to embrace standard medicines and toilet articles, not ordinarily used as beverages, such as tincture of gentian, bay rum and essence of lemon, although containing alcohol. Whether it embraced certain cordials or bitters was held to be a question of fact dependent on the evidence as to their intoxicating qualities and ordinary use. It was said that "bay rum, cologne, paregoric, and tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof." And as to the cordials and bitters, the question was said to be one of fact which should be referred to the jury. "If the compound or preparation," said the court, "be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of the alcohol does not bring the article within the prohibition. The influence of the alcohol may be

counteracted by the other ingredients, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating liquor remains as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, it is within the statute, and this though it contain many other ingredients, and ingredients of an independent and beneficial force in counteracting disease or strengthening the system. 'Intoxicating liquors, or mixtures thereof.' This, reasonably construed, means liquors which will intoxicate and which are commonly used as beverages for such purposes, and also any mixtures of such liquors as, retaining their intoxicating qualities, it may be fairly presumed may be used as a beverage and become a substitute for the ordinary intoxicating drinks."

In *King v. State*, 58 Miss., 737 (1881), the defendants were indicted for selling intoxicating liquor without a license, and contrary to law. The article sold was "Home Bitters," a decoction composed of thirty per cent. of alcohol, and the rest of water, barks, seeds, herbs, and other like ingredients. It was alleged by the defendant to have been sold as a medicine. It was held that if the compound was intoxicating, and was sold as a beverage, the jury should convict; but if it was sold in good faith, only as a medicine, they should acquit. It was said: "One authorized to sell medicines ought not to be held guilty of violating the laws relative to retailing because the purchaser of a medicine containing alcohol misuses it and becomes intoxicated; but on the other hand, these laws cannot be evaded by selling as a beverage intoxicating liquors containing drugs, barks or seeds which have medicinal qualities. The uses to which the compound is ordinarily put, the purposes for which it is usually bought, and its effect upon the system, are material facts, from which may be inferred the intention of the seller. If the other ingredients are medicinal, and the alcohol is used either as a necessary preservative or vehicle for them,— if from all the facts and circumstances it appears that the sale is of the other ingredients as a medicine, and not of the liquor as a beverage,— the seller is protected; but if the drugs or roots are mere pretenses of medicines, shadows and devices under which an illegal traffic is to be conducted, they will be but shadows, when interposed for pro-

tection against criminal prosecution." See, also, *Wall's Case*, 78 Ala., 417; *Ryall's Case*, id., 410. To the same effect substantially is the case of *Com. v. Ramsdell*, 130 Mass., 68 (1881).

We have quoted at length from the foregoing authorities because they seem to be carefully considered, and furnish suitable tests for the determination of what may be considered intoxicating liquors, within the meaning of our prohibition liquor laws, as accurate and just as seems to be practicable. We accordingly adopt the doctrine of these cases as the correct rule for the government of this case on another trial. The rulings of the circuit court are not in accord with this view, and for this reason the judgment must be reversed.

It was competent to prove the intoxicating qualities of the elixir or bitters in question by the experimental effect of its use. *Knowles v. State*, 80 Ala., 9. Or the same fact could be proved by any witness who is shown to have had an opportunity of personal observation, or of experience, such as to enable him to form a correct opinion. He need not be a technical expert, and it is no objection that his statement of the fact is made in the form of an opinion. *Carson v. State*, 69 Ala., 236; *Merkle v. State*, 37 Ala., 139.

So it was proper to prove that this article was bought and used for a beverage, and drank as such by many persons in the community or elsewhere. Its nature was illustrated by the uses to which it was put.

The court did not err in its rulings on the evidence.

The judgment is reversed, and the cause remanded for a new trial.

NOTE.— *What constitutes intoxicating liquor.*— Whatever is generally and popularly known as intoxicating liquor, such as whisky, brandy, and gin, is within the prohibitions of the Kansas act of 1881, and may be so declared as a matter of law by the courts,— that act prohibiting the sale of intoxicating liquors except for medical, scientific and mechanical purposes, and providing that no one shall sell for the excepted purpose without a druggist's permit from a probate judge. Whatever is generally and popularly known as medicine, an article for the toilet, or for culinary purposes, recognized, and the formula for its preparation prescribed, in some standard authority, and not among the liquors ordinarily used as intoxicating beverages, such as *tincture of gentian, paregoric, bay rum, cologne, essence of lemon*, are not within the statute, and may be so declared as a matter of law by the courts, notwithstanding such articles contain alcohol and may produce intoxication.

But as to articles intermediate between these two classes, articles not known in the United States dispensatory or other standard authority, compounds of intoxicating liquors with other ingredients, whether provided for a single case or compounded upon a formula and sold under a specific name, as bitters, cordials, tonics, whether they are within or without the statute, is a question of fact for the jury alone. The test is this: If the compound be such that the distinctive character and effect of intoxicating liquors are gone, that its use as an intoxicating beverage is practically impossible, by reason of the other ingredients, then it is not included within the statute. But if the intoxicating liquor remain as a distinctive force, and the compound is reasonably liable to be used as an intoxicating beverage, then it is within the statute. *Intoxicating Liquor Cases*, 25 Kan., 766. A merchant who keeps a stock of brandy cherries in bottles and furnishes his customers glasses with which they can drink the brandy is guilty. *Musick v. The State*, 51 Ark., 165. "Lemon ginger" and "Empire bitters" contain about one-third alcohol and two-thirds distilled water extracts from herbs, etc., and the quantity of alcohol is not greater than is necessary to extract and retain the virtues from the herbs. It was held that while these liquors will produce intoxication if taken as a beverage, they still are simply medicinal preparations, and a dealer in these is not dealing in liquors. *United States v. Stubblefield*, 40 Fed. Rep., 454.

The fact that a medicine contains alcohol does not of itself render a sale unlawful. *Davis v. State*, 50 Ark., 17.

In Pennsylvania the question whether cider is a spirituous or vinous liquor is a question of fact for the jury. So it is also held in North Carolina. *Com. v. Reyburg*, 122 Pa. St., 229; *State v. Lowrey*, 74 N. C., 121. Hard cider comes within the prohibition against ardent, vinous, malt and fermented liquors. *Berger v. State*, 50 Ark., 20; *Com. v. Dean*, 14 Gray, 99. But it was held in *State v. Biddle*, 54 N. H., 379, that whether ale or cider after fermentation are intoxicating liquors is a question for the jury; and it has also been decided that neither cider nor crab cider is included within the term spirituous liquors, wine, porter, beer, or any drink of a like nature.

The courts will take judicial notice that beer is an intoxicating liquor. *State v. Teissedre*, 30 Kan., 488; *Briffet v. The State*, 58 Wis., 41, and cases cited therein. But it was also held in Illinois that as there are kinds of beer which are not intoxicating, proof of sale of beer to a minor, without a further showing that it was malt beer or intoxicating, will not sustain a conviction. *Hausberg v. The People*, 120 Ill., 21. The courts will take judicial notice that gin and rum are intoxicating liquor. *Com. v. Peckham*, 2 Gray, 514; *United States v. Angel*, 11 Fed. Rep., 34. Also champagne and port wine. *Kizer v. Randleman*, 5 Jones' L. (N. C.), 428; *State v. Parker*, 80 N. C., 439.

People v. Andrews.

(115 N. Y., 427.)

Intoxicating Liquors: *Sale by club.*

1. Code of Criminal Procedure of New York, section 56, provides that "subject to the power of removal provided for in this chapter, courts of special sessions . . . have, in the first instance, exclusive jurisdiction to hear and determine" a complaint for violating the excise law. During a preliminary hearing on a complaint to determine whether a warrant should issue, the attorney for the complainant notified the justice that the people would proceed no further before him, but would go before the grand jury; whereupon the justice sent the papers to the district attorney, and did nothing further, though no order of discontinuance was entered. *Held*, to amount to a withdrawal and discontinuance of the case, surrendering the justice's jurisdiction, and giving the grand jury jurisdiction of the complaint.
2. Delivery by a steward of a club, of liquors, upon the order of a member, to a person not a member, and payment therefor by the member to the steward, is a sale of intoxicating liquors, within the New York statute forbidding such sale without a license.

Appeal from supreme court, general term, fifth department.

John Andrews was indicted for selling intoxicating liquors to be drunk on the premises, without a license. The general term reversed a judgment of conviction entered upon a verdict of a jury, and an order denying a new trial, and both defendant and the people appeal. See 3 N. Y. Supp., 508. Code of Criminal Procedure of New York, section 56, provides that, "subject to the power of removal provided for in this chapter, courts of special sessions, except in the city and county of New York and the city of Albany, have, in the first instance, exclusive jurisdiction to hear and determine charges of misdemeanors committed within their respective counties, as follows: . . . when a complaint is made to, or a warrant is issued by, a committing magistrate, for a violation of the laws relating to excise, and the regulation of taverns, inns and hotels, or for unlawfully selling or giving to any Indian spirituous liquors or intoxicating drinks."

A. P. Rich, district attorney, for the people.
H. Greenfield, for defendant.

DANFORTH, J. The defendant was accused of violating the excise law (Laws 1857, ch. 628). The charge is that on the 10th of July, 1887, at Moravia, in the county of Cayuga, he sold, by retail to various persons, strong and spirituous liquors in quantities less than five gallons, without having a license therefor. He was convicted. The general term of the supreme court have reversed the conviction and ordered a new trial. The plaintiff appeals from the order of reversal, and the defendant appeals from the order directing a new trial.

Two questions are presented: (1) As to the jurisdiction of the court. (2) Whether, within the meaning of the statute *supra*, there was any sale of liquor by the defendant.

The first question was properly disposed of by the general term. 50 Hun, 391.

As to the second, we are unable to agree with that court. Upon the trial one S., describing Andrews' place, says: "Before the 1st of May, 1887, Andrews occupied the premises as a saloon. The front room is used for a fruit, confectionery and tobacco store. Back of that, and partitioned off, is a room with a bar, table and chairs." He also says: "I got whisky and ale of Andrews in the back room and paid him for it. Some I drank there and some I took home and drank. Paid him ten cents for that I drank there and a shilling for that I took home." C., a minor attending school, was often at this place, and drank both ale and whisky and paid for it. Bought it for others and paid for it. Another person had ale and whisky there, and on one occasion bought half a pint of whisky for which he paid twenty-five cents and carried it away. Chase drank there several kinds of liquor — gin, whisky and beer — and paid for it; ten cents for gin and whisky, and five cents for beer. Jones says the place was a saloon soon after it was built and Andrews has always run it. Jones frequently drank there, bought whisky by the glass and paid Andrews or Keeler for it. Keeler testified that he was employed by the defendant at this place and paid by him. He says: "I wait on customers to cigars, fruits and confectionery, and also wait on members of the club. Since July 10th, last, I have delivered both ale and whisky to members of the club there by the drink and took pay therefor in cash. Have done this a good many times. The sales that have been made by me have all

been made by Andrews' direction." Upon cross-examination by defendant of these witnesses, they described themselves as members of the "Valley Social Club," and it appeared that when persons not members came in with a member and called for liquor it was supplied, but payment made by the member. It was shown that neither Andrews nor the club had license. It was refused to Andrews in May, 1887, and on the 1st of June, 1887, the club was organized.

At the close of the plaintiff's case the defendant asked to be discharged upon the ground that there was no proof of a sale of intoxicating liquors, ale or wines by him, and, being refused, went into evidence. Andrews, the defendant, testified that the description of the place by witness S. was correct; that in the front room he had cigars, tobacco, fruit and confectionery, and that was his own private business; that the room back of that was leased to the "Valley Social Club" by himself and wife for the term of one year from the 23d of May, 1887. He was steward of that club. He said: "I have heard the witnesses sworn on the part of the people. Heard them testify that they were members of the club and procured drinks at that place. That I do not deny in any way. None of the drinks had by any of the witnesses was my property, nor did I receive any pay of my own therefor, whatever. The liquors did not belong to me; they belonged to the men that drank them. They were not bought in my name, but in the name of the Valley Social Club, and bills were rendered to that organization for them. The club was organized about the 1st of June, 1887, with William D. Harris as president, and six trustees." It further appeared that Andrews was treasurer, and that all the moneys of the club came to his hands, and had done so since its formation. The club was not incorporated; twenty or twenty-five men met together and made the arrangements. Others subsequently joined, so that the present number is five hundred. Andrews took the rent, and paid the wages of himself and Keeler. This he said was in pursuance of a standing order of the officers of the club. The matter of dividends has been considered by the club, and it was upon motion decided to use the money on hand to defend this suit, and make a dividend of what was left when the suit is ended.

The trial judge, in submitting the case to the jury, assumed

that the liquors belonged to the club, and waiving the question as to the liability of the defendant for liquors sold or delivered to the members of the club, said, in substance, "that where any person, acting as agent or steward of such an association, does, upon request of a member, deliver to a person not a member liquors belonging to that association, and takes pay for it, although from that member, the transaction constitutes a sale within the meaning of the statute, and the offense charged in the indictment is complete." In that we find no error. The liquor belonged to the association, not a legal entity as a corporation, but as joint owners or tenants in common. I do not say that circumstance distinguishes this case from one where the liquor is owned by an incorporated club; that need not be considered; it is the character in which they act. Five hundred men buy a quantity of liquor; they store it and appoint an agent to manage it. On the application of one of the five hundred the agent separates a small quantity from the mass of liquor, fixes its value, delivers the quantity so separated, as directed, and receives its value or price in money. What is that but a sale? It is not an evasion of the statute, it is a violation of it. We have before us the scheme of the association and its by-laws, and can see that the transaction was not in conformity to either. We are therefore not called upon to say whether, if it had been, it would or not have relieved the defendant. The scheme, as declared in the eighth by-law, is that "the expenses of this club shall be sustained by voluntary contributions to its funds by the members, and the refreshments furnished shall be enjoyed by the members in proportion to the amount contributed by each. Such contributions shall be receipted for by the treasurer by certificates; and, as a means of adjusting the expenses equitably between the members, such certificates shall be surrendered to the employees of the club as such refreshments are consumed by such members." In the case before us no certificates were given, and none of course surrendered. Nothing was done by means of which the equities between the members could be adjusted. Nothing remained to be done. The transactions were on a cash basis. The purchasing money went into the hands of the treasurer, with no other ceremony than attended a similar purchase, when, instead of filling that

character, he stood behind the same bar as a saloon-keeper. Liquor was purchased; liquor was paid for by money. The occurrence was not exceptional, but the members were dealt with on a cash basis; and, whether men or boys, received no other consideration than is accorded to ready-money customers at a public bar. Whatever may be the merit of the scheme prescribed by the organization, it has no effect here. It did not control or govern the parties.

We are referred to the case of *Com. v. Ewig*, 145 Mass., 119, as authority to sustain the defendant's appeal. In that case the defendant was convicted because the scheme on which he relied was deemed an evasion of the license law. We do not regard that question as before us, and, if there are observations in the course of the opinion of the learned court below at variance with those already expressed, we cannot yield to them. We put our decision upon the sole ground that the acts of the defendant were as charged in the indictment, in violation of our statute, and that upon the evidence he was rightfully convicted.

The judgment of the general term should therefore be reversed, the defendant's appeal dismissed and the judgment of the court of sessions affirmed. All concur.

NOTE.— In Montana a social club was organized, not for the purpose of evading the liquor laws of the state, but which as an incident to its organization furnished its members with liquor. Upon a prosecution against the club for failing to pay the license tax imposed upon retail liquor dealers the defendant was convicted. The supreme court, in passing upon the question as to the liability of the club for the tax, reviews nearly all the authorities. Justice Blake says:

"The authorities which discuss the problems to be solved in this case cannot be reconciled. Some of the decisions which have been cited relate to the associations that have been organized for the purpose of evading and violating the law restraining the sale of intoxicating liquors. They are inapplicable to the present inquiry, for no charge of this nature has been uttered against the appellant. Such is *State v. Mercer*, 32 Iowa, 405. In the opinion of the court, Mr. Justice Beck referred to the articles of association of the 'Winterset Social Club,' and said: 'They appear by the statement of the counsel to have been nothing more than the foundation of an organization, the object and intent of which was to evade the law for the suppression of intemperance,— a rather clumsy device by which the defendant and the members of the 'Social Club' hoped to defeat that law and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use. The fact that, under the arrangement of selling tickets, the

members of the club became the owners of the liquors to the extent of the money paid, does not make the sale of the liquors in that way lawful.' The statute which was interpreted by the court formed a part of what is generally designated as a 'prohibitory liquor law,' and did not relate to any system of taxation. The case of *Marmont v. State*, 48 Ind., 21, belongs to the same class, and the opinion says that 'the appellant was indicted, tried and convicted in the court below for selling intoxicating liquors on Sunday and permitting them to be drunk upon the premises.' Chief Justice Buskirk in the opinion gives at length the statement of facts concerning the 'Modock Club,' and proceeds: 'It is agreed that each member, upon his initiation, paid fifty cents, and thereafter a monthly assessment of ten cents, to form the basis of a fund for the payment of expenses and reliefs of the society; and that the money received for each glass of beer drawn for and used by a member of said association goes into the society's treasury, to keep up its funds for payment of expenses, procuring refreshments, and for reliefs; which expenses are for fuel, rents of hall, newspapers, the beer used, and the donations or reliefs payable to each member of said association, who, from sickness or other mishaps, may require assistance; and a standing committee from the members of said society is appointed to see after and inquire into and direct the payment of necessary reliefs in all such cases. . . . When the society appointed the appellant its agent for the sale of its beer to the members of the association, it consented that each member might become the owner of such portion of the partnership property as he might be willing to pay for, and appropriate it to his individual use. If the transaction set out in the agreed statements of facts be not an evasion and violation of the law, then a number of persons may do that lawfully which if done by one person would be unlawful. It would be a reproach to the law and its administration if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will.' To the same effect are *Rickart v. People*, 79 Ill., 85; *State v. Horacek*, 41 Kan., 87; *State v. Lockyear*, 95 N. C., 633. It should be observed that these citations support the contention of the respondent that the transaction which is described in the case at bar possessed the elements of a sale. It must be further admitted that the following authorities are directly in point, and uphold the ruling of the court below: *United States v. Wittig*, 2 Low., 466; *Martin v. State*, 59 Ala., 34; *People v. Andrews*, 115 N. Y., 427; *People v. Soule*, 74 Mich., 250; *Chesapeake Club v. State*, 63 Md., 446; *State v. Essex Club* (N. J.), 20 Atl. Rep., 768. They assert, generally, that the property which belonged to the corporation or club has been transferred for a valuable consideration to persons who have received it; that the intention of good faith of the members who authorized such acts is immaterial; and that the law contemplates that the license shall be paid for the disposal of liquors in this manner. The opinions in some of these cases are elaborate essays upon the question under consideration, and their conclusions have been fairly announced. We do not deny their weight, and will not attempt to refute the reasons upon which they are founded, and will not go further, and say that the controversy is surrounded by uncertainty.

"There are, however, well-considered cases in which a contrary view has been expressed. *Graff v. Evans*, 8 Q. B. Div., 373; *Tennessee Club v. Dwyer*,

11 Lea, 452; *Leim v. State*, 52 Md., 566; *Com. v. Smith*, 105 Mass., 144; *Com. v. Pomphret*, 137 Mass., 564; *Com. v. Ewig*, 145 Mass., 119. In *Graff v. Evans*, *supra*, Mr. Justice Field said: 'In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offense within the section. It is not disputed that the club was *bona fide* a club. . . . I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods. I am unable to follow the reasoning of the learned magistrate in saying that the question depends on whether or not a profit was made upon the sale of the liquors. . . . The section must be construed by looking to the language used, and taking a large view of the object of the legislation. The legislature have come to the conclusion that it is unadvisable that intoxicating liquors should be sold anywhere without a license. The enactment is limited to 'sales' of intoxicating liquors, and only seems aimed at sales by retail traders, because the wholesale trader is not touched. The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a 'sale' by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. . . . There was no contract between two persons, because Foster was vendor as well as buyer. . . . I think it was a transfer of a special property in the goods of Foster, which was not a sale, within the meaning of the section.' Mr. Justice Huddlestone concurred, and said: 'It seems to me that Foster had a property, or at least an interest, in the goods which were transferred to him. Mr. Hill rightly designated that interest as a one eleven-hundredth share. Foster, on payment, got from the bar-man who served him the interest of the other one thousand and ninety-nine members, who thereby transferred their interest to him. There was no transfer of the general or absolute property in the goods to Foster, but a transfer of special interest. That, in my view, was the result of the transaction. I cannot think it was a sale of intoxicating liquors by retail.

"In *Seim v. State*, *supra*, Chief Justice Bartol for the court said: 'It will be observed that the license laws (Code, art. 57), which forbid the sale or barter of spirituous or fermented liquors without a license, have never been construed as applicable to social clubs, of which there are several in Baltimore city, where liquors are procured for the use of the members, and are furnished to them in the manner described in the present case; and we think it very clear that no license is required, for the reason that such a transaction is not a sale, within the meaning of the license laws. And, by a parity of reason, we conclude that the members of such associations as the Con-

cordia is admitted to be, who obtain refreshments and liquors at the club by paying into the common fund the price fixed by the regulation of the society, cannot be said in any sense to buy them from the corporation, nor can the corporation be said to sell them to the members, within the meaning of the act of 1876. . . . The society is not an ordinary corporation, but a voluntary association or club united for social purposes. Each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society as long as he remains a member. Among these privileges is that of partaking of the provisions and refreshments provided for the use of the members. These are not sold to him by the corporation, but furnished to him by the steward, upon his paying into the common fund what is equivalent to the cost of the article furnished, and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a bargain or sale in the way of trade, and therefore not within the purview or meaning of the act of 1866.'

"In *Chesapeake Club v. State, supra*, the doctrine of *Seim v. State, supra*, was recognized, but held inapplicable, and the court said: 'The language of the Sunday law of 1866, under which the case of *Seim v. State* was decided, is altogether different from that of the act of 1882, chapter 112; and the decision in that case would seem to have been in the mind of the framers of the act of 1882, chapter 112, for, by the latter act, terms are employed more comprehensive, especially those making the act applicable to associations and corporations, than are to be found in the Sunday law of 1866." A comparison of the statutes of the state of Maryland, which are referred to in *Seim v. State, supra*, and *Chesapeake Club v. State, supra*, illustrates clearly the distinctions which have been pointed out. In the first place the court construed an act providing that 'no person in this state shall sell, dispose of, barter, or, if a dealer in any one or more of the articles of merchandise in this section mentioned, shall give away, on the Sabbath day, . . . any . . . spirituous or fermented liquors.' . . . In the last case the court interpreted a statute embodying these clauses: 'If any person or persons, house, company, corporation or association, or body corporate, shall sell, directly or indirectly, at any place, or give away at his, her, their or its place of business, any spirituous or fermented liquors.' . . . And, 'in case of any violation of any provision of this act by any company, corporation or association, each or any member of such company, corporation or association shall be liable, and shall suffer imprisonment.' . . . In *People v. Soule, supra*, this statute was under consideration: 'All saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned in this act are sold or kept for sale.' . . . In *Com. v. Pomphret, supra*, the court cites *Com. v. Smith, supra*, and the statutes in force when the decision was made, and Mr. Justice Field says in the opinion: 'Nothing is contained in this act, or in any subsequent acts, which, in terms, relates to clubs, until the statute of 1881, chapter 226, was passed. . . . The intention of this statute, however, plainly is to distinguish between clubs in those cities and towns whose inhabitants vote to grant licenses, and clubs in those whose inhabitants vote not to grant licenses, and unlicensed clubs in the former cities and towns are left to be dealt with under other statutes.' The statute of 1881, which is mentioned in the opin-

ion, uses this language: 'In any city or town in which the inhabitants vote . . . that licenses shall not be granted, all buildings or places therein used by clubs for the purpose of selling, distributing or dispensing intoxicating liquor to their members or others shall be deemed common nuisances; and whoever keeps or maintains, or assists in keeping or maintaining, such a common nuisance shall be punished.' . . . The court in *Com. v. Pomphret, supra*, stated: 'It must be assumed that the decision in *Com. v. Smith* was known to the legislature at the time the existing statutes were passed.'" *Barden v. The Montana Club*, 25 Pac. Rep., 1042.

In re Tyson.

(13 Colo., 482.)

JUDGMENT: *Ex post facto laws — Execution of criminal.*

1. Act of seventh general assembly of Colorado, substituting the state penitentiary for the county jail as the place of confinement pending execution, and directing that the executions, which had before taken place publicly, should thereafter take place within the penitentiary walls, is not in these respects *ex post facto* as to one under sentence when the act took effect, as it does not change the punishment to his disadvantage.
2. Nor is the act *ex post facto* in that it designates the confinement as solitary, where it also provides that the accused may be visited by "attendants, counsel, physician, a spiritual adviser, . . . and members of his family."
3. Under the former law, the execution could not take place within fifteen days from sentence. The later act provided that the judge should designate "a week of time within which such sentence must be executed. Such week so appointed shall be not less than two nor more than four weeks from the day of passing such sentence." *Held*, that the "week of time" was a calendar week, beginning Saturday at midnight, and hence the execution could not, under the new law, take place within fifteen days of sentence, and the law did not shorten the time before execution.

Application for *habeas corpus*.

Wycoff & Brierly, for petitioner.
I. N. Stephen, O. N. Jackson and *T. Ward*, for the state.

HAYT, J. The petitioner was indicted at the April term of the district court of Arapahoe county for the murder of one John King. The murder is charged to have been committed

upon the 18th day of May, A. D. 1889. The cause was tried, and a verdict of guilty of murder of the first degree was rendered sometime during the following June, although sentence was not pronounced upon the verdict until the 26th day of July, at which time he was sentenced to suffer the death penalty within the walls of the state penitentiary, at such time during the third week in the month of August following as the warden of said institution might select. The week of execution has been postponed from time to time by order of the governor; the petitioner, at the time of issuing this writ of *habeas corpus*, being in custody of the sheriff of Arapahoe county, awaiting a judicial determination of an inquisition of lunacy which had been commenced at the instance of his counsel. By the law in force at the time of trial, as well as at the time the offense was alleged to have been committed, the penalty for murder of the first degree was death; and, by statute, it was provided that this punishment should be inflicted by hanging the person convicted, by the neck, until dead, at such time as the court should direct, not less than fifteen nor more than twenty-five days from the time of sentence. Gen. Laws, § 729. Under this law, it was the practice to keep the defendant in close confinement in the county jail from the time sentence was pronounced until the day appointed for execution. He was then executed, under the direction of the sheriff, within the county where the conviction was obtained. The seventh general assembly enacted a law substituting the state penitentiary for the jail of the county as the place of such confinement, and directing that, whenever it became necessary to inflict the death penalty in the future, the person convicted should be executed within the walls of such penitentiary. This statute contains no saving clause, but extends to all cases in which the death penalty is thereafter to be inflicted, without regard to the time at which the crime may have been committed, whether before or after the adoption of the act; and also contains a clause repealing all other acts or parts of acts in conflict therewith. Other provisions of the statute will be given in another portion of the opinion. The act received the governor's approval upon the 19th day of April, 1889, and went into effect ninety days thereafter. The petitioner having been sentenced upon

the verdict of the jury after this law had gone into effect, and in accordance with its terms, we are now asked to declare such sentence void, and discharge the prisoner, for the alleged reason that such law is *ex post facto* as to him, and, consequently, obnoxious to both the federal and state constitutions; the argument advanced being that the prisoner was in jeopardy under the old law, but that, such law having been repealed since his trial, he cannot be punished thereunder; that the new law is *ex post facto* and unconstitutional as to him; therefore he cannot be punished at all, but must be discharged.

In our judgment, the new law does not come under the constitutional inhibition relied upon. *Calder v. Bull*, 3 Dall., 386–390, is recognized as the leading case in this country upon the subject, and in that case Chase, J., said: "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition: (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was when committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required, at the time of the commission of the offense, in order to convict the offender." The statute of which complaint is made does not attempt to make that criminal which was not criminal before. It does not aggravate the crime, nor alter the rules of evidence. It cannot, therefore, be considered as an *ex post facto* law under the rule given, unless it changes the punishment for the offense to the disadvantage of the defendant. That it does so change the punishment is urged by counsel, in that it changes the place of execution and provides for solitary confinement in the penitentiary for the period between sentence and execution; and for the further reason that it permits the court to shorten the time between sentence and execution from fifteen days to two weeks, as it is said. Other changes were enumerated in the argument, but these are the ones principally urged, the others being subsidiary; if these objections are not well taken, the others fall with them.

It is to be remembered that by section 2 of the act of 1883, the same being section 709 of the General Statutes, murder is divided into two degrees, *i. e.*, murder of the first degree and murder of the second degree. This section has stood from its adoption unrepealed and without amendment. By this act death was fixed as the punishment for murder of the first degree. By section 729, General Statutes, it is provided that this punishment shall be inflicted by hanging, and this is not changed by the amendment of 1889. So it will be seen that at the time of the perpetration of the crime, and at the time of the trial, the punishment for murder in the first degree was death by hanging; and such is still the law. It is a part of the public history of the state that prior to the passage of this act the death penalty with us was usually inflicted in public, at a previously advertised hour, in the presence of a large concourse of people, and the particulars of the execution published in the public journals. In deference to the wish of many good citizens, who were of the opinion that the tendency of such proceedings was detrimental to the public morals, the recent statute was passed requiring executions in the future to be conducted privately at the penitentiary, enjoining secrecy upon the few persons required or permitted to be present, and making it a misdemeanor punishable by fine for such persons to disclose the details of the execution, or for the press to publish the same. To accomplish the desired change it became necessary to change certain incidents connected with the punishment, but no attempt was made to change the punishment itself. This remains the same as before the passage of the act.

To the argument based upon the change in the place of execution, we say that, in legal contemplation, there is no difference between an execution in one place within the state and in another. The punishment is not aggravated by being inflicted in the county of Fremont, rather than in the county of Arapahoe, where the trial took place. The penalty has not been changed, but only the locality where it is to be inflicted. The case of *Carter v. Burt*, 12 Allen, 425, is directly in point upon this question. In that case the prisoner had been convicted of being a common seller of intoxicating liquors without license, and sentenced to pay a fine of $50 and to be imprisoned in the house of correction for three months. By the

statute in force at the time the offense was committed, it was provided that the imprisonment in such cases should be in the house of correction in the county where the court was holden; while by a subsequent enactment, in force at the time of sentence, it was provided that any person under sentence for such offenses might be committed at the discretion of the court, "to the house of correction in any county in the commonwealth in the same manner as such person might be committed in the county where the court is so holden." It was claimed in argument that the latter law aggravated the punishment, and was therefore *ex post facto* as to such offense; but the court held that such argument was fallacious, that the rights of a person convicted were not materially affected by the change, and that the punishment was not aggravated by an imprisonment in one county rather than in another. If the argument in this case, based upon the change in the place of execution, is sound, then in case future legislation should change the location of the penitentiary to a county other than Fremont and thereby change the place of execution, it would likewise follow that a change so made would be subject to the same objections,—a conclusion we cannot indorse. We think the argument unsound and that the constitutional objection based thereon is not well taken. In arriving at this result we have not overlooked the case of *Garvey v. People*, 6 Colo., 559. It seems to us, however, that counsel have confounded certain incidents connected with the administration of the penalty with the punishment itself.

Counsel say that the punishment in this case is aggravated by reason of the change in place of confinement from the county jail to the penitentiary. We are aware that in many well-considered cases it has been held that a change in the place of confinement from an institution where criminals convicted of minor offenses are incarcerated to one established for the imprisonment of those convicted of more heinous crimes has been held as an aggravation of the punishment, on account of the disgrace and reproach attached to the confinement with criminals of a more depraved and infamous character; but this reason can have no application in the case of one convicted of wilful, deliberate and premeditated murder and awaiting execution therefor. And, the reason for the

rule failing, the rule itself must also fail. Aside from this the defendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment but simply an incident connected therewith, referable to penal administration as its primary object; and such changes may be made applicable to past as well as future offenses. *Hartung v. People*, 22 N. Y., 95–105; Cooley, Const. Lim., 271, 272. And although the statute designates such confinement as solitary, provision is made in the same paragraph of the act in which this term is used for his "attendants, counsel, physician, a spiritual adviser of his own selection and members of his family" to visit him in accordance with the prison regulations, the effect of which is to give the prisoner as many liberties as he would have been entitled to under the old law. So while the imprisonment is designated as solitary it is not so in fact, as solitary imprisonment is usually understood.

It is said in argument that under the new statute the time between the date of the sentence and the execution may be shortened, the former law providing against the court's directing the execution to take place within less than fifteen days from the time of sentence, while under the new enactment it is provided that the judge passing sentence "shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed. Such week so appointed shall be not less than two nor more than four weeks from the day of passing such sentence;" the particular time of execution within the week being left to be fixed by the warden of the penitentiary. If under this act the defendant might be hanged within less than the minimum of time from the date of passing sentence enjoined by the former statute, we could unhesitatingly say that the law could not be made applicable to this case; as to hold otherwise would be contrary to the rule forbidding a change of punishment to the disadvantage of the defendant after the commission of the crime, and slight changes in this respect have been held sufficient to make the law *ex post facto* and void as to past offenses. Thus in *Com. v. McDonough*, 13 Allen, 581, it was decided that a law enacted after the commission of the offense of which the defendant was charged, which decreased the maximum of im-

prisonment that might have been inflicted, and also the fine was unconstitutional as to that offense, for the reason that it fixed the minimum of imprisonment at three months, whereas, before that time, there was no minimum fixed to the court's discretion. A careful examination of the statute of 1889 discloses, however, the fact to be that in no event will the terms of the act permit an execution to take place thereunder within less than fifteen days from the time of sentence as provided in the former act. In arriving at this conclusion we do not rely in the least upon the distinction which some courts have drawn between cases where time is to be computed from an act done and those in which it is to be reckoned from a given day; holding that in the former case the day upon which such act is performed is to be counted and in the latter not. See *Arnold v. United States*, 9 Cranch, 104; and also cases cited in Bouvier's Law Dictionary, under the word "Time." We prefer to rest our decision upon something different, and, as we think, more substantial. The command of the statute is that a week of time shall be fixed by the court within which the sentence must be executed, such week not to be less than two weeks nor more than four weeks from the day of passing sentence. We are of the opinion that the week of time so to be fixed must be held to be a calendar week, *i. e.*, a period of time extending from 12 midnight, Saturday, until 12 midnight the following Saturday. By consulting lexicographers of established accuracy this conclusion will be found to be in accordance with the primary and usual definition given to the word "week." "Week. The period of seven days; particularly the period of seven days commencing with Sunday." Worcest. Dict. "A period of seven days; usually that reckoned from one Sabbath or Sunday to the next." Webst. Dict. "Seven days of time. The week commences immediately after 12 o'clock on the night between Saturday and Sunday, and ends at 12 o'clock, seven days of twenty-four hours each, thereafter." Bouv. Law Dict. The word was judicially construed in accordance with the foregoing definitions in the case of *Ronkendorff v. Taylor*, 4 Pet., 361, where it is said: "A week is a definite period of time, commencing on Sunday and ending on Saturday."

It follows from this construction that, while in most cases

more than two full calendar weeks must necessarily elapse under the statute between the time of sentence and the execution, in no case could such execution take place within less than fifteen days from the date of sentence.. Sunday being a non-juridical day, the most favorable case possible in support of the theory advanced by counsel for the prisoner — that the time could be shortened under the late act — would arise if a defendant should be sentenced upon a Saturday. For convenience we will assume that such Saturday is the 1st day of the month. The week of execution could in no event commence to run until the third Sunday thereafter,— the 16th day of the month,— which would be the earliest possible day for the sentence to be executed under the terms of the act. And the same result would follow under the former law, requiring at least fifteen days from the time of sentence to the execution; as it has been decided in this state that, when time is to be computed, either prior or subsequent to a day named, the usual rule is to exclude either the first or last day of the designated period and include the other. *Stebbins v. Anthony*, 5 Colo., 348. So under either law in the case supposed a sentence might be executed upon the sixteenth day for aught that appears in either act to the contrary. We are not, on account of the illustration given, to be understood as sanctioning the execution of the death penalty upon the Sabbath day. Such a course would be highly improper, if not positively illegal. If the latter, an additional day would be gained under the new law. In addition to the authorities hereinbefore cited, we refer to the following in support of the conclusion reached in this opinion: 1 Bish. Crim Law, § 280 *et seq.;* Whart. Crim. Law, § 31; Wade, Retro. Laws, § 283; *State v. Arlin*, 39 N. H., 179; *Marion v. State*, 20 Neb., 233.

It appearing that the sentence pronounced by the district court is in accordance with the views herein expressed, the prisoner must be remanded, and it is so ordered.

Shaw v. State.

(83 Ga., 92.)

Jury: *Misconduct — Photograph as evidence.*

1. In a murder trial, before the arguments were finished, after adjournment for the night, the bailiff took the jury from the room where he was ordered to keep them, to a prayer-meeting conducted by the active prosecutor in the case, who assigned them seats. Some of the congregation left before and some after the jury. *Held*, that the misconduct of the bailiff and jury was so gross that a new trial must be granted, though the affidavits for the state show that no reference was made to "any law case," that no one spoke to the jury, and the affidavits of the latter were to the effect that they were in no way influenced in their verdict by anything occurring while absent from the jury-room.
2. A photograph of the locality where the deceased was killed, taken after the trial, with persons placed where defendant and his accomplices were said to have stood, is not incompetent, as tending to influence the jury.

Error from the superior court, Butts county; Boynton, judge.

A. D. Hammond, *T. W. Thurman* and *L. L. Ray*, for plaintiff in error.

Clifford Anderson, attorney-general, and *E. Womack*, solicitor-general, for the state.

Simmons, J. Thomas Shaw was tried and convicted upon the charge of murder. He made a motion for a new trial upon the several grounds therein, which motion was overruled and he excepted. The main grounds relied upon before us for the reversal of the court below in refusing a new trial were the sixth and seventh grounds of the original motion, and the first of the amended motion, which are as follows: "(6) Because the jury, while the case was pending, went to church at night. (7) Because said jury, while at church at night, heard the prosecutor in said case talk and shout; also heard a prayer in reference to the execution of the law and the maintenance of justice." "(1) That said jury attended the Baptist church in a body, and while there was addressed by the prosecutor in said case, and was exposed to the crowd going to and from the church." These grounds were certified to by the trial judge, "with reference to the affidavits to sustain and rebut the same,"

which appear in the record. These affidavits show, in substance, that pending the trial, and after the argument to the jury had begun, night came on, and the court took a recess until the following morning, and instructed the bailiff who had charge of the jury, and the jury themselves, not to allow any one to speak to them, or to speak in their presence, about the cause, nor to discuss it among themselves, until the argument in the case was concluded; that during that night the bailiff took the jury from the jury-room (where he was ordered to keep them) to a church where a prayer-meeting was being held, conducted by the pastor, who was the active prosecutor in the case; that, upon their arrival at the church, the prosecutor, Mr. Hooten, politely assigned the jury to seats in the church, separate and apart from the congregation, and that he addressed the jury. The affidavits further show that upon the termination of the exercises the jury left the church, and mixed with the crowd, some of the congregation going out before and some after the jury. The state introduced a number of affidavits to show that, while the jury attended the meeting at the church, they were given seats wholly apart from the congregation, and that no reference was at any time made to "any law case whatever;" that they left the church in a body, in charge of the bailiff, without mixing with the crowd, and without any person having any opportunity to have a conversation with them, either while they were at the church or when they were leaving it; and that the prayer to which reference is made in the seventh ground of the motion made no further reference to the court and jury in said case than to ask "that the blessings of God might rest upon our government, with its officers, and that God would bless the officers of the court then in session, that they might be guided aright in the discharge of their duties." The bailiff who was in charge of the jury made an affidavit that, during the trial, no one spoke of the case in the presence of the jury, and that nothing was said about the prisoner in their presence; that he was careful to guard them, and, not thinking it was improper, had gone with them to the prayer-meeting; that on their way to and from church they did not separate, nor was anything said to them, or any of them, or in their presence, about the case; and that at the church they were seated apart from the congregation,

and that the usual services were held, and nothing was said about the case. The jurors also made affidavits, in which they say that they attended the prayer-meeting in a body, and did not disperse or separate; that they were provided with seats together, apart from the rest of the congregation; that the services were such as are usual at prayer-meetings, and that nothing was said by any one in their hearing, during, after or before the services, directly or indirectly, about the case on trial, or about any one connected with the case; that they were not approached by any one at any time with a view of influencing their verdict; and that their verdict was not in any way influenced by the act, presence or words of any persons present at that time, or at any other time, outside of the testimony in the case, but that their verdict was made up calmly and dispassionately from the testimony as they understood it. The trial judge, after hearing these affidavits, overruled the motion for a new trial.

1. The effect of this judgment was that in his opinion the state had shown beyond a reasonable doubt that the defendant was not injured by the misconduct of the bailiff and the jury. The law in this state is that, where misconduct of a juror or of the jury is shown, the presumption is that the defendant has been injured, and the *onus* is upon the state to remove this presumption by proper proof. When the trial judge has decided, as in this case, that the state has removed that presumption, and has shown that the defendant was not injured by the misconduct of the jury, reviewing courts are loath to interfere with his finding upon that subject. This court, however, has in several cases reviewed and reversed the decision of the trial judge upon this subject, notably in the case of *Obear v. Gray*, 68 Ga., 182. So it is not the rule in this state, as it is in some others, that the decision of the trial judge upon this question will not be reviewed or reversed. The only trouble we have had in coming to our conclusion in this case is the great respect that we have for the judgment of the able and impartial trial judge who presided in the court below. When these grounds of the motion, and the affidavits in reference thereto, were read to us upon the hearing of this case, the misconduct of the bailiff and the jury appeared to be so gross that our minds reached the conclusion at once that

the defendant ought to have a new trial. We apprehend that the judgment of the trial judge was based upon the affidavits introduced by the state, in which the jurors swore that they were not influenced by anything they saw or heard at the meeting; his conclusion therefrom being that the defendant was not injured by the misconduct of the jury, and that he was adhering to the letter of the law in overruling the motion on these grounds. There are many things which can be done by individual members of the jury, or by the whole jury, which are susceptible of such clear explanation that the trial judge would be authorized in refusing to set the verdict aside. There are other things, however, which if done by an individual member of the jury, or by the whole jury, are so contrary to the public policy of the state in the procurement of fair and impartial trials for the citizens of the state as to require that a verdict rendered by such jury be set aside, whether the defendant has been injured thereby or not; and, in our opinion, the case under consideration belongs to this class. The state is jealous of the rights and liberties of its people. When one of its citizens is accused of crime it throws around him all the safeguards that are possible, in order to procure him a fair and impartial trial. It requires the officer who has charge of that particular jury to swear in substance, in open court, to take them to the jury-room, and there keep them safely, and not to communicate with them himself or suffer any one else to communicate with them, unless by leave of the court. The law contemplates that, when a jury are selected and sworn to try a citizen for felony, they shall be entirely separated from the world, and that no communication whatever shall be had with them from the beginning of the trial until the verdict is rendered, unless by leave of the court. It contemplates that no outside influences shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try. Let us apply these rules to the facts in this case. Here was a defendant on trial for his life. This jury had been selected to pass upon that issue. The bailiff had been sworn to keep them separate and apart from their fellow-citizens. In violation of this oath,

without permission of the judge, he took them from their room, where he had sworn to keep them, to a prayer-meeting conducted by the prosecutor in the case. When they arrived there they were shown to their seats by the prosecutor, who provided for them a place apart from the remainder of the congregation, and who led the services and addressed the congregation. Prayers were offered for the court and its officers. How long they remained there does not appear. For aught that appears in the record, the house may have been crowded. One of the grounds of the motion alleges that there was "shouting" at the meeting. What influence this shouting and religious excitement may have had upon the minds of the jury does not appear. It does not appear that Mr. Hooten, the prosecutor, was not among those who shouted. The jury seeing this going on, and seeing this prosecutor filled with religious zeal and fervor, may have reasoned in their minds, and doubtless did, that this man, who was the active prosecutor of the defendant, who assisted in the selection of themselves as jurors in the case, and who testified before them as witness, by his conduct and declarations at the prayer-meeting showed that he was a good and upright man, and that such a man would not prosecute the defendant unless he believed him to be guilty. Some of them were perhaps members of his congregation and looked up to him as their pastor and spiritual guide. We do not say, nor do we intend to intimate, that Mr. Hooten designedly intended his actions to have an undue influence upon the jury, but who can say that they did not have this effect? Suppose that, instead of the jury having been taken by the bailiff to the preacher, the bailiff had brought the preacher to the jury-room, and he had there addressed them, would any one say that this would not have been such gross misconduct as to require their verdict to be set aside? Suppose, too, that in addition to carrying the preacher to the jury-room, the bailiff had carried his congregation, and that these exercises had been held in the jury-room, would any one say that their verdict should not be set aside? What difference does it make whether the jury is carried to the preacher and the congregation, or whether the preacher and congregation are brought to the jury? It is true that the jury say in their affidavits that these things did not influence their minds; but

how can they tell,— how can any man tell what particular facts and circumstances influence his judgment? *Woolfolk v. State*, 81 Ga., 551; *Smith v. Lovejoy*, 62 Ga., 373; Thomp. Trials, 962. After mature consideration of all these facts, we think the misconduct of the bailiff and jury was so gross that the public policy of the state requires a new trial for the defendant. It was such a gross violation of all order, decorum and decency in the trial of a case of life and death that the verdict should be set aside, whether the defendant was injured or not. We have carefully examined the text-books and reports, and we can find no case of such gross misconduct as the facts show this conduct of the jury to be. Numerous cases are cited where the verdict was set aside for conduct much less gross than this.

2. During the progress of the trial a photograph of the place where the deceased was killed was offered and admitted in evidence. It appears from the evidence that the prosecution had procured a photograph of the locality and scene of the homicide. This photograph seems to have been taken before the trial, and persons were placed in the positions said to have been occupied by the defendant and his accomplices. It was insisted by the plaintiff in error that the court erred in admitting this photograph in evidence before the jury. The motion for a new trial fai'ls to state that it was objected to by the defendant, or, if objected to, on what grounds the objection was made. The motion says it was calculated to inflame the jury. We have examined the photograph and do not see in what respect it was calculated to inflame the jury. We do not think there was any error in admitting it on the ground alleged in the motion. The only ground that we can see why it should have been excluded was not argued by counsel for the plaintiff in error. The evidence in the record does not positively show that the defendant's position was that shown in the photograph. Wilson testifies, it is true, that the defendant was in front of the house, but does not locate him in the position the photograph does. Hooten testified that the photograph was a correct representation of the locality, but does not undertake to testify that Shaw was in the position shown by the photograph. As a new trial is to be had, we would suggest that the state, if it seeks to use the photograph again, prove more

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certainly that it represents the defendant's position at the time of the homicide, or that the picture be not used. We do not see any necessity ourselves for using the photograph. If Wilson is to be believed, the locality is sufficiently described in his testimony.

3. There was no error in the other grounds of the motion for a new trial, especially the first, under the explanation made by the judge in his approval thereof. Judgment reversed.

NOTE.— *Misconduct of jury.*— A new trial will not be granted for misconduct on the part of one or more jurors, where it is unquestionably shown that such misconduct did not prejudice any of the substantial rights of the defendant. *State v. Gould*, 40 Kan., 258. It is no disqualification of the sheriff to take charge of a jury on a trial for felony that he is a witness in the case. *State v. Shores*, 31 W. Va., 491. That an officer has charge of the jury in a case in which he was a witness during their deliberations is not a sufficient cause for setting aside a verdict, although it was an impropriety, and another officer ought to have been selected. *State v. Flint*, 60 Vt., 304. The separation of one juror in charge of an officer, from the others, also in charge of an officer, after commencement of their deliberations, is not ground for a new trial. *Com. v. Gagle*, 147 Mass., 576; *State v. Harper*, 101 N. C., 761. The mere fact that jurors, after they are impaneled, have read copies of a newspaper containing nothing about the case except that it was on trial, is not sufficient ground for a new trial. *Fogarty v. State*, 80 Ga., 729. Evidence that a jury proposed that, in determining the verdict, a majority should rule, which was assented to by the others, is not sufficient to cause the verdict to be set aside, where a subsequent ballot showed a disregard of the agreement, and on being polled each juror assented to the verdict. *State v. Harper, supra.* It is fatal, on error, to deliver a jury in charge of one who is not a constable. *Statley v. Barhite*, 2 Cai. (N. Y.), 221. Depositions used in a case must not be given to a jury when they retire to agree on their verdict. *Rawson v. Curtis*, 19 Ill., 456; *Jerry v. Townshend*, 9 Md., 145; *Alexander v. Jameson*, 5 Binn. (Pa.), 238. To the contrary, *Howland v. Willetts*, 9 N. Y. (5 Seld.), 170. Papers and books given in evidence upon a trial may properly be taken by the jury on their retirement to consider their verdict. *Hovey v. Thompson*, 37 Ill., 538; *Hanger v. Imboden*, 12 Mo., 85. It is erroneous for the court to allow the jury to take a law book with them to examine when they retire to consider the verdict. *Harrison v. Hance*, 37 Mo., 185; *Hardy v. State*, 7 Mo., 607. If a paper relating to the cause, though of little or no moment, is given to the jury by a party, after they have begun their deliberations, without the consent of the other party, it will vitiate their verdict. *Jessup v. Eldridge*, 1 N. J. L. (Coxe), 401. As a general rule, the sending out of papers with the jury is regulated by the sound discretion of the court. *Little Schuylkill, etc., Co. v. Richards*, 57 Pa. St., 142.

To the jury belongs the province of judging of the credibility of witnesses, and ascertaining the truth of contested statements; yet this must be done by a deliberate examination of the weight of the respective characters of the

witnesses, and the consistency and probity of their statements, and not by experiments, such as sending the constable out of the room, closing the door, and then talking, with a view to ascertain whether their voices could be heard out of doors, or running, with a view to ascertain whether their tracks could be longer or shorter than when walking, and the like. *Jim v. State*, 4 Humph. (Tenn.), 289. On the trial of an indictment for embezzlement it is not error to send to the jury, at their request, while they are deliberating on the case, books and papers admitted during the course of the trial, although they contain entries not relevant to the issues, it not appearing that the jury disregarded the instruction of the court not to inspect any portions of the books other than those given in evidence. *Jackson v. State*, 76 Ga., 551. To allow a jury in a murder trial to take defendant's pistol and cartridge box to the jury room, to experiment with them, apparently to test the truth of defendant's statement, is reversible error. *Forehand v. State*, 51 Ark., 553. A new trial will not be granted because the jury, while consulting, discussed other murders imputed to defendant, where the reference was but incidental, and the jury agreed not to be influenced thereby, and understood that they were concerned with nothing but the charge on trial, and four of the jurors testify that they were not influenced by the other charges. *Testard v. State*, 26 Tex. App., 260. A mere statement by one juror to his fellows that defendant was a man of bad character; that he had been charged with divers thefts; that he had been known to harbor thieves; and that his witnesses were all of bad character, is not *per se* ground for a new trial. It must appear that the verdict was probably influenced by such statement. *Cox v. State*, 28 Tex. App., 92. The failure of the court to admonish the jury "not to converse among themselves, or with any one else, on any subject connected with the trial, or to form or express any opinion thereon until the cause was finally submitted to them," as required by Comp. Laws Nev., § 2005, will not affect their verdict when it is clearly shown that the accused was not injured by such failure. *State v. Gray*, 19 Nev., 212. Speaking in the presence of one of the jurors of the merits of a cause to be tried is a sufficient interference by a party to vitiate a verdict in his favor. *Sloan v. Harrison*, 1 N. J. L. (Coxe), 123. A jury will be discharged if they hear any remarks touching the case after they have retired. *Commonwealth v. Kauffman*, 1 Phil. (Pa.), 534. The conversation of a juror, pending the jury's deliberation, with a person not a juror, must be such as was calculated to impress upon the mind of the juror the case under consideration in a different aspect from the one made by hearing the evidence, or of such nature as would work harm to the party on trial. *Nance v. State*, 21 Tex. App., 457. On a criminal trial, a separation of the jury, by which, while some of the jurors took their dinner in the dining-room of a hotel, the others remained in the office because there was not room at the table for them all, is ground for reversal. *State v. Gray*, 100 Mo., 523.

People v. Lee Chuck.

(78 Cal., 317.)

JURY: *Misconduct in drinking liquor — Misconduct of counsel — Evidence.*

1. FLIGHT OF ACCOMPLICE — EVIDENCE.— Evidence of the disappearance of other persons accused of complicity in the homicide, and that, though every effort has been made to arrest them under warrants for their arrests, they could not be found, is not admissible to rebut evidence on the part of the defendant tending to prove that the homicide was committed in self-defense.
2. ALIBI.— Evidence that another person accused of complicity with the defendant in the homicide was found apparently in a place of hiding, to avoid arrest, several hours after the homicide, is not competent to prove an *alibi* attempted to be proved by the defendant, there being nothing to show that the whereabouts of such person tended in any way to establish the presence of the defendant at the place of the killing.
3. ARGUMENT.— Where the district attorney, in arguing for the admission of improper testimony, commented at length upon it with the evident intent of prejudicing the minds of the jury against defendant, the refusal of the judge to prevent his remarks was error.
4. SAME — MISCONDUCT OF JURY.— The drinking of intoxicating liquor by a jury while deliberating on their verdict in a prosecution for murder is cause for setting aside a verdict of guilty, and it is not necessary to show that defendant was actually injured thereby, though the Penal Code of California (§ 1181, subd. 3) provides for a new trial where the misconduct prevents a fair consideration of the case.

   BEATTY, C. J., dissenting.
5. INSTRUCTIONS.— Where an instruction on a certain point, standing alone, is open to criticism, but the instructions, taken as a whole, fairly state the law on such point, there is no ground of objection.
6. EVIDENCE ON FORMER TRIAL.— Where a witness is interrogated with regard to statements made by him at a former trial, he has the right, if such statements were reduced to writing, to have the writing presented to him and read.

   MCFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Geo. A. Knight and *H. H. Lowenthal*, for appellant.
Geo. A. Johnson, attorney-general, for appellee.

WORKS, J. The appellant was charged, tried and convicted of the crime of murder in the first degree and sentenced to death. He moved the court below for a new trial, which was denied, and now prosecutes this appeal.

Several grounds for reversal are urged which may be grouped and considered as follows: (1) Alleged erroneous rulings of the court below on the admission and exclusion of evidence; (2) misconduct of the district attorney; (3) misconduct of one of the jurors in visiting and inspecting certain premises during the trial unaccompanied by the officer of the court and without leave; (4) misconduct of the jury in drinking intoxicating liquors while deliberating upon their verdict; (5) error in the instructions of the court.

The evidence is not all in the record. The bill of exceptions recites, substantially, that there was evidence tending to show that the appellant shot and killed one Yen Yuen on one of the streets of the city of San Francisco; that he attempted to escape, was followed by an officer, whom he also atempted to shoot, was arrested and found to be armed with four revolvers, and protected by a coat of mail, made by links of steel, worn under his clothing; that at the time of the shooting he was accompanied by several other persons who also ran away immediately afterwards; that the deceased had a pistol on his person which was fully loaded, none of the chambers having been discharged. There is no general statement showing what the defendant proved in his defense or its tendency.

1. During the cross-examination of one Chow Hin, a witness for the prosecution, he was asked by the defense how long he had known the defendant. He answered: "Several years ago, because it was on last year six months, twenty-eighth day that he killed Yen Yuen, and I knew him about a year before that." The defendant moved the court to strike out so much of the answer as referred to the killing of Yen Yuen by the defendant on the ground that it was not responsive to the question. The motion should have been sustained, but, as the record comes to us, we cannot say that any injury could have resulted from the ruling of the court. The killing of the deceased by the defendant may have been, and we infer from the matters appearing in the record was, an undisputed, though, perhaps, not an admitted, fact, the defense being that the killing was justifiable. If so, the statement of the witness was harmless.

The same witness was asked whether he did not testify to

certain things before the police court, and answered that he did; whereupon the prosecution asked him whether he did not at the same time make certain other statements. To this the defendant objected and the objection was overruled, but there is nothing in the record to show that the question was answered by the witness. To render a ruling in favor of the admission of evidence material, the record must show that the question objected to was answered, thereby carrying the objectionable evidence to the jury. It is unnecessary, therefore, for us to determine whether the evidence that might have been elicited was competent or not.

The defense, on cross-examination of one Sorr Sinn, asked whether he did not on a former trial of this case make certain statements, when the following occurred: The district attorney objected on the authority of *People v. Ching Hing Chang*, 74 Cal., 389, holding that whatever the witness might have said at the former trial, he had the statutory right to have it presented to him and read, if in writing. The court remarked to counsel for defendant: "I would sustain you if I could reverse the supreme court, but I cannot." As the rule referred to is well established, and one in every respect fair and just, it is fortunate that the court below was not possessed of the power to reverse it. There was no error in this ruling.

The bill of exceptions recites: "Evidence having been introduced by the prosecution tending to show that Lee Chuck, the defendant, and Quan Gee and Chung Kit and Chung Wye and Chung Sam were present at and participated in the killing of Yen Yuen, the deceased, the defense then introduced evidence tending to show an *alibi* for Quan Gee and Chung Kit, also tending to show that Lee Chuck and Chung Wye and Chung Sam were first attacked by Yen Yuen and Chow Hin and others, and that Lee Chuck and Chung Wye and Chung Sam shot in self-defense at Yen Yuen and his party." The prosecution then proved by the witness Cox that he was an officer; that he had received certain warrants of arrest for the persons above named, and that he had never been able to serve two of them, although he had made every effort to find the parties, and the warrants not served were offered in evidence, and excluded; but the court permitted the witness to testify that he had searched diligently for the parties who had not

been found, and that if he could have found them he would have arrested them on the charge set out in them, which the district attorney had openly stated to the jury was the same offense for which the defendant was being tried. As to the other party named, the prosecution was permitted to prove that he had been arrested where he had been found several hours after the shooting, in a small "cubby hole" at the top of a house near the place of the shooting. The witness was permitted to testify minutely to the nature of the room, its furniture, the means of reaching it, with the view, we suppose, of showing that he was there in hiding to avoid arrest. The evidence was objected to by the defense on the general grounds that it was immaterial and incompetent. For what purpose or upon what theory the evidence was admitted does not clearly appear. We can only infer it from the statement of the district attorney, made in support of his offer, which will be set out hereafter in connection with another point made. His position, in brief, was that as to those who were not found it tended to show that they were not innocent and acting in self-defense, as claimed, or they would not have run away; and that the fact that they were not present to explain what occurred at the time of the shooting was a circumstance against the defendant, and was "offered to show the utter improbability of this self-defense fabrication; that is why this is offered."

There is nothing to show that the defendant was in any way responsible for their absence, or that he was not as desirous that they should be present as the prosecution. This is to permit the act or conduct of one party, after a crime is claimed to have been committed, indicating his guilt, to be proved as against another in no way connected with such act or conduct. We are wholly unable to see upon what rule of law or justice such a ruling can be upheld. *People v. Sharp*, 107 N. Y., 427, is a case in point. There the defendant was charged with bribery. The prosecutor, as a part of his evidence, offered to show by a detective officer that he was employed to serve subpœnas upon three other parties, all of whom the district attorney claimed to be material and competent witnesses, and to show, further, that the detective was unable to find them in the state, but did find one of them in Canada, and learned that the others

were there, but did not see them. These persons were named in the indictment as co-defendants with Sharp, and the evidence already in tended to show that they were mediaries between the persons offending against the statutes relating to bribery. It was not claimed by the prosecution that the defendant was privy to their absence. The district attorney disclaimed any intention of proving the flight of those persons as co-conspirators, and so make use of their absence as evidence of guilt, or as proof of their conduct that the accusation against the defendant was true, but for the purpose of explaining his inability to produce them as witnesses. In the case before us the district attorney openly avowed that the evidence was offered to disprove the defendant's defense, or, in other words, to prove his guilt. In the case referred to the court says: "The evidence already in was, so far as Sharp was concerned, altogether circumstantial, but tended to show that the persons named, or some of them, were qualified from actual knowledge to give evidence bearing more or less directly upon the very point in issue. We think evidence of their absence was inadmissible. It could have no legitimate bearing upon the issue, and the danger is very great that such testimony will prejudice a party against whom it is offered. It may be and frequently is admissible in answer to evidence from the other side, which would naturally call for an explanation. But the absence out of the jurisdiction of the court of an associate, or one seemingly connected with the defendant in the act charged, is easily construed as evidence of guilt, and, unless the occasion calls for such proof, it should not be allowed. It is an old maxim that 'he confesses the fault who avoids the trial,' but in its application, even to the fugitive, there is great danger of error. A man may avoid the trial for many motives besides consciousness of guilt, but, however actuated, his conduct can in no degree, in a court of justice, reflect upon another. Its admission in this case was virtually saying to the jury: 'There is better evidence, and it might be had from the defendant's associates. It is not the fault of the prosecution that the evidence is not before you, but because of the voluntary act of those who, with the defendant, stand charged with the offense.' Thus the non-production of the witnesses is made to supply the place of proof

of the issue; with that issue the evidence has no possible connection. The rule is that where a party to an issue on trial has proof in his power which, if produced, would render material, but doubtful, facts certain, the law presumes against him if he omits to produce that proof, and authorizes a jury to resolve all doubts adversely to his defense. But the rule cannot be applied unless it appears that the proof, whether it is a living witness or paper, is within his power. It is easy to see that the evidence offered here might be used for an ulterior purpose, although not pressed by the prosecution, yet entertained and made effective by the jury, and there certainly could be no presumption that the prosecution had the power to produce any particular witness, certainly not one of those named, nor did the law require it of them. It is therefore impossible to find any reason for or lawful purpose to be gained by the proof offered, and its admission was a very dangerous innovation upon the general rule, which excludes it as irrelevant to the issue. . . . Proof even of the absence of these persons was inadmissible. But that was not all. The proof was not only of their absence, but of unavailing search by a detective, the service of a subpœna upon some of them, and the failure to obey its mandate. Under the circumstances of the case, the ruling of the court in this instance may not have been of much importance, and upon it alone we should not grant a new trial. But the legal principle which requires relevant and material evidence, and admits no other, is important; and, however serious the charge against an accused may be, and however great the evil it uncovers, he cannot properly be made the subject of a judicial sentence, unless the crime is substantiated according to the established rules of evidence."

It will be seen that the evidence improperly admitted was held not to be of sufficient importance to warrant a reversal of the case, but it must be borne in mind that the evidence there was not offered to prove guilt, while here it was offered for that purpose, and so went to the jury. Having gone to the jury for that purpose, its injurious effect upon the rights of the defendant must be apparent. We hold that this was a fatal error, for which a new trial should have been granted.

As to the evidence of the arrest of the party who was found

by the officer, it was claimed by the district attorney to have been competent to disprove an *alibi* attempted to be proved by the defendant. If competent at all for this purpose, the proof of his presence near the scene of the alleged crime was all that the prosecution was entitled to. The fact that there was a warrant for his arrest for the crime for which the defendant was on trial, and that he was found under circumstances tending to show that he was in hiding, and seeking to avoid arrest, were wholly immaterial. But we are quite clear that it was not competent for that purpose. There is nothing to show that his whereabouts tended in any way to establish the presence of the defendant at the place of the killing, and it appeared that the time to which the testimony referred was several hours after the homicide occurred. It was error to admit the evidence.

2. It is claimed that the assistant district attorney was guilty of misconduct which prevented the defendant from having a fair trial. At the time the warrants above referred to were offered and under discussion, the following proceedings took place: *Assistant district attorney.* "The defense set up here is the plea of self-defense. They claim that Yen Yuen, Chow Hin and other persons assaulted Lee Chuck, Chung Sam and Chung Wye, and under such circumstances that would make Chow Hin the principal in an attempt to murder,—murder by way of lying in wait, which would be murder in the first degree. We now offer to show that upon the same day —*Attorney for defendant.* I object to the counsel's statement, and as to his offer of proof. He offered the warrants and the objection is before the court. *Assistant district attorney.* I am answering your objection. We offer to show that upon the same day, the 28th day of July, Chow Hin, who, it is alleged, picked up Yen Yuen's pistol; Chow Hin, the unsuccessful murderer of Lee Chuck; and Chow Hin, the person who will be rated here as a highbinder and a gambler,—Chow Hin went down to the proper police authorities and made complaint against Chung Sam and Chung Wye and had warrants issued for their arrest for murder; that these warrants were placed by the chief of police in the hands of the most skilful detective in the Chinese quarter. *Attorney for defendant.* I most strenuously object to the statement of counsel as to the

warrants, and what disposition was made of the warrants. He offered certain warrants against Chung Sam and Chung Wye, and I say it is improper to prejudice the jury by speaking of cases,— of any other person except the defendant. The object is to prejudice the minds of the jurors against the defendant. *The court.* Proceed. *Attorney for defendant.* I except to the ruling of the court on behalf of the defendant. *Assistant district attorney.* I offer to show further that this skilful detective officer, who has had several years' experience, who has had eight or ten years' experience among the Chinese, searched high and searched low, and searched every Chinese outgoing steamer which he could search, and has not been able to discover either Chung Sam or Chung Wye, the innocent attacked parties who were with Lee Chuck at the time that Yen Yuen and Chow Hin and Fong Fat and those other people made this malicious attack upon them with pistols, on Washington street. We want to go to the jury on that fact, and we want to ask why these men are not here. We want to know why they should run away from here; why they do not make their appearance here, if they were attacked; why these men who took part in this conflict do not come here to this court and explain how it was, of all the people in the world, Chung Sam and Chung Wye, the men who were with Lee Chuck. *Attorney for defendant.* I protest now, in the name of justice, that the district attorney be not allowed to proceed in the manner in which he does. It is improper testimony and an illegitimate manner to produce testimony before the jury. *Assistant district attorney.* It is not in this view that this testimony is offered. *Attorney for defendant.* I protest against it, and I want the record to show it. *Assistant district attorney.* It is offered to show the utter improbability of this self-defense fabrication; that is why this is offered."

We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be

fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.

We regret to say that the assistant district attorney seems to have failed, in this instance, to apply this salutary check to his conduct. The evidence he was seeking to have admitted was clearly incompetent. What was said was not only an argument in favor of its admission, but as to its effect. The evident intent was to prejudice the jury against the defendant by commenting upon the conduct of others, over whose action he was not shown to have any control, and that in language the impropriety of which is apparent at a glance. The court was appealed to time and again to prevent it, but declined to do so. While we might hesitate to reverse the case on this ground alone, we hold it to have been error. See, as bearing on this point, *People v. Mitchell*, 62 Cal., 411, and cases cited; *State v. Smith*, 75 N. C., 306.

Questions of this kind usually arise out of the closing arguments of counsel, but the rule must be the same at whatever stage of the cause the improper language is used.

3. It is claimed that there was misconduct on the part of the jury which entitled the defendant to a new trial. As to the alleged misconduct of one of the jurors in visiting and examining certain premises unattended by an officer, and alone, it was not made one of the grounds for a new trial, and for that reason cannot be considered here.

The grave charge is that the jury drank intoxicating liquors while they were deliberating upon their verdict. The affidavits show, beyond question, that the case was given to the jury at 3:35 o'clock in the afternoon; that they had failed to agree up to the hour of 6:30, when they were taken, in charge of a deputy-sheriff and bailiff, to a restaurant for dinner; that they were served with a "French dinner," and, with other refreshments, partook of a half-dozen quart bottles of claret wine

and a half bottle of cognac, the latter being used as flavoring for their coffee; that they were about an hour at the restaurant, when they returned to their room, and within two hours agreed upon the verdict that was returned into court. There are affidavits showing that when they returned from their dinner their conduct and appearance, or that of some of them, were such as to indicate that they had been indulging in intoxicating liquors, and it is alleged that their having done so resulted in their agreeing upon the verdict. The two officers in charge make affidavit that none of the jurors were intoxicated, or gave any evidence of being in that condition. Each of the jurors makes an affidavit in which he admits that they drank wine, and took cognac in their coffee, but he does not know how many bottles. Their affidavits are, we believe, substantially, if not precisely, alike, and in each it is said: "And this affiant further avers that upon the said occasion this affiant was not drunk or intoxicated, and that this affiant's intelligence and good judgment were not obscured or affected in any way by intoxicating drinks of any character, and, as far as his observation extended, no one of said jury became drunk or intoxicated upon said occasion, and that the intelligence and good judgment of no one of said jury became or was obscured by intoxicating drinks upon said occasion;" and further, "that he, for himself, did not find any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned; and this affiant repels and repudiates the truth of any insinuation that he, or, so far as his observation extended, any of the members of the jury, found any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned." It appears, therefore, that the amount of liquors mentioned was consumed. Whether it was equally divided, one pint of the wine to each juror, does not appear. If any juror drank less, he has refrained from saying so, perhaps out of delicacy for the feelings of his associates, who would be convicted thereby of having taken more.

The learned attorney-general contends that this was not such misconduct as should reverse the case, because the wine was "California claret," and the cognac was used as a "flavoring for coffee." Whether he intends to insinuate that California

claret is too weak to intoxicate, or to claim that to drink wine of our own make should not be treated as misconduct, does not appear; nor does he show that cognac is less effective when adulterated with coffee. The affidavits show that the wine was intoxicating, and the prosecution introduces the affidavit of the proprietor of the restaurant to show its age, quality and probable effects. He says: "Said claret wine was a good quality of California Zinfandel wine, of four years of age;" and that he has "been engaged in the restaurant business for a period of ten years past; that he has had great experience with wines and their effects, and that he scouts as foolish and absurd the idea that twelve full-grown men could be seriously or at all affected by using — if they did use — six bottles of claret at dinner, with a little cognac in their coffee afterwards."

It must be conceded that this is some evidence that the whole twelve men could not have been seriously or at all affected, and perhaps that none of them were so affected, assuming that the wine and cognac were equally divided. We are thus led to consider, at the outset, whether this court should stop to inquire what was the effect of the drinking of these liquors. That the jury drank the liquors is not denied. The sole question raised is whether the mind of any member of the jury was so affected thereby as to impair his intelligence or judgment or render him less competent to transact with clearness and impartiality the grave duty resting upon him. It is infinitely more important that the channels of justice be kept pure and untainted than that the verdict against this defendant shall be maintained. The question is not a new one. In some cases it has been held that for a juror to take a drink of liquor during the trial was sufficient ground for granting a new trial. The case before us presents quite a different question. Here the trial had closed. The life of the defendant was in the hands of the jury. They were deliberating upon a question of the gravest consequence to the defendant, to society and to themselves. They had, up to the time of partaking of the liquors, failed to agree, and soon after agreed upon and returned a verdict that, if sustained, must send the defendant to the gallows. It seems to us that if the fact that the jury drank intoxicating liquors, without proof that it af-

fected their minds, or the conclusion reached by them, could be held sufficient to set aside the verdict in any case, no stronger case than the one before us could be presented. We are of the opinion that where the proof of the drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict, in a capital case, a verdict of conviction should not be allowed to stand. This is our conviction, independent of authority, but the great weight of authority is to the same effect. *People v. Gray*, 61 Cal., 164, 183; *Leighton v. Sargent*, 31 N. H., 119; *Brant v. Fowler*, 7 Cow., 562; *People v. Douglass*, 4 Cow., 26; *Wilson v. Abrahams*, 1 Hill, 207; *Jones v. State*, 13 Tex., 168; *State v. Baldy*, 17 Iowa, 39; *Ryan v. Harrow*, 27 Iowa, 494; *Davis v. State*, 35 Ind., 496; *State v. Bullard*, 16 N. H., 139; *Pelham v. Page*, 6 Ark., 535; *Gregg v. McDaniel*, 4 Har. (Del.), 367.

In the case of *People v. Douglass*, *supra*, the court said: "It will not do to weigh and examine the quantity which may have been taken by the juror, nor the effect produced." And in *Leighton v. Sargent:* "For the cause that brandy was furnished to the jury, and drank by several of them, while deliberating upon the cause, after retiring to form their verdict, we think the verdict must be set aside. The quantity drank was probably small, but we cannot consent that that fact should make a difference."

So in *State v. Baldy:* "The parties have a clear right to the cool, dispassionate and unbiased judgment of each juror, applied to the determination of the issues in the cause; and the use in any degree of that which stimulates the passions, and has a tendency to lessen the soundness of judgment, is itself conclusive evidence that the party who has the right to the exercise of that dispassionate judgment has been prejudiced in not having it, as perfect as it existed in the juror when accepted, applied to the determination of the cause. If this is true as a general rule, and as applicable to civil cases, *a fortiori* is the rule applicable in criminal cases, and especially in this case, in which the offense charged involves obedience to passions stimulated more than others by the use of spirituous liquors, and, of course, in its correct determination, requiring the most careful guarding against undue influence from them." And in *Davis v. State* it is said: "The bailiff, we may presume, had

been sworn, in the usual form, to take charge of the jury and keep them together without meat or drink, water only excepted, etc. The jurors had taken upon them an oath well and truly to try the cause, etc., and had been solemnly sent out to deliberate upon questions involving the life of an unfortunate fellow-being. If misbehavior, such as that shown by the affidavits, and which is without attempted palliation or justification, should not be regarded as sufficient to set aside the verdict, it would be a stigma upon the law and a disgrace to the courts. We do not mean to say that the court should enter upon the question as to how far such conduct was or was not excusable or innocuous. It will be time to decide that question when it shall come up. In this case it does not arise. We concede that on this point the authorities are not uniform. But as to the sufficiency of such misbehavior, unexplained, to set aside the verdict, the authorities are abundant and satisfactory." Also in *State v. Bullard:* "There had, indeed, been other acts of misconduct in the case; but we think that the old law forbidding the use of refreshments at all to jurors deliberating upon a verdict, although relaxed materially from its early severity, has not yet so far yielded as to exempt them wholly from the control of the court in this particular. And we are of the opinion that the use of stimulating liquors by a jury deliberating upon a verdict in a criminal case, without first showing a case requiring such use, and procuring leave of court for that purpose, is a sufficient cause for setting aside a verdict found against the prisoner in such circumstances, whether the use was an intemperate one or otherwise."

The respondent cites the following authorities not already referred to as opposed to the doctrine that the mere fact that the jury drank intoxicating liquors is sufficient to set aside the verdict, without a showing that it did or might have affected the result: Penal Code, § 1181, subd. 3; *People v. Williams*, 24 Cal., 31; *People v. Brannigan*, 21 Cal., 339; *People v. Symonds*, 22 Cal., 349; *People v. Dennis*, 39 Cal., 625; *People v. Turner*, id., 370; *People v. Anthony*, 56 Cal., 397; *People v. Lyle*, 4 Pac. Rep., 977; 1 Bish. Crim. Proc., § 999; *State v. Caulfield*, 23 La. Ann., 148; *Davis v. People*, 19 Ill., 74; *Thompson's Case*, 8 Grat., 657; *State v. Upton*, 20 Mo., 398; *Rowe v. State*, 11 Humph., 492; *Roman v. State*, 41 Wis., 312; *Westmoreland*

v. State, 45 Ga., 225; *Kee v. State*, 28 Ark., 155; *Russell v. State*, 53 Miss., 382.

We have given these authorities our careful attention, and find that, while they support the general rule that misconduct of the jury should not avoid a verdict unless it appears to have injured the complaining party, in our judgment they do not shake the well-established and salutary rule above laid down, when applied to a capital case, where the misconduct occurred while the jury were actually deliberating upon their verdict.

Section 1181 of the Penal Code, relied upon by the respondent, provides (subdivision 3) that a new trial may be granted to the defendant "when the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or being guilty of any misconduct by which a fair and due consideration of the case has been prevented." It is urged upon us that the section referred to sets forth and limits the kind of misconduct for which a new trial may be granted, and that to authorize the setting aside of the verdict it must affirmatively appear that a fair and due consideration of the case is prevented. Such a construction of the statute would compel a defendant, in every case of this kind, to show affirmatively that he had been actually injured by the misconduct complained of. None of the cases cited go to that extent, and if they did, we should not be inclined to follow them. That the jury in this case was guilty of misconduct we presume none will deny. The wrongful act committed was one the direct tendency and natural consequence of which was to affect their capacity to perform their duties. Such being the nature of the misconduct complained of, and the act being committed at the most critical time in the trial, when a cool head and unclouded brain was so essential to the preservation of the rights of the defendant, to allow the verdict to stand could not, in our judgment, be justified by any rule of law, reason or justice.

Of the many cases cited by respondent there is but one where the punishment was death, and in none of them was the liquor drank while the jury were deliberating upon their verdict. In most if not all of them, it was conceded that the act was reprehensible, and should be punished; but they say that as the act was committed at a time during the progress of the

trial, when it affirmatively appeared that no injury could have resulted, the verdict should not be disturbed. Thus in *Russell v. State*, *supra*, the court said: "No cause can be more baneful to the purity of a verdict than the use of intoxicating drinks by the jury while engaged in their deliberations. Nothing can be more revolting to a sense of justice or of decency than the idea of the life or liberty of a citizen depending upon the maudlin deliberations of drunken jurors. The parties in a civil suit, and *a fortiori* the defendant in a criminal prosecution, have the right to demand that the case shall be tried, not only by jurors who are not drunk, but by men whose minds are not even influenced or clouded by liquor. Intoxicating liquors as a beverage, therefore, should be rigidly and carefully excluded from the jury-room; and, if absolutely necessary for medical purposes, should be administered only in small potions, upon the prescription of a physician, and under the sanction of the judge. But, while the introduction of such liquors in any other manner is highly censurable, and should be the subject of exemplary punishment, it will not vitiate the verdict, if it can be affirmatively shown not to have injuriously affected the deliberations of the jury. The trial lasted five days. The liquor was given to the jury on the night of the second and early in the morning of the third day. The state had not then closed its testimony in chief, nor the defendant commenced his. The quantity of liquor was small, and a portion of the second supply was drunk. Several of the jury are proved to have been affected by the spoilt beef, and it is stated that a number of them partook of the liquor. The quantity was therefore presumably insufficient to have seriously affected the minds of any of them. In addition, it was received at night and early in the morning, some hours before they were called upon in court to listen to testimony, and two days before they retired to consider their verdict. Lastly, it is proved that 'their conduct during the whole trial was marked by great dignity, decorum and propriety.' Under these circumstances, we think it may be fairly said that it has been affirmatively shown that the verdict was not affected by the liquor."

In the case of *People v. Lyle*, *supra*, this court said: "The legal presumption is that jurors perform their duty in accord-

ance with the oath they have taken (*People v. Williams*, 24 Cal., 31); and that presumption is not overcome by proof of the mere fact that during the trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer under circumstances which rendered the act of invitation necessary, and of a supper at the hotel of his associate counsel under like circumstances. Such acts, however improper or indiscreet, could not in themselves have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment, and they will not warrant a court in setting aside a verdict. 'While the law,' says Chief Justice Sharkey, 'is rigidly vigilant in guarding and preserving the purity of jury trials, yet it will not, for light or trivial causes, impugn the integrity of juries, or question the solemnity and impartiality of verdicts.' *Hare v. State*, 4 How. (Miss.) 187. It is the settled rule that to warrant the setting aside of a verdict and granting a new trial, upon the ground of irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct, the verdict will not be disturbed."

It must be conceded that this case supports the contention of the respondent, but the facts are so different that it should have but little weight; and so far as it declares, in general terms, that to warrant the setting aside of a verdict, and granting a new trial, upon the ground of misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct, it is not in harmony with the cases on the question before us, nor does it coincide with our views on the subject, when applied to the circumstances of this case. In the case of *People v. Gray*, 61 Cal., 164, 186 (decided by the court in bank, all of the justices concurring), it was said: "It should be added here that, if it is necessary that intoxicating liquors of any kind should be drank by a juror, application for leave to do so should be made to the court, who can make such allowance as will be proper.

Jurors should not be allowed to judge for themselves in this matter. A defendant in a criminal case should not be called on to consent; and in any case when the party consents, if the juror becomes intoxicated, the verdict should not stand. The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subjected to scandal and distrust." And it was there held that liquors furnished the jury were not suitable food such as they were allowed to have by section 1136 of the Penal Code. The court below should have granted the defendant a new trial on this ground.

4. The appellant complains of one of the instructions of the court, in which it was attempted to define the right of self-defense. This instruction, taken alone, may be subject to criticism; but, taking the instructions as a whole, we think the law on that point was fully and fairly stated.

5. The appellant asked leave of the court to cross-examine the parties who filed affidavits in support of the verdict of the jury, which was denied, and this is urged as error. The defendant was not entitled to such cross-examination as a matter of right. The court might, in its discretion, have allowed it, but the refusal to do so was not error.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

BEATTY, C. J. I concur in the judgment and in the opinion of Mr. Justice Works, except upon one point. It appears that after the case had been submitted to the jury, and they had been for three or four hours deliberating of their verdict, they were by direction of the court sent in custody of two sworn officers to dinner. They were taken by the officers to a public French restaurant, where, in accordance with the invariable custom of the place, they were served with six quart bottles (a half-bottle each) of California claret, which they consumed with their dinner, and a small *modicum* of brandy, which they used with their coffee. In other words, they had, under the sanction of the court, and in the presence and custody of its officers, an ordinary dinner in a respectable house, embracing only the usual concomitants of that meal at that

place. As to whether the jurors were at all affected by the wine and brandy so partaken, the affidavits were conflicting, but certainly there was ample evidence to warrant the judge of the superior court in finding that none of them were affected; and unless we are warranted in holding, as mere matter of law, that any drinking of wine by a jury, after retiring for deliberation, however moderate, and whether sanctioned by the trial court or not, is misconduct *per se*, or unless we can find as matter of fact that men who use wine and brandy in the manner and to the extent these jurors did, and as thousands of men do every day without impeachment of their sobriety or decorum, are thereby necessarily deprived of their ordinary judgment and discretion, we cannot say that this jury was guilty of misconduct, or the defendant prejudiced in this particular. There is, it seems to me, a clear distinction in principle between this case, in which the jurors did, openly, and without attempt at concealment, what was apparently, if not expressly, authorized by the trial court, and that class of cases in which jurors have themselves clandestinely conveyed intoxicating liquors into the jury-room, or where, with their connivance, it has been smuggled in by other unauthorized persons. In such cases the means of procuring the liquor amounts in itself to grave misconduct, and evinces a total disregard on the part of the jurors of their obligations and the rights of the parties. By reason of this distinction, we are not, in my opinion, constrained by the authorities to hold, and I am unwilling to say, that the jury in this case was guilty of misconduct.

I dissent: McFarland, J.

NOTE.— Contrary to the rule announced above, it has been held that the mere partaking of intoxicating liquors by members of a jury during their deliberations will not vitiate the verdict unless it be further shown that the use of the liquor effected intoxication, partial or complete. *State v. Broussard*, 41 La. Ann., 81; *Burgess v. The Territory*, 8 Mont., 57; *Rider v. The State*, 26 Tex. App., 334; *State v. Baber*, 74 Mo., 292. But it was held in New York that where a juror drank brandy, though in a trifling quantity, as medicine, the verdict should be set aside. *Brant v. Fowler*, 7 Cow., 562.

State v. Sutton.

(116 Ind., 527.)

Kidnaping: *Indictment — Fraudulent intent.*

1. Revised Statutes of Indiana, section 1915, provides that whoever kidnaps or forcibly or fraudulently carries off from his place of residence, or arrests or imprisons, any person with intent to have such person carried away from his residence, unless in pursuance of the laws of Indiana or the United States, is guilty of kidnaping. *Held*, that a count in an indictment charging that defendant did carry away forcibly from his residence one K., and that the arrest was not in pursuance of the laws of Indiana or the United States, but not alleging that it was with the intent of having such person carried away from his residence, is bad.
2. A second count charging in addition that the felonious and fraudulent arrest was made with the felonious and fraudulent intention of carrying K. from his residence is good.

Appeal from circuit court, Dubois county; Oscar Welborn, judge.

John L. Bretz and *The Attorney-General*, for appellant.
J. E. McCullough and *T. H. Dillon*, for appellee.

Elliott, C. J. The indictment professes to charge the appellee with the offense of kidnaping as defined in section 1915 of the Criminal Code.

The first count thus charges the offense: "That Auzley Sutton, on the 5th day of April, 1886, at the county and state aforesaid, did then and there feloniously, forcibly and fraudulently carry away from his place of residence and imprison Joel R. King, forcibly and against his will; that said forcible and fraudulent arrest of him, the said Joel R. King, was not then and there in pursuance of any law of the state of Indiana, nor in pursuance to any law of the United States."

If this count of the indictment does, as the state contends, employ the words of the statute, or equivalent words, it is good. It has long been the rule in this state, as well as elsewhere, that an indictment which charges an offense in the words of the statute, or in words of equivalent meaning, is sufficient. *State v. Smith*, 74 Ind., 557, and cases cited, 558; Gillet, Crim. Law, 132*a*, and authorities cited in note.

This rule applies to the crime of kidnaping. Mr. Bishop

says: "In practice most of our indictments for this offense are on statutes, in which case the pleader's special concern will be to follow the statutory terms." 2 Bish. Crim. Proc., § 692. In *State v. McRoberts*, 4 Blackf., 178, the rule was applied to a case of kidnaping, the court saying: "This description of the offense agrees with the language of the statute and is therefore sufficient."

The count under immediate mention is in some respects stronger than the statute, for it charges that the carrying away was felonious. The word "felonious" is one of great power. *Carder v. State*, 17 Ind., 307; *Weinzorpflin v. State*, 7 Blackf., 186.

Taken in connection with the other words of the indictment it charges that the act of the appellee was a criminal wrong, and excludes any presumption or inference of its lawfulness. If this count of the indictment does charge that the defendant feloniously and unlawfully carried Joel R. King from his residence, and that he did not carry him from it pursuant to any law of the state or nation, it must be held to sufficiently show that it was done without legal excuse or justification. The statute does not make it an element of the offense that the person seized shall be carried out of the state or out of the county. If he is unlawfully and feloniously carried away from his residence the offense is complete. *State v. Rollins*, 8 N. H., 550. It is said by appellee's counsel that two offenses are defined by the statute: "*First.* Whoever forcibly or fraudulently carries off or decoys any person from his place of residence, unless it be in pursuance of the laws of this state or of the United States, is guilty of kidnaping. *Second.* Whoever arrests or imprisons any person with the intention of having such person carried away from his place of residence, unless it be in pursuance of the laws of this state or of the United States, is guilty of kidnaping."

We think that counsel have admirably stated the true construction of the statute so far as they have gone, but we are inclined to think they have not gone far enough. We are also inclined to agree in their suggestion that "we suspect that the question of whether the arrest was lawful or unlawful signifies but little," but we cannot entirely concur in their ultimate conclusion. Our judgment is that the offense, as de-

fined by one branch of the statute, is complete if the person is feloniously carried away from his residence, unless the act is done pursuant to some state or federal law, and that an arrest or an imprisonment not made pursuant to such laws constitutes the offense under the other branches of the statute, if either is made with the intention of carrying the person from his residence.

The clause which reads: "And said false and fraudulent arrest of him, the said Joel R. King," must be construed with its associated words and clauses, but when thus construed it does not refer to the carrying away, but to the arrest; for it is antecedently charged that there were two acts,— an arrest and a carrying away,— so that the clause must be held to refer to the act it expressly designates, that is, the arrest. To make the first count sufficiently charge the offense other words must be added, for it must be shown that the arrest was unlawfully made for the purpose of carrying away the person arrested from his residence. It must, in other words, be made to appear that the arrest was made with the intention "of having such person carried away from his residence, for so the statute provides." A defendant may make a fraudulent, felonious and forcible arrest and yet not be guilty of kidnaping, and all that this count of the indictment properly charges on this immediate point is that there was a fraudulent and felonious arrest not made pursuant to any state or federal statute. It is therefore bad, for it does not charge an unlawful arrest with the specified unlawful intention, nor does it charge that the carrying away was not pursuant to any statute of the state or of the United States.

The charging part of the second count reads thus: "That Auzley Sutton, on the 5th day of April, 1886, at Dubois county, in the state of Indiana, did then and there feloniously, forcibly and fraudulently arrest Joel R. King, with the felonious and fraudulent intention of carrying him, the said Joel R. King, forcibly and against his will from his place of residence, said forcible and fraudulent arrest not being then and there made in pursuance of any law of this state or of the United States."

Much that we have said in discussing the first count applies to the second, and if our previous conclusions are correct the latter count is good, for it adds the words lacking in the first,

as it charges that the felonious and fraudulent arrest was made with the felonious and fraudulent intention of carrying King from his residence. The construction placed upon the statute by appellee's counsel is, as we have said, correct as far as it goes; but it does not go far enough, inasmuch as it omits the statement which the use of the word "or" between the words "arrest" and "imprison" makes necessary. The word "or" makes it necessary to add that one who feloniously arrests or who feloniously imprisons another with the "intention of carrying him away from his residence" is guilty of kidnaping. If a defendant arrests or if he imprisons another with the felonious intention designated he is guilty; for it is not necessary that he should both arrest and imprison, since, if he does either of these acts with the felonious intention of carrying away, the offense is complete. As it is here charged that the act and the intention concurred, the second count is good, and the court erred in sustaining the motion to quash.

Judgment reversed, with instructions to overrule the motion to quash the second count of the indictment.

NOTE.— *Statement of the offense.*— It is generally sufficient to state an offense in the language used in the statute defining the crime. As said by Judge Folger in *Phelps v. People*, 72 N. Y., 349: "If the indictment avers the offense as the statute defines it, the averment is sufficient; for the rule is that while in framing an indictment on a statute all the circumstances which constitute the definition of the offense in the statute itself, so as to bring the accused precisely within it, must be stated, yet no other description of the thing in which the offense was committed is necessary to be stated than that contained in the statute itself." See *Elkhardt v. People*, 83 N. Y., 462. The same rule is also laid down in the recent case of *People v. West*, 106 N. Y., 293. And in *State v. Ah Sam*, 14 Oreg., 347, it is said: When the statute sets out what act shall constitute the offense, it is generally sufficient in the indictment to charge the defendant with acts coming fully within the statutory description in the substantial words of the statute, without any further expansion of the matter.

The United States supreme court usually decides cases which come before it with greater care and investigates the questions involved with more thoroughness than the state courts. And as this court has passed upon cases involving the sufficiency of indictments founded upon statutes, we beg leave to refer to a few of those cases in this connection. In *United States v. Mills*, 7 Pet., 138, 142, it was said: "The general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practices in cases of felony, and with respect to some crimes, where particular words must be

used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged." In *United States v. Simmons*, 96 U. S., 360, 362, the court, speaking by Mr. Justice Harlan, held that "when the offense is plainly statutory, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without any further expansion of the matter.' . . . But to this rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense." So in *United States v. Carll*, 105 id., 611, 612, it was said by Mr. Justice Gray, speaking for the court, that "in an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within the intent." In *United States v. Pond*, 2 Curt. C. C., 265, the rule was thus stated by Mr. Justice Curtis: "It must be remembered that this is an indictment for a misdemeanor created by the statute, and that in general it is sufficient to describe such an offense in the words of the statute, unless they embrace cases which it was not the intention of the legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded." For a further discussion as to the law in respect to kidnaping, see ABDUCTION, *supra*.

STATE v. POWELL.

(103 N. C., 424.)

LARCENY: *What constitutes — Not necessary that the taking be secretly done.*

1. While secrecy is the usual evidence of a felonious intent when one takes the goods of another, it is by no means the only evidence of such intent.
2. Prosecutor dropped some money and the prisoner caught it up. Prosecutor asked for the money, whereupon prisoner said: "Oh, hell! You ain't going to get this money." Prosecutor started toward prisoner, and prisoner put his hand to his breast and threatened to kill prosecutor if

he followed him. *Held*, that it was proper to instruct the jury that it was for them to say whether the taking of the money was with a felonious intent or not.

3. The ownership of property stolen can be charged in an indictment for larceny as being in a bailee.
4. A bill of indictment charging A. with larceny, and containing a count against B. for aiding, etc., will be sustained, it not being shown how A. was prejudiced thereby.

Indictment for larceny tried before MacRae, J., at January term, 1889, of Northampton superior court.

The indictment charged the defendant Robert Powell, and one William Bailey, with the larceny of $20, the property of John Whitaker, and contained a second count charging said William Bailey with aiding, etc., said Powell in stealing, etc., the same $20.

Powell pleaded not guilty and was put on his trial. Bailey was not tried.

John Whitaker, a witness for the state, being the person whose money was alleged to have been stolen, testified in substance as follows: On a certain day he went to Weldon for some bagging and carried with him about $40, the property of Mrs. Coker, to get it changed for her. William Bailey saw him with the money and watched him pretty closely until he got through trading. Witness and Bailey left Weldon together and crossed the bridge. While crossing the bridge witness saw the defendant Powell about thirty yards ahead. After crossing the river witness proceeded to count his money, of which he had some silver and $20 in "greenbacks." He commenced to put the silver in a sack, and in doing this dropped the $20 in "greenbacks," which consisted of four five-dollar bills. The defendant Robert Powell caught it up—the four five-dollar bills that had been dropped. "I asked him for it like a gentleman, and he said: 'Oh, hell! You ain't going to get this money.' I run my hand in my pocket for my knife. Bailey held me. Defendant went off with the money. I got loose from Bailey and started after defendant. He put his hand to his breast and threatened to kill me if I followed him." Witness then went back to Weldon and had the defendant arrested. On cross-examination he said that some of the money was his and some was Mrs. Coker's, and he could not exactly tell whose money the four five-dollar bills

were. He had some money and he carried some for Mrs. Coker to get it changed. Had paper money of his own when he went to Weldon; thought he had a bill as large as $10. He denied the truth of the matters testified to subsequently by the defendant.

Robert Powell appeals from a conviction for larceny.

For the state, the *Attorney-General.*

Shepherd, J. The defendant contends that he is not guilty, because "there was no artifice to conceal the fact that he had gotten the money in his possession; that there was no effort to conceal the fact of the taking, and that the prosecutor knew who had his money and against whom to bring his action." For these positions he relies upon *State v. Deal*, 64 N. C., 270, and *State v. Sowls*, Phil. (N. C.), 151. The proposition is that there can be no felonious intent where the taking is done openly, and there is no effort to conceal.

State v. Deal, *supra*, is a leading case in this state upon the subject of felonious intent in larceny, and, while the conclusion reached by the court is generally regarded as correct, much that is said in the opinion has been questioned, and the doubts which have arisen have been greatly strengthened by the forcible dissenting opinion of Mr. Justice Rodman. It will be observed that, in addition to there being no effort to conceal in that case, there was another element, which was sufficient to have entitled the defendant to a new trial. That was, as the learned chief justice says, "a seeming excuse for the artifice by which he (Deal) got possession of the note." "The defendant alleged that the title to the land for which he had executed the note was not good, for that it was subject to a dower right, and, being dissatisfied with this state of things, he resorted to a trick to get hold of the note, for the purpose of canceling it." The trial judge did not submit this view to the jury, and the defendant was thus deprived of this "seeming excuse" for his conduct. We think that this view of the case had much to do with the decision of the court, and in this we are sustained by Wharton's Criminal Law (vol. 2, § 1787), where the author, speaking of *State v. Deal*, says: "It was held that this was not larcency, larceny implying stealth, and this being a forcible taking, under color of right."

We shall not attempt to "run and mark" the shadowy line between trespass and larceny, but we cannot yield our assent to the inference drawn by the defendant, from the language of the opinion, that there can be no case of larceny unless there is an effort to conceal on the part of the offender. The language quoted in the opinion, from Judge Henderson, has never passed into judicial decision, and we have been unable to find in our edition of Foster (cited in *State v. Sowls*, *supra*), anything in support of the doctrine that the taking must be done in such "a manner as to show an intent to defraud the owner by concealing from him who took it, so that he shall not know what has become of his property, and against whom to bring his action to recover it." As far as our investigations have extended, we have found no such criterion laid down in any of the books. True, Mr. Wharton, in his Criminal Law (vol. 3, 1876), states that, where the taking is openly done, it is but a trespass; and perhaps similar expressions may be found in other modern works; but, upon reference to the notes, it will be seen that they are based upon Hale's Pleas of the Crown, 509, where it is said that, if the taking is done openly, it "carries with it an evidence only of a trespass." But these authors fail to add the following language of Lord Hale, used in the same connection: "But, in cases of larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary; but the same must be left to the due and attentive consideration of the judge and jury, wherein the rule is, *in dubiis*, rather to incline to acquittal than conviction." "From which it seems," says Judge Rodman, "that Lord Hale did not think an open manner of taking inconsistent with larceny, but only a circumstance from which the jury might infer the absence of felonious intent." We freely concur with the chief justice and Judge Henderson that a prominent feature of larceny is "that the act be done in a way showing an intention to evade the law — that is, not to let the owner know who took his property;" but we cannot agree that this is the only way the felonious intent may be manifested in larceny, any more than that concealment, as the chief justice suggests, is necessary in robbery. It is true, as Blackstone says (4 Com., 232), that

"the ordinary discovery of a felonious intent is where the party doth it clandestinely, or, being charged with the fact, denies it; but this is by no means the only criterion of criminality, for, in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animus furandi;* wherefore they must be left to the due and attentive consideration of the court and jury." To the same effect is that accurate and discriminating writer, Mr. Chitty, who, in his third volume (p. 927) of Criminal Law, says that "the openness and notoriety of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention (1 Hale, P. C., 507; East, P. C., 661, 662); but this alone will not make it the less a felony. Kel., 82; *Chiffer's Case*, 2 Ld. Raym. 276; *Bealy v. Sampson*, 2 Vent., 94." On page 926 he says: "Where the taking exists, but without fraud, it may amount only to a trespass. This is also a point frequently depending on circumstantial evidence, and to be left for the jury's decision." East, P. C., 662, after speaking of the evidences of felonious intent, says: "And the circumstance of the party's offering the full value or more at the time ought to be left to them (the jury) to show that his intention was not fraudulent, and so not felonious; for it does not necessarily follow, as a conclusion of law, that, if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious, though it is, I apprehend, pregnant evidence of the negative." 3 Greenl. Evid., § 157, sustains the view that the mere fact of the taking being without concealment is evidence which should be left to the jury. He says that it "would be pregnant evidence to the jury that the taking was without a felonious intent." In *Vaughn's Case*, 10 Gratt. (Va.), 758, the defendant was held guilty of larceny of his bond, under circumstances similar to those in *State v. Deal*. Moncure, J., dissented, on the ground that the bond was given for land; that there was a controversy about the boundaries, etc., and that this, in connection with the open manner in which it was taken, showed that there was no felonious intent. He expressly admits that concealment is unnecessary. "It is true,"

he says, "that secrecy, though a usual, is not a necessary, attendant of larceny, which may be and sometimes is committed openly." None of the definitions of larceny require that the taking be done secretly. It must be done, says Fost. C. L., 124 (*McDaniel's Case*), "with a wicked, fraudulent intention, which is the ancient known definition of larceny. *Fraudulenta obtrectatio rei aliene invito domino.*" Lord Hale (P. C., 508) says: "As it is *cepit* and *asportavit*, so it must be *felonice* or *animo furandi*, otherwise it is not felony; for it is the mind that makes the taking of another's goods to be a felony or a bare trespass only; but because the intention and mind are secret, the intention must be judged by the circumstances of the fact. . . . The felonious intent or *animus furandi* means an intent fraudulently to appropriate the goods. . . . Whether the intent existed or not is entirely a question for the jury, which, as in all other cases of intent, they must infer from the words or acts of the defendant or the nature of the transaction." 2 Arch. Crim. Pr. & Pl. (6th ed.), 366, 367. In his Pleading and Evidence (3d Am. ed., 173) Archbold thus defines "felonious intent:" "But 'larceny,' as far as respects the intent with which it is committed, . . . may perhaps be correctly defined thus: Where a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use."

These authorities, we think, conclusively establish that, while secrecy is the usual evidence of the felonious intent, it is by no means the only manner in which it may be proved. In our case every ingredient of Mr. Archbold's definition is present. The defendant knowingly took the goods of another, and he made no pretense whatever of any claim or right to them. It is shown as clearly as any fact can be shown that he intended to wholly deprive the owner of them and to appropriate them to his own use; and yet it is insisted that, because he showed such a reckless disregard of the consequences of his outrageous act, he could not, as a matter of law, have a fraudulent or felonious intent. The defendant, according to the testimony of the state, "catches up" the money of the prosecutor. When it is demanded he says to

the prosecutor: "Oh, hell! you ain't going to get this money." His companion holds the prosecutor when he attempts to regain the possession. The defendant walks off with the money and when finally the prosecutor releases himself and starts in pursuit, the defendant puts his hand to his breast and threatens to kill him if he continues to follow. We think these circumstances afford strong evidence that there existed in the mind of the defendant a fraudulent, a felonious, intent. Such open taking, where there is neither force nor stratagem, is very unusual, and as we have seen is a "pregnant" circumstance in favor of the non-existence of the felonious intent. Strong evidence, therefore, is necessary to sustain a conviction in such cases. The circumstances deposed to by the prosecutor clearly pointed to the existence of a felonious intent, and we cannot but think that, if the facts of this case had been presented to the late distinguished chief justice, he would have unhesitatingly sustained his honor in submitting them to the jury.

The principles we have declared dispose of exceptions 1, 2, 3 and 6. Exception 4 is without merit. The prosecutor, it appears, was the bailee of Mrs. Coker, and therefore had a special property in the money. See *State v. Allen*, 103 N. C., 432, decided at this term, and the authorities cited. We are unable to see how the rights of the defendant were injuriously affected by the count against Bailey. It seems that he was not tried with this defendant, and there is nothing in the record to suggest that this defendant was in any way prejudiced. There is no error.

NOTE.—See *Queen v. Kenny*, 3 Am. Cr. R., 444; *Queen v. Brittleton*, 4 id., 605.

STATE v. HALL.

(76 Iowa, 85.)

LARCENY: *Obtaining possession of property by fraud.*

Where the owner of goods parts with their possession without the purpose of parting with the property therein, and expects their return or disposition according to his direction, or expects payment for them to complete a sale thereof, the taking and conversion with the felonious intent to deprive the owner of the goods is larceny. So, if possession of the goods is obtained by a trick, artifice or false pretense, with the felonious intent on the part of accused to convert them to his own use, he is guilty of larceny. Accordingly, *held*, in this case, that where defendant obtained from his tailor's employee finished garments, upon the pretense that he would pay for them when he got to his room, whither he invited the employee to accompany him, but when he arrived at what he falsely represented to be his room, he, by a trick, escaped from the employee, taking the garments with him without paying for them, and disappeared, he was guilty of larceny.

Appeal from district court, Pottawattamie county; C. F. Loofbourow, judge.

Defendant was indicted and convicted of larceny. He now appeals to this court.

Wright, Baldwin & Haldane, for appellant.

BECK, J. 1. The undisputed facts of the case are these: Defendant employed a tailor in Council Bluffs to furnish the materials and make for him an overcoat and a pair of pantaloons. When the garments were finished he went to the tailor's shop and tried on the overcoat, which proved quite satisfactory. He stated that he did not have money enough to pay for the clothing, but would have in a few days. He did not ask for credit. The tailor did not offer to give him credit, and replaced the garments where finished work was kept. In three or four days thereafter the defendant returned at night, when the tailor was absent, and the shop was in charge of an employee. He said he wanted the garments. The employee proceeded to get them, and defendant took out his pocket-book and counted out the money to be paid for them. He tried on the overcoat, and approved it. He then said he did not have quite enough money to pay for the garments, and asked the

employee to wrap up the garments and go with him to his room, where he would pay for the clothing. The employee complied, and defendant wore the overcoat and took the other garment. When he reached a stairway on the street he said to the employee, "Wait here a minute, and I will go up stairs and get the key of my room." He left the employee and went up the stairs, and this was the last seen of him that night. The employee searched for him without avail. He left his old overcoat in the tailor-shop, saying he would return for it the next morning, which he did not do. At that time he had a room in Omaha, where he was arrested for this offense.

2. Where the owner of the goods parts with their possession without the purpose of parting with the property therein, and expects their return or disposition according to his direction, or expects payment for them to complete a sale thereof, the taking and conversion with the felonious intent to deprive the owner of the goods is larceny. So, if possession is obtained by a trick, artifice or false pretenses, with the felonious intent on the part of the accused to convert them to his own use, he is guilty of larceny. These are familiar rules of the law. See Wat. Crim. Dig., p. 373, § 9; p. 377, §§ 47–53.

3. The evidence clearly brings defendant's case within these rules. It is shown beyond dispute that his purpose was to obtain the garments without the tailor's assent, and thus, in the rogues' dialect, "beat him out of his money." The cheat and trick resorted to by defendant have often been practiced by this class of fellows, but are none the less criminal. The very moderate term in the penitentiary given to defendant by the court below will serve to teach rogues of defendant's class that it is no safer to commit larceny by deceit, trick, and the abuse of confidence which tradesmen are authorized to put in their customers, than by stealthily taking property with intent to steal it. The instructions given to the jury accord with the views we have expressed. In our opinion the judgment of the district court ought to be affirmed.

NOTE.— *Possession obtained by fraud.*— While the facts in the above case very nearly reach the "shadowy line" between false pretenses and larceny there is no doubt but that the decision is borne out by the great weight of authority. The case of The *People v. Rae*, 66 Cal., 423, illustrates clearly the difference between the two last-named offenses. In that case the defendant in company with a confederate, who passed by the name of Turner, boarded

an emigrant train of the Central Pacific Railroad Company, and engaged the prosecuting witness, who was a passenger on the train, in conversation. He represented himself to be a dealer in furs, and said he was traveling on the emigrant train because of the convenience it afforded him of stopping along the route for the transaction of his business. He asked the prosecuting witness if he knew a Mr. Turner, of the firm of Turner & Co., of Boston, and told him he had telegraphed Turner to meet him at the point the train then was, but had not seen him. Just as the prosecuting witness answered that he did not know such a man, the pretended Turner opportunely appeared in the car, when defendant looked up and said, "Oh, here is the gentleman coming now." Defendant introduced his confederate to the prosecuting witness. The confederate then said to the defendant, "I got your telegram, and I have got your goods all fixed up." Defendant replied: "I am very glad. How are you sending them,—by express?" The confederate replied: "Yes, by express. No, by transfer; they will not touch any unless prepaid." Defendant then produced two currency notes, saying that was all the change he had, and that he did not know how he was going to arrange the matter unless Turner could change "this bill;" at the same time producing what bore a slight resemblance to a United States bond for $1,000, with coupons attached. Turner said he could not change it, when defendant asked the prosecuting witness how much money he had, who replied that he had about $100 or so. Defendant then said he was in a bad fix and did not know what he was going to do, and then asked the prosecuting witness to let him (defendant) have what money he had, until he (defendant) could go to the baggage-car and get what money he wanted, and that they could settle up as they went along; at the same time offered the prosecuting witness the pretended bond as temporary security. In response to that request, the prosecuting witness handed defendant $160 of his money, and defendant, saying that he would be back in half an hour, and asking the prosecuting witness to retain his seat for him in the meantime, left the car. Of course, instead of returning, he left the train with the money and his confederate.

"It is claimed for the appellant that the offense thus committed was not larceny, but the obtaining of money by means of false pretenses. The distinction between the two crimes is sometimes very narrow, but yet it is well defined. Where, by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, larceny is established. While the crime is false pretenses, if the title as well as the possession is absolutely parted with, no one, we presume, would seriously deny the sufficiency of the evidence to justify the finding of a felonious intent on the part of the defendant in taking the money in question; and, under the circumstances of the case, there can be as little doubt of the proposition that there was no intention on the part of the prosecuting witness to part with his ownership of the money. The criminal and fraudulent conduct of the defendant and his confederate in no way operated a transfer of the title to them, or either of them, or at all changed the ownership of the money; it remained the money of the prosecuting witness. In *Com. v. Barry*, 124 Mass., 325, there was evidence that as A. was passing a bar-room, the defendant, a girl, called him in, and he,

at her request, gave her money to buy a bottle of brandy. They went up stairs together, and she said this bottle would not be enough for the night, and asked for more money with which to buy another bottle. A. thereupon gave her a twenty-dollar bill to get a quart of brandy, the price of which was three dollars, not expecting to receive the bill back, but the change, after deducting the price of the brandy. The defendant went out and soon returned with another girl, saying she could not get it. The other girl said she knew where to get it, and the two girls went out and he saw no more of them or his money. Upon this evidence the supreme court of Massachusetts had no difficulty in holding the defendant properly convicted of larceny. In principle that case is like that now here. Still closer as respects the facts, and therefore more directly in point, is the case of *Loomis v. People*, 67 N. Y., 322. There it appeared that Lewis, one of the prisoners, made the acquaintance of Olason, the prosecutor, and, under the pretense that he had a check for $500 he desired to get cashed at a bank, invited Olason to go with him. He led him into a saloon, where was the prisoner, Loomis, whom the evidence showed to be a confederate of Lewis. Lewis proposed to Loomis to throw dice; they did so for $5, and Loomis lost. They then proposed to throw for $100. Lewis asked Olason to lend him $90, saying, 'I am sure to beat him again, and you can have your money back. If I do lose I have got the check for $500, and we will go up to the bank and get the check cashed and you can have the money.' Olason let him have the $90. The dice were thrown and Lewis lost. Olason insisted on the return of the money. The purported check was then put up against $100, and Lewis again lost. Loomis and Lewis thereupon went away. The court charged the jury, in substance, that if satisfied beyond a reasonable doubt that the two prisoners conspired fraudulently and feloniously to obtain the complainant's money and to convert it absolutely, without his consent and against his will, they could convict of larceny; and it was held on appeal no error, and that the evidence was sufficient to sustain the conviction; the court observing: 'It was a clear case of larceny, as marked and significant in its general features as if the prisoners had wrongfully seized and appropriated it when first produced. The form of throwing the dice was only a cover, a device and contrivance to conceal the original design, and, so long as there was no consent to part with the money, does not change the real character of the crime. While the element of trespass is wanting, and the offense is not larceny, where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*, yet, as is well said by a writer upon criminal law, "it is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property *and then converts it to his own use*. The act goes further than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animus furandi*, avail himself of a temporary possession for a specific purpose, obtained by consent to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. He is therefore acting against the will of the owner, and is a trespasser, because a tres-

pass upon the property of another is only doing some act upon that property against the will of the owner." In the case at bar there was no valid agreement to part with the money absolutely, and no consent to divest the owner of his title. It was passed over for a mere temporary use at most, and, the legal title remaining in the owner, the conversion of it by the prisoners, within the rule cited, was larceny. The reports are of familiar illustrations of this rule, as a reference to some of the leading cases will show.' And the court proceeded to refer to many of them, which may be consulted by turning to the case from which this extract is taken.

"Sharpstein, J., dissented in a very strong opinion. He urged that in *Smith v. People*, 53 N. Y., 111, the New York court of appeals says: 'If by trick or artifice the owner of property is induced to part with the custody or *naked* possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but the right of property also, the offense of the party obtaining them will not be larceny, but that of obtaining goods by false pretenses.' Also in an earlier case the same court said: 'The only question remaining in any case is whether the taking was with the consent of the owner; for if so, although the consent was obtained by gross fraud, there is no larceny.' *Bassett v. Spofford*, 45 N. Y., 387. And Bishop says: 'Where the consent is as broad as the taking, going to the relinquishment of the ownership in the property, it is effectual though obtained by fraud; in other words, by reason of the consent, even when procured by fraud, there is still no trespass, therefore no larceny.' 2 Crim. Law, 811.

"In *Frazier v. The State*, 85 Ala., 17, it appeared that the defendant shot a hog in a thicket, and covered it with pine tops; that he then went in company with another to the owner of the hog, and told him that they had found one of his hogs killed in one of his fields; that it was spoilt and unfit for use; that the owner told him he might have it for soap-grease; that the owner found the hog at defendant's house the next morning and that it was not spoilt. The court said: 'It has been held that to shoot and then chase a hog with felonious intent, over which the defendant was prevented from acquiring dominion, is not a sufficient caption and asportation to constitute larceny. *Wolf v. State*, 41 Ala., 412. On the other hand, a charge has been held to be correct which instructed the jury that if the defendant shot and killed, and then took hold of the hog, and cut its throat, this would constitute a taking and carrying away in the meaning of the law. *Croom v. State*, 71 Ala., 14. It is said, generally, that, to constitute the offense, there must be a wrongful taking possession of the goods of another with the intent to deprive the owner of his property, either permanently or temporarily. The accused must have acquired dominion so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent. The caption may be constructive, as when possession is obtained by trick, fraud or deception. If the defendant shot and killed the hog, with the larceny of which he is charged, in a pine thicket in the field, with felonious intent, and covered it with pine tops, in order to conceal it until he could return and secretly remove it, and if he subsequently removed it in pursuance of the previous felonious intent, there was, in the legal acceptance of the terms, a taking and carrying away sufficient to com-

plete the offense, though the removal may have been with the consent of the owner, if such consent was procured by intentional misrepresentation and deception. *State v. Wilkerson*, 72 N. C., 376; *Fulton v. State*, 13 Ark., 168. The charge requested by the defendant ignored these material facts, which there was evidence tending to prove, and was misleading.'

"In the case of *People v. Miller*, 4 Utah, 410, the defendant asked the following instructions: 'If the jury believe from the evidence that the defendant took this property under color of right, and in good faith, believing it to be his property, there should be a verdict of not guilty, although it may afterwards turn out, and though the jury may believe it to be a fact, that the property belonged to Frederick Bird.' This instruction the court refused as asked, and said: 'I charge you substantially as requested by counsel, with this exception: that if you find that he afterwards discovered it to be the property of Frederick Bird, and, after knowing that it was Frederick Bird's property, that he still retained it, then, of course, he would be guilty.' While the charge as given by the court is sustained by some of the authorities (see *State v. Ducker*, 8 Or., 394; *S. C.*, 34 Am. Rep., 590, and note), we think that the court erred, and that the great weight of authority is the other way. It is an elementary principle that ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse. 1 Bish. Crim. Law, § 301; 1 Whart. Crim. Law, § 884. In order to convict of larceny, the jury must be satisfied that the taking of the property was with a felonious intent. It is not sufficient to find that, after the taking, it was converted to the use of the defendant, with a felonious intent. It is necessary to find that the intent to steal existed at the time of the taking. No subsequent felonious intent will suffice. *Wilson v. People*, 39 N. Y., 459; *People v. Clifford*, 14 Nev., 72; *Reg. v. Hore*, 3 F. & F., 315; *S. C.*, Jac. Fish. Dig., 3337; *Rex v. Leigh*, 2 East, P. C., 694; *S. C.*, 57 Am. Dec., 275, and cases cited; *Ex parte Kenyon*, 5 Dill., 389; *S. C.*, 12 Myer, Fed. Dec., 809; *Phelps v. State*, 55 Ill., 334; *State v. Wood*, 46 Iowa, 116." See, also, *Wilson v. The State*, 1 Port. (Ala.), 118; *Com. v. Collins*, 12 Allen, 181; *State v. Brown*, 25 Iowa, 561; *State v. Lindenthal*, 5 Rich. (S. C.), 237; *Com v. Eschelberger*, 7 Am. Cr. R., 324; *Haley v. The State*, id., 328 and note; *Reg. v. Hollis*, 4 id., 609. But where the owner parts with both the possession and title to his goods to the alleged thief, then neither the taking nor the conversion is felonious. *Murphy v. The People*, 4 id., 323.

CROWN CASES RESERVED.

(Before Lord Coleridge, C. J., Pollock, B., Stephen, Mathew and Willis, JJ.)

(REG. v. HANDS AND OTHERS.)

(16 Cox, C. C., 188.)

LARCENY: *Automatic box containing cigarettes — Obtaining cigarette by means of a brass disc of no value.*

Against the wall of a public passage was fixed what is known as an "automatic box," the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the center of one of its sides was a projecting button or knob. The box was so constructed that upon a penny piece being dropped into the slit and the knob being pushed in, a cigarette would be ejected from the box on to a ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not half-pennies;" "To obtain an Egyptian Beauties cigarette, place a penny in the box and push the knob as far as it will go." The prisoner went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc, about the size and shape of a penny, and thereby obtained a cigarette, which he took to the other prisoners. *Held*, that the prisoners were guilty of larceny.

Case reserved by the quarter sessions for the county of Gloucester, as follows:

Prisoners Hands and Phelps were severally indicted for that on the 29th day of November, 1886, they did feloniously steal, take and carry away one cigarette, of the goods and chattels of Edward Shenton, against the peace of our said lady the queen.

Prisoner Jenner was indicted for an attempt to steal, etc.

Prisoners Jenner and Phelps pleaded guilty.

Prisoner Henry Hands pleaded not guilty, and was given in charge to the jury.

J. D. S. Sim appeared for the prosecution.

Moore appeared for the prisoner, Hands.

This is a case of larceny from what is known as an "automatic box," and the circumstances are as follows:

Mr. Edward Shenton is the lessee of the Assembly Rooms at Cheltenham and has fixed against the wall of the passage leading from the High street to the rooms an "automatic box."

This box presents the appearance of a cube of about eight or ten inches, and in the upper right-hand corner (facing the operator) of the front face there is a horizontal slit or opening of sufficient size to admit a penny piece.

In the center of the face is a projecting button or knob about the size of a shilling.

In the lower left-hand corner is a horizontal slit or opening of sufficient size to allow of the exit of a cigarette.

There is an inscription on the face of the box: "Only pennies, not half-pennies." Also, "To obtain an Egyptian Beauties cigarette, place a penny in the box, and push the knob as far as it will go."

If these directions are followed a cigarette will be ejected from the lower slit on a bracket placed to receive it.

The box is the property of the Automatic Box Company. The cigarettes with which it was charged belonged to Mr. Shenton.

For some time past Mr. Shenton has found, on clearing the box, which he did once or twice a day, that a large number of metal discs (brass and lead) of the size and shape of a penny had been put in, and a corresponding number of cigarettes had been taken out.

In consequence of this discovery a watch was set upon the box, and upon the day named in the indictment, the box having been previously cleared, two gentlemen were seen to go to it, each put something in, and each took a cigarette, as it appeared.

The box was then examined and found to contain one English penny and one French penny. These coins were left in. The box was locked and the watch was again set.

Shortly after this, three lads (afterwards proved to be the three prisoners) were seen to come to the entrance of the passage, one of them came in, went to the box, put something in, obtained a cigarette, and then rejoined the two others at the entrance. This was repeated a second time. The third time it was observed that the box would not work, and while the lad, who afterwards was found to be the prisoner Jenner, was pushing at the knob, the watchman came from his place of concealment and put his hand upon him.

The box was then opened, and a piece of lead was discov-

ered stuck in the "valve," which had the effect of preventing the machinery of the box from working.

It was then found that the box contained (besides the English and French pennies already mentioned) two discs of brass about the size and shape of a penny.

No other coin or metal piece was found in the box and no one (but the three lads as above mentioned) had approached it after the two gentlemen who had put in the English and the French pennies.

The prisoner, Jenner, was given in charge to the police, and the two other prisoners were subsequently apprehended.

Upon being brought together at the police station the prisoners all made statements more or less implicating themselves and each other.

The prisoner, Hands, said:

"Me and Jenner met Phelps about 7:45 P. M. Phelps said 'I want to go to Dodwells.' I did not go, and we went down into the High street. Phelps and Jenner stopped by the Assembly Rooms and went in, I remained outside. I believe Jenner was caught at the box. Mr. Shenton's man took him inside. I afterwards put a penny in the box and had a cigarette myself. The pieces of brass produced are cut in our shop, the blacksmith's shop at Mr. Marshall's."

In leaving the case to the jury the learned chairman told them that they would have to consider: First, was there a theft committed; that is, was Mr. Shenton unlawfully deprived of his property without his knowledge or consent? Secondly, if that were so, were they satisfied that the prisoner (Hands) took any part in the robbery? He also told them that if they thought that the prisoner was one of the three lads who came to the entrance of the passage, and that he was there with the others for the common purpose of unlawfully taking of cigarettes from the box, or that he afterwards partook of the proceeds of the robbery, or that he had taken a part in making the discs knowing for what purpose they were to be used, that they would be justified in finding him guilty, although he might not actually have put the discs into the box or have taken out a cigarette.

The jury found the prisoner (Hands) guilty, and, upon motion in arrest of judgment on the ground that "the facts as

disclosed by the evidence were not sufficient to disclose a larceny," all the prisoners were allowed to stand out on bail until the next quarter sessions.

The question for the court was whether the facts as disclosed by the evidence were sufficient to constitute a larceny? No one appeared on either side.

Lord Coleridge, C. J. In this case a person was indicted for committing a larceny from what is known as an "automatic box," which was so constructed that, if you put a penny into it and pushed a knob in accordance with the directions on the box, a cigarette was ejected on to a bracket and presented to the giver of the penny. Under these circumstances there is no doubt that the prisoners put in the box a piece of metal which was of no value but which produced the same effect as the placing a penny in the box produced. A cigarette was ejected which the prisoner appropriated; and in a case of that class it appears to me there clearly was larceny. The means by which the cigarette was made to come out of the box were fraudulent, and the cigarette so made to come out was appropriated. It is perhaps as well to say that the learned chairman somewhat improperly left the question to the jury. He told them that if they thought that the prisoner Hands was one of the three lads who came to the entrance of the passage, and that he was there with the others for the common purpose of unlawfully taking the cigarettes from the box, or that he afterwards partook of the proceeds of the robbery, they would be justified in finding him guilty — he did not say, larcenously or feloniously; and he further directed them that, if they thought the prisoner had taken part in making the discs, knowing for what they were to be used, they would be justified in finding him guilty, although he might not actually have put the discs into the box or have taken out the cigarette. Now I am not quite sure that simply the fact of doing an unlawful thing, as joining in the manufacture of discs that someone else was to use, would make him guilty of larceny. He might be guilty of something else, but I doubt very much whether he could be convicted of larceny. As upon the facts of the case, however, I do not think that the jury could have been misled; and as upon the facts there

was undoubtedly a larceny committed, I am not disposed to set aside the conviction.

POLLOCK, B., STEPHEN, MATHEW and WILLIS, JJ., concurred.

Conviction affirmed.

CROCHERON V. STATE.

(86 Ala., 64.)

LARCENY BY A SERVANT.

One who has the bare custody of property as the employee or servant of the owner is guilty of larceny if he fraudulently appropriates such property to his own use.

Appeal from circuit court, Marengo county; W. E. Clarke, judge.

The defendant in this case, Lewis Crocheron, was indicted for the larceny of a mule, the property of Newton Marx, and was convicted under the charge of the court. On the trial, as the bill of exceptions shows, said Marx testified on the part of the state that he employed the defendant on his place during the year 1887, "to perform the ordinary service of a field hand; that the defendant, as such, did plow, feed, and generally use the mule alleged to have been stolen; that one day during said year, before the finding of the indictment, defendant took the mule, and went to the field, where he plowed it until nearly sunset, when he took it out of the plow, and went to water it;" and that he did not see the mule again for several days, when he found it in the possession of one Childs, in Marion, to whom the defendant had sold the animal. The defendant asked the court to charge the jury, in writing, "that if they believe the defendant had charge of the mule, and took it out of the plow while in his custody, then he is not guilty of larceny." The court refused to give this charge to the jury, and the defendant thereupon excepted.

John C. Anderson, for appellant.
T. N. McClellan, attorney-general, for the state.

SOMERVILLE, J. The conviction of the defendant for larceny was proper under the circumstances. The prosecutor had parted only with the custody of the mule, as distinguished from the possession, which was still in him as owner, although the defendant had the custody of the animal as mere employee or servant. It has often been decided, and is now settled law, that goods in the bare charge or custody of a servant are legally in the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use. *Oxford v. State*, 33 Ala., 416; 2 Bish. Crim. Law (7th ed.), § 824. It is accordingly said by Lord Hale that it would be larceny if a butler should appropriate his master's plate, of which he had charge; or the shepherd his master's sheep, in his custody; and so of an apprentice who feloniously embezzles his master's goods. 1 Hale, P. C., 506; Rosc. Crim. Ev. (7th ed.), *639. In all such cases, the custody of a servant is distinguishable from that of a bailee or other person who has a special property in the goods, by reason of being under a special contract with respect to them. A mere servant or employee has no such special property. 3 Greenl. Ev. (14th ed.), § 162. Where, however, a bailee, having such special property in goods, converts them to his own use, no conviction of larceny can be had without proving a fraudulent or felonious intention on his part at the time he received the goods in bailment. 2 Whart. Crim. Law (9th ed.), § 963; *Watson v. State*, 70 Ala., 13. The charge requested by the defendant was in direct conflict with this view of the law, and was properly refused. The judgment is affirmed.

ROBERTS v. STATE.

(83 Ga., 369.)

LARCENY: *Indictment — Effect of circumstantial evidence.*

1. If bills alleged to be stolen are not sufficiently described in the indictment, the indictment should be demurred to. The witnesses may give such description of them in the testimony as may be consistent with truth and not inconsistent with what is stated in the indictment.

2. Larceny committed in a house may be simple larceny. If bills be lost in a house, and, when found therein, the owner or his agent be present, but the finder, instead of making his discovery known, conceals it, takes and retains the bills wrongfully, fraudulently and with intent to steal the same, he may be convicted of simple larceny.
3. A request to charge, partly legal and partly illegal, should be declined.
4. An inaccurate statement in the charge as to the distinction the law makes between direct and circumstantial evidence will not vitiate the verdict, the court having correctly instructed the jury as to the legal definition of both classes of evidence, and afterwards charging that reasonable doubt was to be given in favor of the accused.
5. No hurtful error, if any, was committed by the court, and the evidence warranted the verdict.

Error from superior court, Habersham county; Wellborne, judge.

J. B. Jones and *J. J. Bowden*, for plaintiff in error.
Howard Thomson, solicitor-general, for the state.

BLECKLEY, C. J. The indictment was for simple larceny, and the goods stolen, as alleged, consisted of "$100 in greenback bills of the value of $100." There was no demurrer to the indictment for insufficient description of the bills. Simple larceny is "the wrongful and fraudulent taking and carrying away by any person of the personal goods of another with intent to steal the same." Code, § 4393. Being found guilty the accused moved for a new trial on various grounds. We will dispose of these grounds by ruling upon all of them which seem material.

1. It was contended that it was erroneous to admit evidence descriptive of the bills stolen, inasmuch as they were not described in the indictment. It may be that the indictment was demurrable by reason of being too general in the matter of description; but this, we think, should have been taken advantage of by demurrer, and not by objection to the evidence. Certainly the witnesses, if they could testify as to bills at all, could describe them. There is no rule that restricts testimony to the limits of the indictment in describing stolen property. Any description, however minute, which is consistent with the indictment may be given in the testimony.

2. The bills were lost from the possession of an agent of the owner, and it is doubtful whether they were lost in a certain

railway depot or elsewhere; some of the evidence tending to show that the loss took place in the depot. The accused may have found them in that building, but if he did so it was while the agent of the owner was present, to whom he might have restored them instantly if he had not intended to steal them. They had not been placed in the house by design if they were there at all, and consequently were not, so to speak, in the protection of the building as a house. Larceny from the house, as defined by the Code, section 4413, "is the breaking or entering any house with the intent to steal, or, after breaking or entering said house, stealing therefrom any money, goods, chattels, wares, merchandise, or any thing or things of value whatever." If the finding was in the house the stealing was there also; and though it may have been larceny from the house, we think, under the peculiar circumstances of such a larceny from the house, it was one which included simple larceny. He had already stolen the money before he left the house, and if he never had left it the simple larceny would have been complete.

3. A lengthy request to charge was made embracing numerous propositions, some of which perhaps were legal, but certainly others of them were illegal. This being so, the request was properly refused.

4. After defining to the jury in terms of the code both direct and circumstantial evidence, the court charged as follows: "The only distinction that the law makes between the two classes of evidence is that, where positive and direct evidence is relied upon, then the jury must be satisfied beyond a reasonable doubt of the guilt of the party. If circumstantial evidence alone is relied upon for conviction, the rule is then that the evidence must go to the extent of satisfying the jury to the exclusion of every other reasonable hypothesis except that of the guilt of the accused." The court added in a subsequent part of the charge: "If, after you have gone over all the testimony in this case, and weighed and considered it, there remains in your minds a reasonable doubt as to whether the defendant is guilty or not, you ought to give him the benefit of that doubt and acquit him, but the doubt must be a reasonable one." It is plain that the court was not accurate in saying that the only distinction that the law makes between the

two classes of evidence is as he states. But we think this inaccuracy did no harm. It was not necessary to charge at all on the distinction, for the court had already properly defined direct and circumstantial evidence, and from the definition the jury could see the distinction which was material for themselves.

We do not quite understand what the court meant by "the only distinction," and by stating it in the terms above recited; nor have we any idea that the jury understood this part of the charge. If they thought the court meant that direct evidence must be strong enough to exclude reasonable doubt, and circumstantial strong enough to exclude reasonable hypothesis, they probably thought hypothesis and doubt both had to be expelled from the mind, in a case of circumstantial evidence, as this was, and they were subsequently told again that, if reasonable doubt remained, the benefit of it was to be given to the accused. The result is that while we cannot approve the only distinction between the two sorts of evidence as marked out in the charge, because, besides other reasons, we do not quite understand it, yet, if error at all, we are satisfied it is not reversible error.

5. If the court committed any other error, it was not such as to be hurtful to the accused. The evidence warranted the verdict, and a new trial was properly refused. Judgment affirmed.

PEOPLE v. SWALM.

(80 Cal., 46.)

LARCENY: *Community property.*

1. Personal ornaments purchased by a wife on her husband's credit, but without his authority, for which he afterwards pays, and which he never gave to her as her own, though she took and retained possession of them, are community property, and her possession being that of her husband, her consent to the taking thereof by one knowing the facts would not prevent such taking from being larceny.
2. Defendant having taken the property with the consent of the wife, with whom he was on terms of criminal intimacy, and attempted, under an assumed name, to convey it out of the state, and having, when arrested,

falsely stated the property to be that of another person, and attempted to escape by the bribery of an officer, the evidence sufficiently shows his felonious intent to warrant his conviction of larceny.

3. The fact of defendant's adultery with the wife is relevant to show that he knew the taking to be without the husband's consent, and that he intended to deprive the husband of the property.
4. The court having informed the jury in the general charge that the law presumes ornaments in a wife's possession to be her separate property until the contrary is shown, it is not error to refuse an instruction reiterating that principle.

Appeal from superior court, city and county of San Francisco; D. J. Murphy, judge.

Seneca J. Swalm was indicted and convicted of the larceny of jewels alleged to be the property of Richard H. McDonald, Jr., and appeals.

Chas. B. Darwin, for appellant.

Attorney-General Geo. A. Johnson, *Flournoy & Mhoon* and *Sawyer & Burnett*, for the people.

FOOTE, C. The defendant was convicted of the crime of grand larceny, and from the judgment rendered upon the verdict of the jury and an order denying him a new trial he appeals. His first claim for the reversal of the judgment and order is that the property, consisting of certain valuable articles of jewelry, which he is alleged to have stolen, was not the property of the person alleged to be the owner thereof as charged, but was the separate property of his wife. There is evidence in the record which the jury evidently believed, and which it was their right so to do, which showed that the property in question was bought upon the credit of the husband, and was paid for by him; that the purchase of it by the wife was not authorized by him, but that he finally paid for it,—there being no evidence that either spouse purchased it with separate money. It also appears that the husband never gave the wife the property as her own, but made an effort to have it returned to the seller, but it was never returned, and it was afterwards given into the hands of the defendant by the wife, to be taken out of this state, after she had become connected with him. Swalm was arrested while endeavoring clandestinely, under an assumed name, to leave this state, and the

property found in his possession. He endeavored to bribe the officer arresting him to allow him to proceed on his journey, without avail. His main defense is that the wife intrusted him with, or what at least he believed to be such, her separate property, to deposit for her in New York, and that he had no intent to steal any property from her husband. The property, as has been stated, when it came to the hands of the wife, was that which had been bought upon the husband's credit, billed to and paid for by him, costing several thousand dollars; it not appearing that the separate money of either spouse was used to pay for it. Being acquired after marriage, in this way, by either or both husband and wife, it became community property. Sec. 164, Civil Code. Thus acquired, it came to the possession of the wife from her husband, he having never given it to her as separate property. It remained common property when she handed it over to Swalm. The possession of the wife is that of the husband as to community property. *Schuler v. Savings & Loan Society*, 64 Cal., 400. He had the title to it, and right of control over it. The wife's interest was a mere expectancy. *Greiner v. Greiner*, 58 Cal., 119.

The property being that of the husband, and in his possession, the sole question left for determination was, what was the intent of the defendant in taking and carrying it away? The evidence tended to show that he had seduced the wife, and had been handed the property by her to take away from the state; that he afterwards falsely declared it not to be her property, but that of a third party; that he was going away under an assumed name; that he tried to bribe the officer arresting him; and the other facts and circumstances in the case were, as we think, sufficient to warrant a belief in the minds of the jury either that the property was purchased by the wife, upon the husband's credit, at the instigation of the defendant, then having the intention, if he could, to steal it from both parties, and that the theft was afterwards consummated, or that he received the property from the wife, knowing it to be the husband's, and taken against his will, with a view to steal it. In either point of view the larceny was complete; for it was the taking and carrying away with felonious intent the personal property of another.

The question of intent was a matter solely for the jury, and they have found against the defendant upon conflicting testimony, and, as we think, properly. Suppose the wife did consent to the taking away of the property of her husband, if the defendant took it with the felonious intent of depriving the husband of it, her consent, when she had repudiated her relation of wife, would not help him. 2 Bish. Crim. Law, §§ 873, 874, and cases cited. And the evidence tending to show adulterous intercourse between the defendant and the wife of the owner of the property was admissible and proper, as going to show that the defendant knew that the taking was against the will of the husband, and tending to show that the defendant took the same with intent to deprive the husband of it. The improper intercourse did not make the offense larceny, but it threw a clear light upon the intent of the taking, as showing that the wife's consent was without her husband's knowledge, against his will, and that the defendant knew the facts, and that his intention in taking it was to steal it from the husband. *People v. Grover*, 43 N. Y., 508.

There was no necessity, as the appellant contends, that the husband after the purchase should have reduced the property in dispute to manual possession; for, when acquired as it was, it became common property, and the wife's possession was the husband's.

The court instructed the jury that the exclusive possession of the wife of the property, being personal ornaments, would warrant the presumption that they were her separate property, and also that this presumption was liable to be rebutted. There was no evidence, as has been observed, that the jewelry had been purchased with the separate property of either spouse. There was the positive evidence of the husband that it had been acquired during the marriage; that he had never made a gift of it to her; and that it was not hers exclusively. This the jury believed, and that is sufficient.

The question as to the belief of the defendant, when he took the jewels, as to the person to whom the property belonged, was for the jury. They found, as we think, properly, that he knew the property was that of the husband. There is nothing in the point that larceny in this state is different from what it is at the common law. Pol. Code, § 4468. The defendant

was found guilty, not of "adulterous larceny," as he claims, of which crime there is no mention in our Penal Code, but of grand larceny, which is "the felonious stealing, taking, carrying, leading, or driving away the personal property of another," exceeding the value of $50. Penal Code, §§ 484–487.

It is contended by the appellant that it was error for the trial court to refuse an instruction that the possession of personal property by a wife creates a legal presumption that it belongs to her, which must be overcome by a party who would establish the contrary. The case was apparently tried in the court below, upon both sides, upon the theory claimed by the defendant here, that the possession of the wife of personal ornaments suitable to her condition, during the continuance of the community, creates a presumption of ownership in her, which is disputable. Conceding, without deciding, and for the purposes of this case only, notwithstanding what has been said by the appellate court in *Meyer v. Kinzer*, 12 Cal., 253, 254, that the appellant's view of the law as asked for in the refused instruction is correct, yet the court below in its charge to the jury had already said: "There are several presumptions of law which the code says are disputable; that is to say, they may be controverted by other evidence, and which should control jurors in their action. And among these is that things which a person possesses are owned by him or her. And I charge you that the exclusive possession by a woman of personal ornaments, such as necklace, bracelets, and such articles as are usually worn by a woman in her condition of life, creates a legal presumption that they are hers, and the presumption increases in strength with the length of time that such possession continues." This was a full statement of the general principle involved in the instruction, and besides it was made applicable to the facts in evidence. A repetition of the general proposition of law, as claimed and asked for, was entirely unnecessary. Upon the whole record we perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

STATE v. WAIT.

(44 Kan., 310.)

LIBEL AGAINST ATTORNEY: *Bribing jury — Justification — Liberty of the press — Evidence.*

1. A newspaper containing an alleged libelous article was published in Lincoln county, but *held* that sufficient evidence was introduced to sustain a finding by the jury that the newspaper and the alleged libelous article were also published in Saline county.
2. An article published in a newspaper concerning an attorney at law which would tend to injure his character and reputation as an honest and honorable attorney at law and citizen, would, like any similarly injurious article published against any other person, be *prima facie* libelous; and the fact that it had some connection with judicial proceedings, though not a report of any portion thereof, would not render it privileged or conditionally privileged. Nor would the burden in a criminal prosecution, founded thereon against the publisher for libel, be devolved upon the state to prove express malice, but malice would be presumed, and nothing would be a complete defense to the action except a showing that the alleged defamatory matter was true in fact and published for justifiable ends; and such a showing would, under the constitution and statutes of Kansas, be a complete defense, and in such a case the supposed libelous matter would not be libelous.
3. A part of the alleged libelous article was that the person alleged to be libeled, who was an attorney at law assisting in the defense in a criminal prosecution for murder, had at the time no possible hope of being able to clear his client with a fair jury, but his only hope lay in a packed jury, and that his manner of conducting the trial showed that he relied upon hanging the jury by a "fixed man," or, in other words, by a bribed juror; and evidence was introduced tending to prove these matters; and the defendant in the libel case then, for the purpose of showing that one of the jurors was "fixed" or bribed, and that he did in fact hang the jury in the murder case, offered to introduce other evidence to show the conduct of this juror in the jury-room while the jury were deliberating upon their verdict in the murder case, and what he then and there said and did, and what he omitted to say and do, and how he voted, and how the other members of the jury voted, and that in fact he did hang the jury; but the court excluded all this evidence. *Held*, error.
4. In a criminal prosecution for libel, where the defendant justifies upon the ground that the alleged libelous matter was and is true, and was published for justifiable ends, it is necessary for him to prove, or in some manner to show, only its substantial truth and that it was published for justifiable ends; and it is not necessary for him to prove or show the truth of any of the alleged libelous matter, except such as would in fact be libelous if not true, and it is not necessary for him to prove or show the truth of even that portion of the alleged libelous

matter by a preponderance of the evidence, but only by evidence sufficient to create a reasonable doubt in the minds of the jury. His proof, however, should extend to all the alleged libelous matters that would in fact be libelous if not true.

5. In a criminal prosecution for libel the court permitted the counsel for the state in his closing argument to read to the jury, from an opinion published in the Supreme Court Reports, statements with regard to certain matters in another criminal case as evidence of certain facts in the libel case. *Held*, error.

Appeal from district court of Saline county.

Garver & Bond, Lovett & Norris and *C. B. Daupters*, for appellant.

L. B. Kellogg, attorney-general, and *E. W. Blair*, for the state.

VALENTINE, J. This was a criminal prosecution, commenced in the district court of Saline county, in which it was charged upon information that the defendant, Walter S. Wait, published in The Lincoln Beacon, a weekly newspaper published in the city of Lincoln, in Lincoln county, and having a circulation in Saline county, a libelous article concerning J. G. Mohler, the prosecuting witness. A trial was had before the court and a jury, and the defendant was found guilty and sentenced to pay a fine of $10 and the costs of suit, taxed at $723.25; and from this sentence the defendant appeals to this court. It appears that on January 3, 1888, in Lincoln county, Patrick Cleary shot and killed Jesse Turner; that afterwards he was charged with murder in the first degree, and tried therefor, and convicted of murder in the second degree and sentenced to imprisonment in the penitentiary for the term of twenty years; that the sentence was afterwards reversed by the supreme court and a new trial granted (*State v. Cleary*, 40 Kan., 287); that on May 16, 1889, and succeeding days, he was again tried in the district court of Lincoln county for murder; that during such trial J. G. Mohler, an attorney at law residing in Saline county, assisted in the defense; that on May 29, 1889, the jury retired to deliberate upon their verdict, but, failing to agree, they were discharged on June 1, 1889; that on June 3, 1889, Cleary was taken by a mob in Lincoln county and hung until he was dead; that on June 13, 1889, the present defendant, Walter S. Wait, published in a weekly newspaper edited and

published by him in Lincoln county, and known as The Lincoln Beacon, an article which reads as follows:

"'Sentimentalists cannot arouse sympathy for Pat. Cleary by appealing to the heart or saying that the murder was committed in self-defense. Pat. was a murderer on at least three occasions, was a highway robber plying his vocation from Salina to Denver, and ought to have been killed years ago. . . . Kansas people ought now to be convinced of the necessity of capital punishment. Men commit the most cold-blooded murders imaginable, and, after spending thousands of dollars, a sentence of from three to twenty years is the result. We do not want the legislature abolished until after they pass a suitable law on this subject. . . . Senator Mohler is getting a great deal of free advertising these days. We will have to spring his name as a candidate for the senate, not against Ingalls, but against Burton, if this thing continues.'—Salina Daily Republican.

"The number of people in Lincoln county who would have raised a finger to remove Pat. Cleary, had his attorney been content to have let him serve his first sentence of only twenty years, could have been counted on the fingers of one hand. That Pat. Cleary is dead can be laid at the door of his attorney, J. G. Mohler, whose insatiate greed to secure not only the last dollar that Pat.'s family had, but the last penny his relatives and friends had and also a $400 judgment covering what they might hereafter earn, must be satisfied. He had no possible hope of being able to clear Cleary with a fair jury. His only hope lay in a packed jury, and his manner of conducting the last trial showed that he relied upon hanging the jury by a 'fixed man.' His effort before the jury was so weak that it was noticed by nine out of ten who heard it. His whole effort was constituted of abuse of the witnesses and Mr. Downey, one of the attorneys for the state. The people felt that it was absolutely necessary that Pat. Cleary should be where he could take the lives of no more men; and they would have been satisfied had he been imprisoned for even twenty years, for that would virtually have been a life term. Society would then have been safe from depredations by him. But a mob could not imprison him. They had but one alternative, and Jerry Mohler forced that upon them. If he likes

the advertising, he is welcome to it." The newspaper in which this article was published also had a circulation in Saline county. On June 17, 1889, this present criminal prosecution was commenced in the district court of Saline county, J. G. Mohler being the prosecuting witness. Only that portion of the aforesaid article commencing with the words, "The number of people in Lincoln county," etc., and closing with the end of the article, is complained of. The case was tried in the manner and with the result aforesaid. Section 11 of the bill of rights of the constitution reads as follows: "Sec. 11. The liberty of the press shall be inviolate, and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." Sections 270, 272 and 275 of the act relating to crimes and punishments (Gen. St. 1889, pars. 2444, 2446, 2449) read as follows: "Sec. 270. A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation, made public, as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." "Sec. 272. In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury; and, if it appears to them that the matter charged as libelous was true, and was published with good motives, and for justifiable ends, the defendant shall be acquitted." "Sec. 275. In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact." That portion of section 272 above quoted, requiring the defendant, in order to make a good defense of justification, to prove that the alleged libelous matter was published "with good motives," has been held to be in violation of the constitution, and void. *State v. Verry*, 36 Kan., 416.

It is claimed by the defendant that there was no proof of the publication of the aforesaid article in Saline county. The newspaper was published in Lincoln county, and the proof is meager of any publication or circulation thereof by the defendant, or at his instance, in Saline county. We think, however, the evidence was sufficient to go to the jury, and sufficient to sustain a finding by the jury that the article was published in Saline county.

The defendant also claims that the publication of the article belongs to a class which is privileged, or at least conditionally privileged. Now, it is generally true that a newspaper publisher may, without committing libel, publish judicial proceedings, although such proceedings may contain false statements injurious to individual persons. In such a case he merely publishes the proceedings as judicial proceedings, without giving the statements contained therein any credit on his own account, and without reference to whether such statements are true or false; and in such cases he need not publish the entire proceedings, or publish them *verbatim;* but he may publish merely their substance. But this he should do fairly and truthfully. He may also make comments upon the proceedings, but the comments should also be fair, and should be such only as the proceedings themselves, or as the proceedings and the actual extrinsic facts, would fairly warrant. He cannot assume to be true extrinsic defamatory matters which are not true, nor can he assume to be true anything in the proceedings which is still controverted, or which has not yet been judicially determined. To the extent already mentioned, the publication and comments respecting judicial proceedings may go to all persons connected with such proceedings — to the judges or justices, to the jurors, witnesses, sheriffs, constables, and bailiffs, and to the parties and their attorneys or counsel. There are also many other kinds of privileged publications or communications, and conditionally privileged publications or communications, including such as have reference to the official conduct of public officers and to the qualifications and fitness of candidates for public office, etc.; but the matters published in the aforesaid article do not come within any of them. As to candidates for public office, see *State v. Balch*, 31 Kan., 465. It is true that the matters published in the aforesaid article

had some connection with judicial proceedings, but such matters were not the proceedings themselves, nor were they determined to be true by such proceedings. It is claimed that Mohler relied upon hanging the jury by a "fixed man." This "fixed man" was the juror J. P. Harman, who, it is claimed, was bribed. Now the fixing of this juror, and the procuring of a hung jury by means thereof, was no part of the judicial proceedings. Nor was the procuring of the last dollar that Pat. Cleary's family had, and the last penny that his relatives and friends had, and the $400 judgment covering what they might subsequently earn, any part of the judicial proceedings; neither was the hanging of Cleary, for which it is claimed that Mohler is responsible, any part of such proceedings. Now, upon the theory that these matters as published in the aforesaid article are false, we think they are also libelous, and not privileged or conditionally privileged. Weeks, Attys., §§ 136, 137 *et seq.*; Odger, Sland. & Lib., 7, 29, 30, 99, 253, 254; Newell, Defam., pp. 184–186, §§ 18–22; Id., pp. 544–599, §§ 147–167; Id., pp. 580, 581, §§ 19–21; Townsh., Lib. & Sland., §§ 230, 252; *Ludwig v. Cramer*, 53 Wis., 193; *Hetherington v. Sterry*, 28 Kan., 426. It is claimed, however, that attorneys at law are to some extent public officers, and this for the reason that they are often spoken of as "officers of the court," and therefore it is inferred that false and defamatory matters may be published of and concerning them with impunity, provided, of course, that the publisher does so in good faith. Now an attorney at law is not, except in a very limited and remote sense, a public officer. His business or vocation is to him a private matter. It is the means by which he procures his livelihood, and with reference to it and to his good character and reputation he is treated just as other persons are treated with reference to their private business or vocation and their character and reputation. He is treated in these respects just as a physician or farmer or artisan or mechanic would be treated. The authorities seem to universally sustain this view, and not a single authority, so far as we are informed, can be found that promulgates or enunciates any different doctrine.

It is also stated that the public is vitally concerned in knowing the truth with reference to the conduct of attorneys at

law, and therefore it is inferred that a newspaper publisher may publish falsehoods of a defamatory character concerning attorneys at law with impunity, provided, of course, that the newspaper publisher does so in good faith. This is hardly the law. The authorities seem universally to lay down the doctrine that a newspaper publisher has no greater right to publish falsehoods of a defamatory character concerning attorneys at law, or concerning any one else, than any other person has. All are equally required to tell the truth. We have already stated that newspaper publishers have a right to publish judicial proceedings, and to make fair comments thereon, but, when they resort to extrinsic matters, they should be sure that such extrinsic matters are not false and defamatory. Innocent persons should not be defamed by falsehoods, nor should the public be deceived by the same. Each is entitled to demand that whatever is published should be the truth. The public is certainly interested in knowing the conduct of attorneys at law as well as of all other persons whose acts or conduct might in any manner affect the public; but the vital interest of the public in this respect is in knowing the truth, and not in being deceived by falsehoods, and the public interest is not fairly satisfied by the publication of falsehoods instead of the truth. The publication of falsehoods is like giving stones, or something worse, where bread is wanted. In our opinion, an article published in a newspaper, concerning an attorney at law, which would tend to injure his character and reputation as an honest and honorable attorney at law, would, like any similarly injurious article published against any other person, be *prima facie* libelous; and the fact that it had some connection with judicial proceedings, though not a report of any portion thereof, would not render it privileged, or conditionally privileged. Nor would the burden, in a criminal prosecution founded thereon against the publisher for libel, be devolved upon the state to prove express malice, but malice would be presumed; and nothing would be a complete defense to the action except a showing that the alleged defamatory matter was true in fact, and published for justifiable ends, and such a showing would, under the constitution and statutes of Kansas, be a complete defense, and in such a case the supposed libelous matter would not be libelous.

The defendant further claims that the court below erred in refusing to permit evidence to be introduced on the trial tending to show the conduct and actions in the jury-room of the juror J. P. Harman, who, it is claimed, was a "fixed man," or, in other words, was bribed to prevent, and who did prevent, the jury from agreeing upon a verdict that Patrick Cleary was guilty of murder, or of any other offense charged against him. That portion of the aforesaid newspaper article which had reference to this matter, with the innuendoes explaining the same, as set forth in the information in this case, reads as follows: "He [meaning the said J. G. Mohler] had no possible hope of being able to clear Cleary [meaning the said Patrick Cleary] with a fair jury. His [meaning the said J. G. Mohler's] only hope lay in a packed jury [meaning thereby a jury composed of one or more persons unduly or dishonestly biased or prejudiced in favor of said Patrick Cleary], and his [meaning the said J. G. Mohler's] manner of conducting the last trial [meaning the trial aforesaid of said Patrick Cleary] showed that he [meaning the said J. G. Mohler] relied upon hanging the jury by a 'fixed man' [meaning that said J. G. Mohler, either by himself or others with his knowledge, did unlawfully bribe or induce a member of the jury on said trial corruptly not to agree to a verdict of guilty against the said Patrick Cleary on said charge of murder in the first degree, and relied as his defense of his said client, Patrick Cleary, on said trial, upon a jury composed of one or more persons unduly or dishonestly or corruptly biased or prejudiced in favor of said Patrick Cleary]. His [meaning the said J. G. Mohler's] effort before the jury [meaning the jury in the case aforesaid] was so weak that it was noticed by nine out of ten who heard it [meaning that the said J. G. Mohler did not labor all in his power as an advocate, attorney and counselor before the jury aforesaid, and in the case aforesaid, and on the trial thereof, because that the said J. G. Mohler knew that one or more of said jury was unduly or dishonestly or corruptly biased or prejudiced or influenced in favor of said Patrick Cleary, or against rendering a verdict in said cause against said Patrick Cleary of guilty of any of the offenses of which he stood charged in said cause]." Some evidence was introduced on the trial of this case tending to show that Mohler

did rely upon some one hanging the jury in the *Cleary Case*. Other evidence was introduced tending to show that an improper effort was made, presumably by bribery, to procure some one to hang the jury in that case. And evidence was also introduced tending to show that J. P. Harman, one of the jurors in that case, acted very strangely, to say the least. He refused to have his photograph taken along with the other jurors, and gave as a reason therefor that "there might be some hard feelings against the jurors by some people, and if they had their photographs they could very easily hunt them out, and they would know the jurors and the jurors would not know them." And when a fellow-juror said to him during the trial that the judge was very strict and did not intend that they should be tampered with, Harman said: "No, you might have an envelope slipped into your hand with a hundred-dollar bill in it." And although Harman, upon his *voir dire*, while the jury were being impaneled, qualified as a competent and an impartial juror, and one who knew nothing about the case, yet it was shown on the trial of this case that he was and had been a subscriber to The Lincoln Beacon, that gave a full report of the proceedings of the former trial. The defendant further attempted to show in this case what Harman said and did, and what he omitted to say and do, while the jury in the *Cleary Case* were in their room deliberating upon their verdict; but the court refused to permit anything of the kind to be shown. It is claimed that all the jurors except Harman voted for conviction, and that Harman voted constantly for acquittal, and that he did in fact hang the jury. But the court refused to permit anything of the kind to be shown. The court refused to permit anything to be shown which transpired in the jury-room during the deliberation of the jury, although it was stated that what did transpire in the jury-room had come to the knowledge of the defendant in this case before he published the alleged libelous article. The court excluded the foregoing evidence upon the following ground, as stated by the court, to wit: "If that kind of evidence is admissible, it would be necessary to recall to this court every witness who testified in that case, and to show whether or not he had reasons for taking the position he did upon the jury. I do not believe the evidence ought to be admitted."

It will be noticed that the evidence was not excluded because no sufficient foundation for its introduction had been laid, but because its introduction would involve the calling as witnesses of all the witnesses who had previously testified in the *Cleary Case*. Now we do not think that the introduction of this kind of evidence would necessarily, or even probably, involve any such consequences; but, even if it would, it would hardly be a sufficient reason for its exclusion. In proving Harman's conduct in the jury-room, only so much of it could be proved as might tend to show that he was a "fixed man," or, in other words, to show that he had been bribed or tampered with; and this might not have required the calling of a single witness who had previously testified in the *Cleary Case*. We think the evidence should have been admitted.

The defendant claims that the court erred in giving a certain instruction to the jury, wherein the court said: "But the truth so shown must be as broad as the libelous publication, and the proof of one of these matters alone does not constitute a defense in such a case." This, however, was modified by another instruction given to the jury, wherein the court stated that the defendant must be found guilty, "unless you further find that said article was substantially true, and was published for justifiable ends; but, if you find that it was both substantially true and published for justifiable ends, then you should acquit the defendant." And the court also gave full instructions with respect to "reasonable doubts." Taking all these instructions together, we think no material error was committed, nor was the jury probably misled. As to the first of the above instructions, see Newell, Defam., p. 796, § 45; as to the second, see the case of *State v. Verry*, 36 Kan., 416. Where the defendant in a criminal prosecution for libel justifies upon the ground that the alleged libelous matter was and is true, and was published for justifiable ends, he is required to prove, or in some manner to show, only its substantial truth, and that it was published for justifiable ends; and he is not required to prove or show the truth of any of the alleged libelous matter, except such as would in fact be libelous if not true, and he is not required to prove or show the truth of even that portion of the alleged libelous matter by a preponderance of the evidence, but only by evidence sufficient to cre-

ate a reasonable doubt in the minds of the jury. His proof, however, should extend to all the alleged libelous matters that would in fact be libelous if not true; and in this sense the proof should be "as broad as the libelous publication." In this state in every criminal action it devolves upon the state to prove beyond a reasonable doubt every fact, ingredient or element necessary to constitute the offense charged. Crim. Code, § 228; *State v. Crawford*, 11 Kan., 32, 42 *et seq.; State v. Child*, 40 Kan., 482. It may be different with respect to such defenses as admit, in effect, that the offense charged may have been originally committed, as once in jeopardy, a former acquittal, a former conviction, or a pardon. These are affirmative defenses, that admit substantially that the offense charged may have once been committed, and are not negative defenses included in the general plea of "not guilty," which in substance denies that the offense charged was ever committed. If the alleged libelous matter was true, and published for justifiable ends, then no offense was ever committed; and if, upon the whole of the evidence introduced, with all the relevant legal presumptions, the jury cannot say that they are convinced beyond a reasonable doubt that the alleged libelous matter was not true, or was not published for justifiable ends, the defendant should be acquitted.

The defendant further complains of the following matters that occurred in the closing argument of counsel for the state, to wit: "In the closing argument upon the part of the state by J. R. Burton, after referring to the position taken by defendant and his counsel that the juror Harman had been bribed, and that Pat. Cleary was a murderer, he said: 'The supreme court takes a different view from what they do as to Cleary's guilt,' and thereupon, taking up the fortieth volume of the Kansas reports, and turning to the case of *The State v. Pat. Cleary*, that he would read what the supreme court said as to the guilt or innocence of Cleary. Thereupon counsel for defendant interrupted Mr. Burton in his argument, and objected to the court to counsel's reading from the report of the case which he had just referred to. The court overruled said objection, remarking that 'counsel for defendant had been allowed great latitude in presenting the case to the jury,' to which ruling defendant excepted. Thereupon

said J. R. Burton read from the decision of the court in the case referred to above, on page 299, as follows: 'We are loath to express an opinion on the merits of this case, but we are compelled by an unavoidable necessity to say that the evidence preserved in this record does not so strongly impress us with the guilt of the defendant as to incline us to the opinion that the substantial rights of the defendant have not been invaded by this erroneous ruling. On the contrary, we think, as the case is one of fact entirely, and grave doubt might be fairly entertained, that the district court should have given the defendant the benefit of the doubt, and sustained the motion for a new trial for the reason that the jury was not fairly constituted.' Counsel stated to the jury that that was the language of the decision of the supreme court upon the evidence in that case. Thereafter, and in another part of this argument, said J. R. Burton read from the alleged libelous article: 'He had no hope of being able to clear Cleary with a fair jury,'—again took in his hands said report of the case of *The State v. Cleary*, and said to the jury, 'The supreme court says that he has.' And again, in another part of his argument, said J. R. Burton again referred to said report and said expression of opinion in said report of said case, and said to the jury: 'Cleary may have been guilty, or there may have been a grave doubt as the supreme court says there was.'"

The views or supposed views of the supreme court referred to by counsel for the state in the closing argument are found in the opinion prepared by one of the commissioners of the supreme court in the case of *State v. Cleary*, 40 Kan., 288 *et seq.* These views, however, have nothing to do with the law of the present case, nor, indeed, with any law. They are really only an expression of opinion with regard to the facts of the *Cleary Case*, as deduced from the evidence introduced on the first trial of that case. This report of the views of the supreme court was not introduced in evidence in the present case, except by counsel for the state in his closing argument; and it was then introduced for the purpose of rebutting any opinion that might be deduced from the evidence in this case, or be entertained, "that the juror Harman had been bribed," or "that Pat. Cleary was a murderer," or that Mohler "had no hope of being able to clear Cleary with a fair jury." It

was an attempt to make the supreme court testify in the present case with regard to some of the facts of the *Cleary Case* supposed to be involved in the present case; and it was new evidence not introduced on the trial of the present case, nor in the case at any time prior to the closing argument of counsel for the state, and it could not properly have been introduced at all. We think the court committed error when it permitted this to be done. Some of the decisions which have some application to this question are as follows: *Huckell v. McCoy*, 38 Kan., 53, 59, and cases there cited; *Wolffe v. Minnis*, 74 Ala., 386; *Bulloch v. Smith*, 15 Ga., 395; *Dickerson v. Burke*, 25 Ga., 225; *Forsyth v. Cothran*, 61 Ga., 278; *Tucker v. Henniker*, 41 N. H., 317; *Bullard v. Railroad Co.*, 64 N. H., 27; *Railroad Co. v. Boyd*, 67 Md., 32; *Hall v. Wolff*, 61 Iowa, 559; *Henry v. Railroad Co.*, 70 Iowa, 233; *Ricketts v. Railway Co.*, 33 W. Va., 433; *Coble v. Coble*, 79 N. C., 589; *Paper Co. v. Banks*, 15 Neb., 20; *Railroad Co. v. Bragonier*, 13 Ill. App., 467; *Kinnaman v. Kinnaman*, 71 Ind., 417; *Rudolph v. Landwerlen*, 92 Ind., 34; *School Town of Rochester v. Shaw*, 100 Ind., 268; *Campbell v. Maher*, 105 Ind., 383; *Hoxie v. Insurance Co.*, 33 Conn., 471; *Bedford v. Penny*, 58 Mich., 424; *Rickabus v. Gott*, 51 Mich., 227; *Railroad Co. v. Nichols* (Tex.), 9 Amer. & Eng. R. Cas., 361; *Willis v. McNeill*, 57 Tex., 465; *Railroad Co. v. Cooper*, 70 Tex., 67; *Railroad Co. v. Kutac*, 76 Tex., 473; *Insurance Co. v. Cheever*, 36 Ohio St., 201; *Brown v. Swineford*, 44 Wis., 282; *Bremmer v. Railroad Co.*, 61 Wis., 114; *Baker v. City of Madison*, 62 Wis., 137; *Koelges v. Insurance Co.*, 57 N. Y., 638; *State v. Balch*, 31 Kan., 465. The judgment of the court below will be reversed and cause remanded for a new trial.

JOHNSTON, J., concurring.

HORTON, C. J. I fully concur in the reversal of the judgment of the district court, but I am not satisfied with all that is stated in the opinion. I do not agree with all the limitations placed on the publication of judicial proceedings or matters directly connected therewith. I think that every newspaper has a right to comment on matters of public concern, provided it is done fairly and honestly. I do not think that such comments are libelous, however severe in their

terms, unless they are written and published maliciously. I think the administration of the law, the verdicts of juries, the conduct of suitors, their lawyers and witnesses, are all matters of lawful comment by newspapers as soon as the trial is over. Attorneys at law are officers of the court in which they practice, and are admitted by its order, upon evidence of their possession of sufficient legal learning and good moral character. They hold their office during good behavior and can only be deprived of it for misconduct. Therefore, any attorney can be protected from libel for anything occurring upon a trial, or for any matter connected directly therewith, to the same extent as any other officer of the court. That, and nothing more. Of course, if a publisher of a newspaper writes and publishes maliciously any false or libelous matter against an attorney, or any other officer of a court, there is no danger but that the publisher may be properly punished, even if express malice must be proved. The jury have the authority to take all the matters into consideration, and, if express malice is established, or if malice is found from the circumstances attending the publication, the jury will be justified in rendering a verdict of guilty. When it is said that malice must be shown in the case of privileged communications, the term "malice" is used in its legal, not in its popular, sense. It is legal malice if one publishes as true what he knows to be false, or what, by proper investigation, he might have assured himself was false. The case of *State v. Cleary* was a public trial. The state and the people of the state were greatly interested in its result. If justice miscarried from the act or conduct of any officer of the court during the trial, it was a subject of legitimate newspaper comment. The jury could determine, under the facts and circumstances of this case, whether the comments of the newspaper were made from good or honest motives upon reasonable grounds, or whether they were maliciously written and published. If the defendant, in referring to the trial, or any matters directly connected with the trial, acted solely from good and honest motives and upon reasonable grounds, he ought not, in my opinion, to be criminally liable.

NOTE. — *Imputing unchastity to a woman.* — In *State v. Hanson*, 103 N. C., 374, which was a prosecution for wantonly and maliciously uttering

words imputing unchastity to an innocent woman, the testimony tended to show that the parties were surprised while in the very act of copulation, and prevented from consummating it, and the defendant requested the court to charge the jury that if the prosecutrix had surrendered her person to Christenbury for the purpose of committing fornication with him, she would not be an innocent woman, though the act was not completed, in consequence of the coming upon them of other parties." Instead of so charging, the court told the jury "that the woman was innocent, unless she had had sexual intercourse with a man." Disposing of this question the court says: "As we understand, the parties were in each other's embrace about to commit the act, and were interrupted so that it did not take place. It is true, the moral degradation from such a surrender of the person is little, if any, less than would have resulted from actual coition, but it is necessary to draw the line somewhere, the overstepping of which destroys the *status* of innocency in the sense of the statute, and short of which it is not lost, and the past adjudications on the construction of the statute draw the line between actual sexual intercourse and any approximation, however near to it. It is difficult to define any other." A woman who has had illicit intercourse with a man, but has since repented and become virtuous, is an "innocent woman" within Code of North Carolina, section 1113, which provides that any person who shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words amounting to a charge of incontinency, shall be guilty of a misdemeanor. *State v. Grigg*, 104 N. C., 882. In the decision of the case Mr. Justice Clark aptly and humanely says: "Every man in the course of his life must have had instances brought to his knowledge of unfortunate females who have at some period in their lives been led from the path of virtue by the wiles of a seducer, who have afterwards reformed, and by a course of exemplary conduct established for themselves a character for chastity above all reproach. Shall it be said that these unfortunates are not to be allowed a *locus penitentiæ*, and are to be subject forever to the vile tongue of the maligner and slanderer?".

Cochran v. State.

(28 Tex. App., 422.)

MANSLAUGHTER: *Distinction between and murder — Self-defense — Instructions — Evidence.*

1. In a murder case, in which there was no evidence that deceased, in striking defendant, caused pain or bloodshed, the court instructed that "adequate cause" sufficient to reduce the homicide to manslaughter is such as would commonly produce a degree of rage or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection, and that mere insulting words or gestures, or an assault and battery so slight as to show no intention

to inflict pain or injury, are insufficient; but that, if pain or bloodshed is caused by an assault and battery, it is such adequate cause. *Held* error, as the jury should have been left to determine the question of "adequate cause" from all the facts, and not restricted to a single cause not shown by the evidence.

2. The true test as to murder in the second degree and manslaughter is that if the homicide was committed under the immediate influence of sudden passion, for which there was adequate cause, the homicide, if not justifiable, would be manslaughter, but if such cause did not exist, and the homicide was not justifiable, then it would be murder in the second degree. Any circumstance capable of and actually creating sudden passion, such as anger or terror, rendering the mind incapable of reflection, whether or not accompanied by bodily pain, is "adequate cause;" and if defendant killed deceased at a time when the latter's actions and words, in connection with his physical strength, produced such "adequate cause," and defendant, under its influence, and while not acting in self-defense, killed deceased, he would be guilty of manslaughter.

3. In judging of the danger the circumstances must be viewed as they appeared to defendant, and if, when he shot deceased, the latter was violently attacking him under circumstances which reasonably indicated an intention to murder, maim, or inflict serious bodily injury, and the weapon and the manner of its use were reasonably calculated to produce either of such results, then the law presumes that deceased intended to murder, maim, or inflict such injury on defendant (Penal Code Tex., art. 571), and the homicide would be justifiable; and though the danger was not real, but merely apparent, the homicide would be justifiable, if at the time the conduct of deceased was such, under the circumstances, as to reasonably induce defendant to believe that deceased was about to kill or inflict serious bodily injury on him.

4. The testimony of a person, who was, at the time, standing to the left of defendant, that he passed behind defendant from his left to his right side because he expected deceased would strike at defendant with a billiard cue, and that he feared being hit, is admissible as bearing on the effect likely to be produced on defendant's mind by the conduct of deceased.

Appeal from district court, Johnson county; J. M. Hall, judge.

Poindexter & Padelford, for appellant.
W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This appeal is from a conviction for murder of the second degree. The main errors complained of are the instructions given by the court in the charge upon manslaughter and self-defense. The facts in the case clearly raised both of these issues, and demanded of the court a plain

and pertinent exposition of the law applicable to the facts which presented them.

Deceased and defendant were strangers, who had never seen each other before the fatal meeting. Defendant came into the room where deceased and another were engaged in a game of billiards. As he entered the door some one pulled off his hat and placed another upon his head, which he jerked off, and, in throwing it from him, it fell upon the billiard table. Deceased became enraged, approached defendant, and addressed him in an angry and threatening manner. Defendant apologized; made every effort to pacify him; begged for peace. Deceased would accept no apology, but became more and more enraged and threatening in his words and conduct. He had his billiard cue in his hand, uplifted in a striking attitude, and slapped defendant in the face or on the breast. Defendant was much the smaller man, and unable to contend with him. He gave back, or was pushed back by third parties, until he had retreated, or been shoved to the wall. Deceased, too, was shoved back by third parties, who were endeavoring to separate and keep them apart, but deceased, pushed by these parties, advanced again with his drawn billiard cue, a deadly weapon, swearing he would kill defendant; and when he (the deceased) had gotten within four or six feet of defendant, but not within striking distance of him, at the time, with said billiard cue, the defendant fired the fatal shots in rapid succession. There is no evidence that when deceased slapped or tapped defendant on the face or breast he inflicted either pain or bloodshed upon him.

As to what would constitute "adequate cause" sufficient to reduce the homicide to manslaughter, the court, in the seventh paragraph of its charge, instructed the jury as follows: "By the expression 'adequate cause' is meant such as would commonly produce a degree of rage, anger, resentment or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection. Insulting words or gestures, however insulting they may be, or an assault and battery so slight as to show no intention to inflict pain or injury, are not adequate causes sufficient to reduce a homicide from the degree of murder to the grade of manslaughter. But an assault and battery causing pain or bloodshed is a

sufficient cause to reduce an unlawful homicide to the grade of manslaughter." This is the only explanation of adequate cause given. Under the facts it was insufficient, and was calculated to mislead the jury. In like circumstances this identical charge was given by the same learned trial judge in *Hawthorne's Case*, 28 Tex. App., 212, and Judge Willson, delivering the opinion of the court, says: "While this portion of the charge is abstractly correct, it is not applicable to the evidence. There was no proof . . . of an assault and battery causing pain or bloodshed. Under this charge the only 'adequate cause' was an assault and battery . . . upon the defendant causing pain or bloodshed. Of course, the jury would conclude under this charge that adequate cause did not exist because no such assault and battery was committed. . . . Adequate cause should not have been so restricted. Any condition or circumstance which is capable of creating sudden passion sufficient to render the mind of a person of ordinary temper incapable of cool reflection may constitute 'adequate cause,' and where the evidence shows a number of conditions or circumstances tending either singly or collectively to constitute what a jury might consider adequate cause, the charge should leave the jury at liberty to consider them all in determining whether or not adequate cause existed. . . . The jury should have been left free to determine the question of 'adequate cause' from all the facts in evidence tending to show such cause, instead of being restricted as they were by the charge to a single cause, and that a cause not shown by the evidence." Willson, Crim. St., § 1030; *Orman v. State*, 24 Tex. App., 495; *Miles v. State*, 18 Tex. App., 156; *Wadlington v. State*, 19 Tex. App., 266; *Johnson v. State*, 22 Tex. App., 206.

Defendant's counsel excepted to the sufficiency of the charge of the court upon manslaughter, and asked the court to give the following requested instructions: "(1) That you may understand the difference between murder in the second degree and manslaughter, you are, in connection with the general charge of the court upon murder in the second degree and manslaughter, further instructed as follows: When an unlawful killing takes place under the immediate influence of sudden passion, and no cause exists which will, under the law,

justify or excuse its commission, then, in order to determine whether such homicide is murder in the second degree, or manslaughter, the true test is, was there adequate cause to produce such passion? If such adequate cause existed, the homicide, if not justifiable, would be manslaughter. If such adequate cause did not exist, and if the homicide was not justifiable, then it would be murder in the second degree. (2) And you are further instructed that any condition or circumstance which is capable of creating, and does create, sudden passion, such as anger, rage, sudden resentment or terror, rendering the mind incapable of reflection, whether accompanied by bodily pain or not, is in law 'adequate cause.' (3) And in this case, if you should find from the evidence that the defendant shot and killed John McLennan, and that at the time he did so the actions and words of said McLennan, taken in connection with the physical strength of the said McLennan, were of such a nature as to produce 'adequate cause,' as above explained, and did produce such 'adequate cause' sufficient to render the defendant's mind incapable of cool reflection, and if, under the immediate influence of anger, rage, sudden resentment or terror, the defendant shot and killed said John McLennan, and if you are satisfied from the evidence beyond a reasonable doubt that the defendant did not kill said McLennan in self-defense, then you should find him guilty of manslaughter." These instructions were apt, pertinent and comprehensive, and it was error for the court to refuse them.

Upon the law of self-defense, applicable to the facts of the case as made by the evidence, we are also of opinion that the charge of the court was insufficient as to apparent danger, and in not instructing the jury that in judging of the danger the facts and circumstances surrounding the defendant must be viewed and estimated from his stand-point, and as they appeared to him. "If the jury might believe from the evidence that at the time the defendant fired the fatal shot the deceased was making a violent attack upon him under circumstances which reasonably indicated an intention to murder, maim [or inflict upon him serious bodily injury], and the weapon and the manner of its use were such as were reasonably calculated to produce either of those results, then the

law presumed that the deceased intended to murder or maim [or inflict such injury upon] the defendant, and the jury should have been so instructed in explicit terms (Penal Code, art. 571; *Kendall v. State*, 8 Tex. App., 569), and that in such state of case the homicide would be justifiable. Furthermore, upon this subject the charge should have instructed the jury that, if the conduct of the deceased at the time of the homicide was such under the circumstances as to reasonably produce upon the mind of the defendant the belief that the deceased was then about to kill or inflict serious bodily injury upon him, the homicide would be justifiable, although in fact the danger was not real, but only apparent." *Jones v. State*, 17 Tex. App., 602; *Bell v. State*, 20 Tex. App., 445; *Spearman v. State*, 23 Tex. App., 224; *Patillo v. State*, 22 Tex. App., 586; *Brumley v. State*, 21 Tex. App., 222. Defendant's special requested instructions, which were refused, called the attention of the court to the defects in the charge above pointed out.

Defendant offered to prove by the witness Wilshire, who was standing just to the left of defendant immediately before the shots were fired, that "the reason he [the witness] passed from defendant's left side around behind his back to his right side was that he [witness] expected that deceased would strike at defendant with that billiard cue, and that he feared deceased might miss defendant and hit him." An analogous question is discussed in *Thomas v. State*, 40 Tex., 36, and it was held that such character of evidence was admissible as tending to explain the effect the acts of the party would likely have produced upon the accused. It was said that "the effect produced on a by-stander by the conduct of Wren would illustrate the effect likely to be produced on the mind of the party himself, and we can perceive no good reason why it should not have been allowed." It was error to reject the evidence.

For errors above discussed, the judgment is reversed and the cause remanded.

NOTE.— *Manslaughter — What constitutes.*— As said by Mr. Bishop (2 Crim. Law, 757), any definition of this offense will prove unsatisfactory, and the law must be gathered from the somewhat uneven line of adjudicated cases. Questions concerning the commission of the offense arise most frequently where death ensued from the perpetration of an act not preceded by an intention to kill, and some fine lines of distinction mark the difference from guiltless homicide and manslaughter, as well as between manslaughter

and murder. "However, every act producing an unintended result must, when evil, be measured by the intent or by the result. The common-law rule measures it substantially by the latter, holding the person guilty of the thing done where there is any kind of legal wrong in the intent, the same as though specifically intended, though not always in the same degree." . . . 1 Bishop, Crim. Law, 411. But when a man in the execution of an act which is unlawful, because it is *malum prohibitum* merely, and by misfortune or chance, does another act which, if wilfully done, would be criminal, he is blameless for the commission of the latter. *Estell v. The State, infra;* Arch. New Crim. P., 9; 1 Bishop, 414. When, on the other hand, the act is *malum in se*, and the consequences are evil, the doer is held responsible for all the results. So it may be regarded as a well-settled principle of law that a man will be held guilty of murder or manslaughter who, in the attempt to kill one person, by mistake kills a third person, although there is no intent or design to kill such third person. So, also, where a number of persons conspire together to do an unlawful act, and in the prosecution of the common design a person is killed, all will be guilty of murder. 2 Whart. Crim. Law (4th ed.), § 998, says: "If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happened collaterally, or besides the principal design." 1 Russ. Crimes, 540, says: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseizin with great numbers of people, or going to beat a man, or rob a park, or standing in opposition to the sheriff's *posse*, they must when they engage in such bold disturbances of the public peace at their peril abide the event of their actions; and therefore if, in doing of any of these acts, they happen to kill a man, they are all guilty of murder." In 1 Hale, P. C., 441, the doctrine is stated thus: "If divers persons come in one company to do an unlawful thing, as to kill, rob or beat a man, or commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this may be adjudged murder in them all that are present of that party abetting him and consenting to the act, or ready to aid him, although they did but look on." No person can be held responsible for a homicide unless the act was either actually or constructively committed by him. And in order to be his act, it must be committed by his hand, or by some one acting in concert with him, or in furtherance of a common design or purpose. Where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose, for which the parties were assembled or combined together; otherwise a person might be convicted of a crime in the commission of which he never assisted, which could not be done upon any principle of justice. *Butler v. The People*, 125 Ill., 641.

In a Michigan case the court reviews a number of the authorities. There the defendant was charged with having killed a boy who had thrown stones at him. By the defendant's own statement he was armed with a deadly weapon, and, being so armed he gave chase to the deceased, and if he had caught him "he might have slapped him in the face, and told him what was

right." He was not very angry, but he did not want to be called names. He was trying to scare the boys, and stop their throwing dirt or stones. He took his revolver out to shoot in the air to scare the boys, and when he took it out to do this, while he was pursuing and the deceased fleeing from him about one hundred feet distant, he says he does not know how it happened, but it went off, and hit and killed the boy, Willie Pickel. He also shows that there was an altercation there between him and the boys, they calling names, and throwing dirt or stones, one of which hit him on the leg. "It thus appears from his testimony that he meant to do two things, both of which were unlawful: (1) He chased the deceased with intent to slap him in the face, or, in other words, to do him bodily harm. (2) He meant to shoot his pistol — a deadly weapon, loaded with powder and ball — in the air for the purpose of scaring the boys. Under such circumstances, if death of a person ensues from the act, the crime is, at least, manslaughter, whether he intended to kill the person or not. It seeme to me that it would be monstrous to hold that the respondent is not legally responsible for such criminal carelessness as his own story shows he was guilty of. Can it be that human life has come to be so cheap that it can be sacrificed without provocation, and the slayer go unpunished, because he did not intend to take life by his rash or careless act? And yet such was the effect of the respondent's requests to charge the jury above quoted.

"Mr. Bishop, in his work on Criminal Law, says: 'It is reasonable to hold that where one uses a deadly weapon without justification, he evinces a disregard for human life and safety amounting to malice.' Was there any justification for the use of the deadly weapon in this case? Assuredly not. Its use was uncalled for and wanton. The boy chased and killed was but fifteen years old. He had committed no crime, and respondent had no right to lay violent hands upon him,— much less to shoot him.

"In the case of *State v. Smith*, 2 Strob., 77, the prisoner fired a pistol at a person on horseback merely to frighten his horse, and caused it to throw its rider, and the ball caused the death of another person. The offense was held to be murder. Mr. Justice Evans, in deciding the case, said: 'If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used such means only as was appropriate to that end, then there would be some reason for applying to this case the distinction that, where the intent was to commit only a trespass or a misdemeanor, the accidental killing would be only manslaughter.' The above case, in many of its features, is quite similar to this. The occurrence happened after dark. A crowd had assembled in the street, among whom was the prisoner. Two children had been sent upon an errand, and, meeting the crowd, had climbed upon the fence, and sat there. Carter rode by upon horseback. The prisoner discharged his pistol and accidentally hit and killed one of the children. The prisoner said that he did not know the child was there, and would not have hurt him for the world if he had known it. Again, being asked, when he said he did not mean to kill the negro: 'Well, who did you mean to kill?' he hesitated, and said: 'Really, I did not intend to kill anybody. I shot at that d—d mulatto, but did not intend to kill him.' Again, he said: 'I shot with this intention: to make Carter's horse cut or caper, and throw him down; and I thought I had elevated the pistol high enough to be out

of danger.' And again: 'I designed a frolic, to scare Carter or his horse, and thought I had raised the pistol so as not to hit anybody.'

"In this case, if the object of respondent was simply to frighten the boy, the means used were entirely inappropriate for the purpose. If that had been his only object, his giving chase seems effectually to have accomplished it, for they were fleeing from him; and for what reason other than affright? The people's testimony showed that the respondent made threats, and had deliberately taken his pistol from his pocket while behind the tree, and that he pursued, and deliberately took aim, and fired the fatal shot. I think there was testimony in the case that would have justified the court in submitting it to the jury whether the respondent was not guilty of murder in the first degree.

"Adverting again to decided cases: It has been held that where a parent corrects his child, if the correction exceeds the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances. *Rex v. Cheeseman*, 7 Car. & P., 455; *Anonymous*, 1 East, P. C., 261, 1 Hale, P. C., 455; Foster, 262.

"In *Wigg's Case*, 1 Leach, 378, a boy having the care of some sheep suffered some of them to escape through the hurdles of the pen, and the master, seeing the sheep escaping, ran towards the boy, threw a stake at the boy, which hit and killed him. The jury, under the direction of the court, found the master guilty of manslaughter.

"In the case of *Rex v. Sullivan*, 7 Car. & P., 641, a lad, in frolic, without meaning harm to any one, took the trapstick out of the forepart of a cart, in consequence of which it was upset, and the carman, who was in it putting in a sack of potatoes, was thrown backward on some stones, and killed. The lad was held to be guilty of manslaughter. So it was held that where one whips a horse on which another is riding so that it springs out, and runs over and kills a child, he is guilty of manslaughter. 2 Bish. Crim. Law, § 693. It is also manslaughter if, on a sudden quarrel between two persons, a blow intended for one of them accidentally falls upon a third, whom it kills. *Rex v. Brown*, 1 Leach, 135; 1 East, P. C., 231, 245, 274.

"Mr. Bishop says: 'It appears to be a doctrine of the courts that, if parties become excited by words, and one of them attempts to chastise the other with a weapon not deadly, he will be held for manslaughter, though death is unintentionally inflicted.' Vol. 2, § 704. And when a man discharges a gun at another's fowls in mere wanton sport, he commits, if he accidentally kills a human being, the offense of manslaughter, while his intended act is only a civil trespass. 2 Bish. Crim. Law, § 692.

"In *State v. Roane*, 2 Dev., 58, it was held the firing of a gun simply for the purpose of frightening another, by which shooting death is produced, is manslaughter. In this case the prisoner's counsel requested the court to charge the jury 'that if the defendant did not intend to kill, but only to frighten, the deceased, they should find him not guilty of an offense,' which was refused; and the judge charged that if the defendant discharged his gun in a careless, negligent and heedless manner, and thereby caused the death of the deceased, he was guilty of manslaughter, although he did not intend to kill. Held no error.

"And in *People v. Fuller*, 2 Parker, C. C., 16, it was held that where one carelessly discharged a gun into the street in the night-time, and shot deceased unintentionally, not knowing he was there, it was manslaughter.

"Mr. Bishop formulates the doctrine to be drawn from the adjudicated cases as follows: 'If an act is unlawful, or is such as duty does not demand, and of a tendency directly dangerous to life, however unintended, it will be murder. But if the act, though dangerous, is not directly so, yet sufficiently dangerous to come under condemnation of the law, and death unintended results from it, the offense is manslaughter; or if it is one of a nature to be lawful, properly performed, and it is performed improperly, and death comes from it unexpectedly, the offense still is manslaughter.' 2 Bish. Crim. Law, § 689.

"Applying the principle to be deduced from the cases referred to, and the doctrine above laid down, to the case under consideration, and viewing the transaction in the light of the most favorable circumstances shown by the testimony, the act of respondent in killing the lad was manslaughter. *People v. Steubenvoll*, 62 Mich., 329."

The unlawful and felonious killing of a human being, "without malice, but voluntarily upon a sudden heat," is voluntary manslaughter. Involuntary killing in the commission of an unlawful act is involuntary manslaughter. One guilty of involuntary manslaughter cannot be convicted under an indictment charging him with voluntary manslaughter. The question as to whether the manslaughter committed was voluntary or involuntary is one wholly for the jury. *Bruner v. State*, 58 Ind., 159. One who, in attempting to commit suicide, accidentally kills another who is trying to prevent it, is guilty of criminal homicide. *Commonwealth v. Mink*, 123 Mass., 422. Where one laid in wait and shot another dead, *held*, that the murder was not reduced to manslaughter by the fact that the accused had gone bail for the deceased, who had refused to appear in court according to his recognizance, had made violent threats to resist his bail, and, on the night before the homicide, had shot at him in his carriage. *State v. Downham*, 1 Houst. Crim. C. (Del.), 45. A homicide cannot be reduced from murder to manslaughter by the fact that the defendant knew positively that the deceased had carried on an adulterous intercourse with his wife, unless he has caught him in the act, and killed him in the first transport of passion. *State v. Pratt*, 1 Houst. Crim. C. (Del.), 249. The fact that the person killed was trespassing on property of the accused does not reduce the offense to manslaughter. *State v. Woodward*, 1 Houst. Crim. C. (Del.), 476.

If a person, seeing his friend shot, becomes so aroused by sudden rage and resentment that his mind is not capable of cool reflection, and if, under the immediate influence of passion, he shoots and kills the offender, the offense is manslaughter. *Moore v. State*, 26 Tex. App., 322. A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, is sufficient to reduce the killing to manslaughter, though it does not "entirely dethrone reason." *Smith v. State*, 83 Ala., 26. To reduce homicide from murder to manslaughter there must be not only an absence of malice and deliberation, but also "some actual assault upon the person killing, or an attempt by the person to commit a serious personal

injury upon the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice," under Code of Georgia 1882, section 4325. *Fogarty v. State*, 80 Ga., 450. Where a policeman, with nothing to show that he was such, at night calls on a passer-by to stop, and, when the latter starts to run, shoots him, he is guilty of manslaughter in the second degree. *People v. McCarthy*, 47 Hun, 491. If two fight with deadly weapons in a mutual combat, begun in hot blood, and death ensue, it is manslaughter. *United States v. Mingo*, 2 Curt., 1; *Atkins v. State*, 16 Ark., 568; *State v. Floyd*, N. C. L., 392; *Golden v. State*, 25 Ga., 527; *State v. McDonnell*, 32 Vt., 491; *State v. Roberts*, 1 Hawks (N. C.), 349. But in cases of mutual combat, to reduce the offense of taking life from murder to manslaughter, it must appear that the contest was waged upon equal terms, and no undue advantage was taken. *People v. Sanchez*, 24 Cal., 17. And, in case of a sudden quarrel, the going out to fight must occur immediately after the quarrel, before the blood has time to cool. Id. In manslaughter there may be intention to kill, arising in the sudden transport of passion, but it may, and must, in this grade of offense, be unaccompanied by premeditation or malice. *Dennison v. State*, 13 Ind., 510. Manslaughter is the unlawful and felonious killing of another, without malice, either express or implied; and if, therefore, in doing an unlawful act, or in carrying out an unlawful design, death happen, but without malice, the offense would be only manslaughter, provided such unlawful act or design be not a felony, because then the law implies the existence of malice. But if the intent goes no further than to commit a bare trespass, it will be manslaughter. *State v. Shellady*, 8 Iowa, 447. Mere words or gestures, though they may excite passion, do not constitute such provocation as will of itself extenuate a homicide committed with a deadly weapon, and make it manslaughter. *Rapp v. Commonwealth*, 14 B. Mon. (Ky.), 614; *People v. Murback*, 64 Cal., 369; *State v. Buchannan*, 1 Houst. Cr. C. (Del.), 133; *State v. Draper*, id., 531; *Ross v. State*, 59 Ga., 248.

Homicide, which results from the perpetration of offenses below the degree of felony and without malice, is manslaughter. *State v. McNab*, 20 N. H., 160. Ordinary provocation given by a woman or child to a man of average strength, even though it amounts to giving a blow, does not lower a homicide from murder to manslaughter. *Commonwealth v. Mosler*, 4 Pa. St., 264. If a person upon meeting his adversary unexpectedly, who had intercepted him upon his lawful road, and in his lawful pursuit, accepts the fight, when he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping him on the way, and it would be manslaughter. *Copeland v. State*, 7 Humph. (Tenn.), 479. On a trial for homicide, committed by firing a pistol from the window of a dwelling-house into a *charivari* party assembled about the house after midnight, it is error to direct the jury that such a demonstration would not be a sufficient provocation to reduce the killing to manslaughter. *State v. Adams*, 78 Iowa, 292. It is no defense to an indictment for manslaughter that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was therefore murder; but the defendant in such case may, notwithstanding, be properly convicted of

the offense of manslaughter. *Commonwealth v. M'Pike*, 3 Cush. (Mass.), 181. A person who intentionally and in a wanton and reckless manner illegally discharges his pistol in the street of a town, and thereby kills another, is guilty of manslaughter. *Sparks v. Commonwealth*, 3 Bush (Ky.), 111; *People v. Fuller*, 2 Park. (N. Y.) Cr., 16. Unless there are circumstances to render it an assault, one's playful and negligent handling of a pistol which he believes to be empty, with no intent to harm, will not make the consequent killing voluntary manslaughter. *Robertson v. State*, 2 Lea (Tenn.), 239. An assault by one attempting to regain his liberty from unlawful arrest or restraint, if resulting in the death of the assailed person, is no more than manslaughter; and, if death does not ensue, is no more than an aggravated assault and battery. *Goodman v. State*, 4 Tex. App., 349. A police officer, at night in a city street, attempted to arrest A. for being drunk, noisy and disorderly. A. resisted and ran away. The officer repeatedly called on him to stop, drew his pistol, and would have fired but that A. shot and killed him. *Held*, that A. was properly convicted of manslaughter in the second degree. *State v. Cantieny*, 34 Minn., 1.

BELK ET AL. v. PEOPLE.

(125 Ill., 584.)

MANSLAUGHTER: *Negligent driving — Instructions.*

1. NEGLIGENCE — CRIMINAL LIABILITY — CONTRIBUTORY NEGLIGENCE.— Where a team and wagon run into another wagon, and the horses hitched to the latter are frightened and run away, throwing an occupant out, and causing injuries from which she dies, the collision is the proximate cause of the death; and it is no excuse of the criminal liability of those causing the collision that the runaway horses might have been checked by the driver by the exercise of diligence and care.
2. SAME — HOMICIDE.— Upon an indictment for murder, where it appeared that the deceased had come to her death in consequence of the collision of a vehicle driven by defendants with that in which deceased was riding, criminal liability of the defendants depends, not merely upon the question whether they were active in inducing their team to run, thereby causing the collision, but also whether they recklessly or wantonly permitted the collision.
3. SAME — INSTRUCTIONS.— In a trial for murder, occasioned by the collision of two vehicles, one of which defendants were driving, an instruction submitting to the jury the question whether defendants were active in causing the collision by urging their team on, no evidence of such fact having been introduced, and the only reference to it in the record being the statement of counsel explaining why it had not been proved, is improper.

Error to circuit court, Jo Daviess county; William Brown, judge.

D. & T. J. Sheean & McHugh, for plaintiffs in error.

George Hunt, attorney-general, and *W. W. Waglin*, state's attorney, for defendant in error.

Shope, J. The plaintiffs in error, John Belk, John Hill and George Williams, with George Belk, were jointly indicted in the Jo Daviess circuit court for the murder of Ann Reed; the indictment charging, in the various counts, in varying forms, that the murder was committed by the defendants, by wilfully, recklessly, negligently, wrongfuly and feloniously driving a team of horses, hitched to a wagon, upon and against a wagon in which the deceased was riding,—thereby causing the horses attached to the wagon in which she was so riding to run away, thereby throwing said Ann Reed upon the ground, whereby she received wounds and injuries from which she died the following day. A trial resulted in an acquittal of said George Belk, and a verdict of guilty of manslaughter as to plaintiffs in error, and fixing their punishment at confinement in the penitentiary at one year each. Motions for a new trial and in arrest were severally overruled, and sentence pronounced by the court upon the verdict. The facts immediately connected with the killing of Mrs. Reed, in reference to which there is little or no controversy, are as follows: On the 5th day of July, 1886, a celebration of the 4th of July was held in a grove about a half-mile from the village of Elizabeth, in Jo Daviess county. The grove was a quarter of a mile from the public highway, and was reached through a lane about one rod wide and fifty rods long, extending from the road into the fields in which the grove was situated. This lane, ordinarily closed by gates at each end, was on this day thrown open and used by the public. About six rods from the gate nearest the grove was a hollow or depression crossing the lane, the descent into which by the road was quite steep, and at this point, owing to the unevenness of the surface of the land, a team could not be driven aside to permit another to pass. About 6 P. M. the deceased, with others, started homeward, through this lane, in a spring wagon or "hack," drawn by two

horses, driven by her son Richard. About the same time plaintiffs in error, in company with George Belk, also started from the grove in a like vehicle, also drawn by two horses, driven by the defendant John Belk. At the time the latter entered the narrow lane the former was some six rods in advance, and in plain view. About the time of so entering the lane, the horses driven by Belk began to run, and ran into and against the wagon in which the deceased was riding, breaking the end-gate and the back of the seat. The collision occurred just as the forward conveyance was descending the declivity into the hollow mentioned. The result was that the horses attached to the vehicle in which Mrs. Reed was riding became unmanageable, and ran away, whereby she was thrown violently to the ground, and was injured so that she died the next day. Some question is made whether the collision was the proximate cause of the team running away, and of the injury and death of Mrs. Reed; but it is enough to say the evidence was sufficient upon which to base the finding of the jury in that respect, the question was submitted under proper instructions, and there is no ground for disturbing the verdict for that reason. There was direct causal connection between the collision and the death of the deceased. Between the acts of omission or commission of the defendants, by which, it is alleged, the collision occurred, and the injury of the deceased, there was not an interposition of a human will acting independently of the defendants, or any extraordinary natural phenomena, to break the causal connection. It may be fairly said that what followed the colliding of the defendants' team with the wagon in which the deceased was riding was the natural and probable effect of the collision, and the collision was in consequence of the manner in which the team of the defendants was controlled. It can make no difference whether the driver of the team after which the deceased was riding was guilty of negligence in not controlling or failing to control his team after the collision. It may be that persons standing by, or the driver, might, by the exercise of diligence and care, have checked the horses, and thereby prevented the final catastrophe; but because they did not do so, and were derelict in moral or even legal, duty in that regard, will not release the defend, ants from the responsibility of their wrongful act or omission

of their legal duty. If the driver, instead of being negligent, as is claimed, in controlling his team, had done some act contributing to the running away of his horses, or driven upon a bank, whereby the carriage had been overturned and the deceased thrown out, or the like, it might justly be said that it was the act of the driver, and not of the defendants, to which the death of the deceased was legally attributable. 1 Whart. Crim. Law, § 341 *et seq.;* Rosc. Crim. Ev., 700 *et seq.*

The case made by the evidence fairly presented the question for determination as to whether the collision was the result of the reckless and wanton failure of the plaintiffs in error, or some one or more of them, to control and manage the team of which they were in charge, or was the result of unavoidable mischance or accident. This record shows that, in approaching the gate and entering the lane, the horses of the defendant were being driven in a walk or slow trot, and apparently under perfect control; about the time they entered the lane the horses started to run, and continued to do so until the wagon in which the deceased was riding was struck as before mentioned; that then, and from there on, said horses were again apparently under perfect control. The evidence fails to show that the horses were started or urged into a high rate of speed by any act or word of the defendants, or either of them. There is great conflict in the evidence as to whether or not said horses were unmanageable, and ran despite the efforts of the defendants John Belk and Hill to control them, or whether they were permitted to run and collide with the wagon of the deceased without any attempt on the part of defendants, or either of them, to control said horses. It is insisted by counsel for the defendants that as there is a failure to show that they were active in inducing their horses to run at the place indicated, that no criminal responsibility attaches to the defendants. This we think a misapprehension of the law. There can be but little distinction, except in degree of criminality, between a positive intent to do wrong and an indifference whether wrong is done or not. It is therefore said: "Carelessness is criminal, and, within limits, supplies the place of the direct criminal intent." 1 Bish. Crim. Law, § 313; *Com. v. Rodes*, 6 B. Mon., 171; Rosc. Crim. Ev., *supra.* Every person driving upon the public highway, or in other place frequented

by others, is bound to exercise reasonable care and caution to prevent injury to others. The law casts upon him the legal duty of observing such care and caution as is exercised by reasonable and prudent men under like circumstances. As a rule, the care required is to be proportioned to the danger; hence driving rapidly in an open country highway may not be negligence, while the same character of driving in a thronged street or thoroughfare, or where there is known hazard to others, may be negligent in the highest degree. 1 Whart. Crim. Law, §§ 353, 355. We have seen that every person driving upon the public highway is under a legal duty to observe, in the control and management of his team, the exercise of reasonable care to prevent injury to others. Every person is criminally responsible for the neglect or wilful failure to perform that duty. To create this responsibility, however, the law must cast upon the persons sought to be charged the legal obligation to do the act or perform the service the omission of which is alleged to be the direct cause of the injury. Id., § 229 *et seq.* If, therefore, the defendants, or such of them as had the control or management of the horses attached to the vehicle in which they were riding, knowing of the danger of the collision and the probable consequences flowing therefrom, recklessly and negligently, or wantonly and wilfully, permitted the horses to run down and collide with the vehicle of the deceased, without using such means as was reasonably at their command to prevent the same, they should be held penally responsible for the result of their negligence or wilful omission of duty. Archb. Crim. Proc., 9; 1 Bish. Crim. Law, § 314. The case in this view should have been submitted to the jury by the trial court. It is strenuously contended, and there is much proof tending to show, that after the horses of defendants had entered the lane, they became frightened and unmanageable, and that the collision was without fault on the part of accused, or either of them; that they used every endeavor to prevent the same, but without avail. If the defendants were not guilty of negligence, and the collision was the result of inevitable accident, or resulted from their horses becoming unmanageable without fault of the defendants, and uncontrollable by the exercise of proper care by the defendants, there would be no criminal liability. It is not our pur-

pose, however, to discuss the evidence pertaining to this branch of the case, for the reason that the plaintiffs in error may again be placed upon trial for the crime of manslaughter under this indictment. As we have seen, there is a total want of evidence in this case showing that anything was said or any act done by the defendants, or either of them, to induce their team to run away, or become unmanageable, or that might have produced that result; and all that can be claimed by the prosecution upon this record is that they failed to perform the legal duty of using reasonable care to check the team and prevent the collision.

The court, by the sixth and eighth instructions given for the people, told the jury that if they believed from the evidence that the defendants, etc., unlawfully, recklessly and carelessly did drive and urge a certain span of horses to so rapid a pace that they could not control them, and in consequence of the careless, reckless and unlawful driving the horses ran into another wagon, etc., whereby the death, etc., of Ann Reed occurred, the defendants would be guilty of the crime of manslaughter. It is to be remarked that the only place in this record in which any reference is made to the fact that the defendants were urging or doing any act tending to urge their horses into a rapid gait, after reaching the lane, is to be found in these instructions, and in the remarks of counsel in argument to the jury. One of the counsel in argument said to the jury that the reason why the prosecution had failed to prove that the defendants were whipping their horses, just as they struck Reed's hack, was because of the absence of the witness Herman Praegar; that, if the witness Praegar had been present, the prosecution would have proved by him that, as the defendants were driving along and running into Reed's hack, they were whipping their horses. It is true, it does not appear that these remarks of counsel were objected to, or the attention of the court called to them by the defendants or their counsel. But followed immediately, as they were, by the instructions referred to, having for their sole foundation these remarks of counsel, or none at all, gave emphasis to them, and must have been prejudicial to the defendants. It is a doctrine so well established in this court that instructions must be based upon the evidence, that no authorities are re-

quired to be cited in support of it. To instruct the jury that if they believed from the evidence that the defendants were carelessly and recklessly urging their horses, was for the court to say, in substance, to the jury, that in the view of the court there was some evidence upon which such finding might be predicated, whereas it is totally without foundation in this record. This was manifest error, and necessitates the reversal of the judgment of the circuit court. The judgment will accordingly be reversed, and the cause remanded to the circuit court of Jo Daviess county for further proceedings. Reversed and remanded.

NOTE.— *Death from negligence.*— Any unlawful and wilful killing of a human being without malice, including a negligent killing, which is also wilful, is manslaughter, and it may exist where there is no evidence of sudden heat of passion. *United States v. Meagher*, 37 F. R., 875. Manslaughter may be committed by wantonly permitting wild beasts to go at large (*Durden v. Barnett*, 7 Ala., 169); or riding an unruly horse into a crowd; or exposing helpless persons in such position that death ensues; and if done maliciously, it is murder. *Nixon v. People*, 3 Ill., 267. Or by immoderate correction, if done in a manner likely to kill or to inflict serious injury. *State v. Harris*, 63 N. C., 1. An indictment for manslaughter lies, under the New York statute, against a builder who uses poor materials, so that the building falls and kills one in it. *People v. Buddensieck*, 103 N. Y., 487. One who, thinking that he had been insulted, brutally pushed or struck the offender, who fell, striking his head against the pavement, *held* guilty of involuntary manslaughter. *Brown v. State*, 110 Ind., 486. It is manslaughter to inflict wounds in rude sport that cause death. *Pennsylvania v. Lewis*, Add. (Pa.), 279. A party leaving dangerous agencies where they are likely to be taken by passers-by may be guilty. *Harvey v. State*, 40 Ind., 560. As by placing poison in such a position that in the ordinary course of things it is likely to be taken by a passer-by. *Reg. v. Chamberlain*, 10 Cox, C. C., 486. But not if it be administered compulsorily, or by another independently of him. *Blackburn v. State*, 23 Ohio St., 146. But it was decided that a master of a house who leaves powder unlawfully and carelessly on his premises is not liable for its negligent misuse by his servants who are capable of judging of the danger. *Reg. v. Bennett*, 8 Cox, C. C., 74. Unless it be left in such a disguised state that its character is not subject to detection. *Reg. v. Bennett*, 9 Car. & P., 356. If death ensues from the performance of a lawful act, it will be murder, manslaughter, or misadventure, according to the circumstances. *Com. v. York*, 9 Met., 93. If an act is committed heedlessly, without any mischievous intent, it will be manslaughter only. *Ann v. State*, 11 Humph., 150. So, recklessly throwing a billet of wood into the street, and thereby causing death. *Reg. v. Vanplew*, 3 Fost. & F., 520. Or recklessly steering a vessel or driving a vehicle. *Reg. v. Taylor*, 9 Car. & P., 672. Or burning a steamer while racing. *Reg. v. Taylor*, 9 Car. & P., 672. Or recklessly and negligently running dangerous machinery. *People v. Sheriff of*

Worcester, 1 Park. Cr. R., 659. Or recklessly and carelessly handling a revolver believing it to be unloaded. *State v. Hardie*, 2 Am. Cr. R., 326. Or recklessly pointing a gun at another without examining it to see whether it is loaded. *Robertson v. State*, 2 Lea (Tenn.), 237. Or recklessly or heedlessly firing a gun. *Reg. v. Jones*, 12 Cox, C. C., 628. But in a case where N., after amusing himself with a small pistol, shooting "Christmas guns," loaded it with only a paper wad, approached a friend, asking her to kiss him, and, upon her refusal, said: "If you don't kiss me I will shoot you," put both arms around her, discharged the pistol below her shoulder, thereby killing her, it was held that the facts did not warrant a conviction for voluntary manslaughter. *Nelson v. State*, 6 Baxter (Tenn.), 599. But it has been held that where one, by the careless use of a pistol in sport, kills another by accident, it is manslaughter, although the victim told him to shoot. *State v. Virnus*, 53 Am. Rep., 466. So if one pursue another with a pistol in sport, and death ensues, it is manslaughter. *Collier v. State*, 39 Ga., 355. Unless the killing was accidental. *State v. Vance*, 17 Iowa, 138. In the use of a revolver, a person is held to only such care as a reasonably prudent man should use under the circumstances. *State v. Hardie*, 2 Am. Cr. R., 326. On an indictment for involuntary manslaughter, the defendant should be convicted if he had reasonable grounds to believe, and did believe, that there was no danger in handling the gun as he did, and he did so with no intent to harm, but the killing, to the exclusion of a reasonable doubt, resulted from the careless use of the gun; but should be acquitted if the killing was accidental, and without carelessness. *Commonwealth v. Mathews* (Ky.), 12 S. W. 333. A careful use of a dangerous article, in ignorance or with a lawful purpose, is not necessarily unlawful. *Ann v. State*, 11 Humph., 159. A person who is guilty of negligence in manufacturing a dangerous article is liable for the damage done by it, however numerous may be the agents through whose hands it was innocently passed. *Elkins v. McKean*, 79 Pa. St., 493.

Estell v. State.

(51 N. J. Law, 182.)

Manslaughter: *Act not malum in se — Res gestæ.*

1. In a case of homicide the narration of the transaction given by the injured man a few minutes after the affair, and after the defendant had left, is not admissible in evidence as a part of the *res gestæ*.
2. The mere unlawfulness of an act done, the same being *malum in se*, will not make the doer criminally liable for its unforeseen consequences, such act being neither dangerous in its nature nor dangerous from its mode of execution.

Error to court of quarter sessions, Monmouth county; Walling, judge.

Aaron E. Johnston, for plaintiff in error.
Charles Haight, for the state.

BEASLEY, C. J. This writ of error has brought up the record of the conviction of the plaintiff in error before the Monmouth sessions of the crime of manslaughter. The pertinent facts were these: The defendant drove his team of mules, attached to a wagon, through a toll-gate of which the deceased man, William H. Hart, was keeper. The state alleged that the defendant's purpose was to escape the payment of toll. Hart, in frustration of this design, ran out and endeavored to stop the team by seizing some part of the harness, and either by this act, or, as was alleged by the state, by incitement from the defendant, the team broke into a run. Hart was dragged a short distance, fell to the ground, the wagon-wheels passing over his body, and so badly injuring him that he died within two days.

The first objection against the proceedings at the trial, as appears from the bill of exceptions, relates to certain statements made by Hart, the injured man. They were made under these circumstances: Hart was run over thirty or forty yards from the toll-house. The defendant drove away, leaving him insensible on the ground. In a few minutes he was removed into the toll-house, and, after being there a short time, perhaps fifteen or twenty minutes, he made the statements in question, being questioned by his wife, thus: "I said to him, 'Why did you not let go?' and he said, 'I could not let go, for they whipped up their horses, and urged them on, and I did not dare let go for fear I would go under the wheel, they were going so fast.' He said they ran over him. I said, 'Who?' and he said, 'I recognized Cale Patterson, and I think it was his son. He had his face from me, the young man did.'" The wounded man died in about thirty-six hours afterwards. These declarations were admitted by the court, not as dying declarations, but as part of the *res gestæ*.

It is entirely plain that they were not admissible. They were no part of the transaction that was being tried. The issue was whether or not the defendant had inflicted the mortal injury. The subsequent statements respecting that affair did not belong to it as a portion of its substance, or as an in-

cident of it. The *res gestæ* were finished, and the wounded man merely described the past transaction. If he could make such description ten minutes after the occurrence, he could do so ten hours afterwards. Nor does it seem that immediate declarations would be more reliable than those that should be made at a later period; for, while the latter in some cases might afford time and opportunity for fabrication, it is certain the former might be adulterated by reason of the vindictive passion unavoidably awakened by the strife or accident, and which would have had no chance of becoming appeased. All such statements, whether proximate or remote, are untrustworthy in the extreme. They are not made under oath; they cannot be discussed by cross-examination, nor are they likely to be open to explanation, generally being fragmentary and incomplete, and liable, therefore, to be misunderstood and misreported. Mr. Wharton correctly defines the rule of law on this subject when he says: "All declarations which are in the nature of a narrative of past events are inadmissible." 1 Whart. Ev., § 265. The decision in the case of *Donnelly v. State*, 26 N. J. Law, 463, 601, rests virtually upon this basis. There the narration of the murdered man was as clearly connected in point of time with the transaction to which it referred as was the narration now in question, and yet the former was not sanctioned on the ground that it was part of the *res gestæ*, but, under the circumstances shown, as a dying declaration. On the assumption that the narration in that case was admissible in evidence for the reason that it was parcel of the matter in issue, it would be manifest that the entire discussion of the subject of the receivability of the statements of persons who are *in extremis* was out of place and uncalled for. The narrative of the wounded man in the present case should have been excluded.

There was also error in the judicial instruction to the jury. The court charged as follows, viz.: "If you find from the evidence that the defendant knew that he was at the toll-gate, and intended and attempted to go through it without paying toll; that to prevent this, and to collect toll after he had demanded it, Hart (the deceased) caught hold of the team, which, then being urged by the defendant, or from fright, went on so fast that Hart was thrown to the ground, run over by the

wagon, and thereby so injured that he died,— then under that finding you would be justified in rendering a verdict of guilty against this defendant." And also: "That if it should appear to the jury that the act of Hart in stopping the team was careless and negligent on his part, nevertheless that fact would in nowise lessen the guilt of this defendant, if your finding as to the facts is as we have just stated the state claims them to be." In this connection the judge was asked to charge that "if the jury believe defendant was driving on the road, using due care in the management of the team in his charge, and the team was suddenly sprung at by the deceased, and thereby frightened and made uncontrollable, causing the death of the deceased, the defendant is not guilty." This instruction was refused. Therefore it is evident that the legal theory on which the case has been tried is that the defendant was chargeable with the death which ensued by reason of the simple fact of his having attempted to pass through the toll-gate without paying his toll. The act being unlawful, it was not necessary that it should appear that it was done in a careless or dangerous manner; nor did it affect this responsibility if the deceased by his own carelessness frightened the team, thus producing the fatal result. This was a plain misstatement of the legal principle. The act of the defendant in making this attempt, in the exercise of due care, was at its worst merely *malum prohibitum*, and was in itself devoid of dangerous tendency, and therefore was not criminal. The mere unlawfulness of the act does not, in this class of cases, *per se*, render the doer of it liable, in criminal law, for all the undesigned and improbable consequences of it. The doctrine is stated in the text-books, and is exemplified in a long train of decisions. 1 Bish. Crim. Law (2d ed.), § 258. In this case the jury should have been told that the defendant was guilty as charged if he did the unlawful act in question under conditions that were dangerous to the toll-gate keeper; as if he drove through the gate at a rapid pace, or urged his team of mules on after they had been seized by the deceased, or if from their known fractiousness it was hazardous to stop them; the criminality consisting of the two elements of the unlawfulness of the act and the unlawfulness and dangers in the mode of its execution. Let the judgment be reversed.

State v. Dorsey.

(118 Ind., 167.)

Manslaughter: *Negligence of railroad engineer.*

An indictment alleging that defendant, a railroad engineer, carelessly and negligently ran his engine into a passenger car, thereby causing the death of a certain person, is sufficient, as charging an offense under Revised Statutes of Indiana, 1881, section 1908, providing that "whoever unlawfully kills any human being without malice, . . . either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter."

Appeal from circuit court, Porter county; E. C. Field, judge.

Indictment of John Dorsey for manslaughter. The state appeals from an order quashing the second count of the indictment.

E. D. Crumpacker, *L. T. Michener*, attorney-general, and *J. H. Gillett*, for the state.

Kenner & Dille, for appellee.

Berkshire, J. The indictment is made up of two counts. The second count was quashed in the court below, and from that decision the state appeals.

The appellee was a railroad engineer, and was running and operating a locomotive engine over the Chicago & Atlantic Railroad, and through Porter county, and while thus engaged he carelessly and negligently ran his locomotive engine into a passenger car standing upon said railroad, thereby causing the destruction of said car, and the death of one William Perry, who was a passenger thereon.

The indictment contains all of the formal allegations necessary to a good indictment, and all necessary substantive allegations, if our statute defining involuntary manslaughter is broad enough to cover an involuntary destruction of life by the commission of a careless and negligent act, not of itself criminal. The statute reads as follows: "Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter." Sec. 1908, R. S. 1881. At common law there is

no question but that the indictment would be good. The authorities in that direction are abundant, some of which we will cite: 1 Bish. Crim. Law (7th ed.), § 314; 1 Whart. Crim. Law, § 130 *et seq.;* Id., § 329 *et seq.; State v. O'Brien*, 32 N. J. Law, 169; *Com. v. Kuhn*, 1 Pittsb. R., 13; *Com. v. Hunt*, 4 Metc., 111; *Mercer v. Corbin*, 117 Ind., 450; *Com. v. Hartwell*, 128 Mass., 415; Moore, Crim. Law, § 863; Gillett, Crim. Law, § 502.

The common-law definition of manslaughter, as given by Blackstone, is as follows: "The unlawful killing of another without malice, express or implied, which may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act." Book 4, p. 191. The statutory definition of involuntary manslaughter is, word for word, the same as Blackstone's. There is nothing to be found in the section defining this crime, or elsewhere in the statute, to indicate that the words "unlawful act" are to have a different interpretation than that given to them at common law; and, the legislature having borrowed the common-law definition of involuntary manslaughter, it is fair to presume, there being nothing to indicate to the contrary, that it was the legislative intention that the statute should be construed in the light of the common law. In addition, we have the following statutory provision in regard to the construction of statutes: "Words and phrases shall be taken in their plain or ordinary and usual sense; but technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import."

The words "unlawful act," as used in the section of the statute relating to involuntary manslaughter, are not technical words, therefore they are to have their plain or usual meaning. Webster defines the word "unlawful" as follows: "Not lawful; contrary to law; illegal; not permitted by law;" and the word "act" as follows: "That which is done or doing; the exercise of power, or the effect of which power exerted is the cause; performance; deed." The word "unlawful" as defined by Bouvier in his Law Dictionary is "That which is contrary to law." Another definition is: "Unlawful implies that an act is done or is not done as the law allows or requires." Abb. Law Dict. "Lawful, unlawful and illegal

refer to that which, in its substance, is sanctioned or prohibited by law." Anderson, Law Dict. "The reader should bear in mind that 'unlawful' signifies contrary to law, and many things are contrary to law while not subjecting the doer to a criminal prosecution." 2 Bish. Crim. Law, § 178. A lawful act done in an unlawful or negligent manner is in law an unlawful act. *Com. v. Hunt, supra.* "Involuntary manslaughter is where a man doing an unlawful act, not amounting to a felony, by accident kills another, or where one kills another while doing a lawful act in an unlawful manner." *Com. v. Kuhn, supra.* See Moore, Crim. Law, § 863; *Reg. v. Skeet*, 4 Fost. & F., 931.

It is claimed that the legislature has given construction to the statute defining involuntary manslaughter by the enactment of sections 2172–2178, inclusive, Revised Statutes 1881. We do not regard these sections as shedding light as to the construction to be given to the statute in question. These sections relate exclusively to the running and operating of locomotive engines and trains of cars over railroads, and were enacted with reference to certain acts and omissions which were theretofore not criminal. We do not mean to be understood as holding that every careless or negligent act whereby death ensues constitutes manslaughter. Far from it. To constitute manslaughter the act causing death must be of such character as to show a wanton or reckless disregard of the rights and safety of others, but not necessarily an act denounced by the statute as a specific crime.

The unlawful act charged in the indictment shows such wantonness and recklessness as to constitute manslaughter if not murder. We are of the opinion that the second count in the indictment is good, and that the motion to quash should have been overruled.

The judgment is reversed, with costs of this appeal, and the court below directed to overrule the motion to quash the second count in the indictment.

TERRITORY v. MANTON.

(18 Mont., 95.)

MANSLAUGHTER: *Evidence — Omission to provide for wife.*

1. Evidence that defendant and his wife had both been drinking; that he allowed the wife to lie on the ice all night, poorly clad, near the house; that he and an employee, who lived with him, brought her to the house the next day, when she died, no effort having been made to get medical aid, is sufficient to sustain a verdict of guilty of manslaughter.
2. INSTRUCTIONS — MURDER. — An instruction that, if deceased was defendant's wife and she was in such condition as to be unable to protect herself, and to reach shelter, and defendant knew her condition, and, from the circumstances, the temperature, his wife's wrappings, and where she lay, and the length of time he left her exposed, had reason to believe that leaving her there would endanger her life, and if he wilfully so left her, and her death was caused by such exposure, he is guilty of murder, — is proper.
3. MANSLAUGHTER — SURPLUSAGE. — Instructions defining manslaughter, voluntary and involuntary, in the words of the statute, are proper, and portions relating to "sudden heat of passion," and "the performance of a lawful act not felonious," or "without due care and caution," may be rejected as surplusage, and an instruction that "death resulting from the wilful omission of duty is murder," and if, beyond a reasonable doubt, deceased came to her death by reason of defendant's wilful neglect of duty towards her, he is guilty of murder, if all the other elements of the crime are proved, — is proper, and not objectionable because irreconcilable with those defining manslaughter.
4. JUSTIFICATION — BURDEN OF PROOF. — An instruction that, "the killing being proved, the burden of proving circumstances of mitigation," or justification or excuse, is on defendant, is not objectionable as leading the jury to believe that, as soon as death is proved or admitted, the burden is then on defendant.
5. INSTRUCTION NOT ASKED FOR. — An instruction to consider her drunkenness, on the question whether she was of so violent a disposition that defendant could not control her, is not erroneous, on the ground that the jury should have been told to consider it in determining whether she died from drunkenness or exposure, where the latter instruction was not asked for.
6. STATEMENT OF FACT. — An instruction that the jury may take into consideration any previous difficulties and quarrels between deceased and the prisoner as evidence of malice is not erroneous as stating a fact to the jury.
7. CONTINUANCE — ABSENT WITNESS. — An application for a continuance, on the ground that an absent witness will contradict the testimony of a witness, on a former trial, that "defendant gathered up all the papers he could get, made a bundle of them, and put them in his pocket," by testifying that the latter witness afterwards searched the premises,

and burned all the papers of any value found there,— is properly denied, as the statements are consistent.

8. CHANGE OF VENUE.— Affidavits that deponents have heard the case frequently discussed, and do not believe that defendant can have an impartial trial in the county because the inhabitants are prejudiced against him, are insufficient for change of venue, and the action of the court in taking the motion under advisement until an effort was made to obtain a jury, and then overruling it, was harmless.

Appeal from district court, Deer Lodge county; before Justice De Wolfe.

Indictment for murder. The eighth, tenth, eleventh, twentieth and thirty-second instructions were as follows: "(8) The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused unless the proof on the part of the prosecution sufficiently manifest that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide." "(10) Manslaughter is the unlawful killing of a human being, without malice or any mixture of deliberation. Voluntary manslaughter is the killing of a human being by another person upon a sudden heat or passion, caused by a provocation apparently sufficient to make the passions irresistible in a reasonable person. (11) Involuntary manslaughter is the killing of a human being by another, without any intention to do so, in the performance of an unlawful act not felonious, or which would not naturally tend to destroy human life, or in the performance of a lawful act without that due care and caution which every reasonable man should exercise in doing any act which might result in the destruction of human life." "(20) Death resulting from the wilful omission of duty is murder. If the jury believe beyond a reasonable doubt that Susan E. Manton came to her death by reason of the wilful neglect of Dennis Manton of his duty towards her, then they should find him guilty of murder, provided they believe that all the other elements necessary to constitute that crime have been proved beyond a reasonable doubt." "(32) The law in this kind of a case is that, if the defendant, at the times charged in the indictment, was the husband of the deceased, the law imposes upon him the obligation of affording her shelter and protection from the cold, and of caring for and saving her life under all circum-

stances and conditions, as far as it lay in his power to do, and if, at the times charged in the indictment, when she received the injuries therein named, said Susan E. Manton was in such feeble condition, or was from any cause so feeble, or was in such condition as not to be able to protect herself, and to reach her house or shelter, and the defendant was her husband, and knew of her said condition, and also knew from all the facts and circumstances, taking into consideration her condition, the coldness of the night, the extent and character of her wrappings, and where she lay, and the length of time he left her lying there so exposed, and that leaving her in such condition would endanger her life, and that he wilfully and purposely so left her, and that her death was caused by such exposure,—if all these facts exist, it would be murder; and if you find from the evidence, beyond a reasonable doubt, that, about the time charged in said indictment, Susan E. Manton was in such condition as not to be able to protect herself, and that the said Dennis Manton knew such fact, and had the means and ability to protect and keep her from the cold, and that he left her so exposed as stated in the indictment, and lying out of any house or shelter all night, and was her husband, and had reason to believe that the leaving her to lie out in such condition all night would endanger her life, and that he, said Dennis Manton, so left her, said Susan, in such condition, with malice aforethought, either express or implied, and that she died from the effects of such exposure, and that the same occurred in Deer Lodge county, Montana territory, you will find the defendant guilty of murder." Defendant was convicted of manslaughter, and appeals.

Cole & Whitehill, for appellant.
W. E. Cullen, attorney-general, for the territory.

McConnell, C. J. The prisoner in this case was convicted of manslaughter in the district court of Deer Lodge county on the 20th day of December, 1887, and was sentenced to imprisonment in the territorial prison for ten years. There was a motion for a new trial, which was overruled, and an appeal taken to this court. This case was before us at the July term, 1887, and was then reversed and remanded for a new trial,

upon the ground of an erroneous instruction inadvertently given. See 7 Mont., 162. There are several grounds of error relied upon by appellant for a reversal of this case. (1) Error for not granting a change of venue. (2) Error for not granting a continuance. (3) Error of law in giving certain instructions to the jury. (4) The evidence does not sustain the verdict.

We will notice these several grounds *seriatim*.

1. The prisoner presented his petition, which was sworn to, supported by the affidavits of a number of the residents of Deer Lodge county, setting forth that the "inhabitants of said county were so prejudiced against him" that he could not expect a fair trial therein. The court took the matter under advisement until an effort was made to obtain a jury. In other words, he made the result of an effort to obtain a jury determine the question whether the prisoner was entitled to a change of venue, and being satisfied from the disclosures made from such effort that he could have a fair trial in said county, he overruled the motion. This proceeding was had under section 226 of the criminal practice act of the territory. It provides, among other things, that "any defendant in any indictment or information may be awarded a change of venue, upon a petition," etc, "and such judge or court, being satisfied that such cause exists, . . . may award a change of venue." The judge or court may award the change of venue upon the unsupported petition of the prisoner, verified by oath either of himself or some creditable person. The whole matter rests in the sound discretion of the trial judge, subject to a reversal for an abuse of that discretion. This discretion is a judicial one, which should only be exercised on good cause shown, which must consist of facts proven to the satisfaction of the judge or court, and not the conclusions and opinions of the parties who make the affidvits. *Kennon v. Gilmer*, 5 Mont., 257. The prisoner read the joint affidavit of fourteen persons in support of his application for a change of venue. That affidavit, after giving the names of the witnesses, is as follows, to wit: "—— ——, being duly sworn, each for himself says that he is a resident of Deer Lodge county; that he has heard the case of the territory of Montana against Dennis Manton frequently discussed by persons living in the neighborhood of where affiant resides, and from what he has heard he does not believe

that said Dennis Manton can have a fair and impartial trial in said county, for the reason that the inhabitants of said county are prejudiced against said Manton." This affidavit does not state a single fact. It simply states the opinions of the witnesses from what they have heard. In the case of *Kennon v. Gilmer*, *supra*, the learned chief justice, who delivered the opinion of the court, says: "An affidavit against a whole community, that states the mere conclusions of the witnesses, is of no consequence whatever. It ought to state the facts, so that the court, and not the witnesses, may determine whether the community is prejudiced. The court is to make a finding from the facts. It is to determine in a judicial manner whether an impartial trial may be had." He sustained this holding by reference to the following cases: *People v. Yoakum*, 53 Cal., 567; *People v. Congleton*, 44 Cal., 95; *People v. Shuler*, 28 Cal., 495; *People v. Mahoney*, 18 Cal., 185; and *People v. McCauley*, 1 Cal., 383. The fact that the court wanted to see whether a jury could be obtained before it decided the application for a change of venue, and the further fact that it may have decided it upon the ground that a jury could be and was easily obtained, make no difference in this case, because the petition and affidavits were wholly insufficient, and the court ought to have refused the application when it was presented. We remark, however, that we do not think that the fact that a jury may be obtained in a county is at all conclusive that a fair and impartial trial can be had in such county. See case of *Kennon v. Gilmer*, *supra*. We do not approve this practice. The court should determine the question from the facts shown, upon a procedure for that special purpose, either by testimony taken by affidavits, or witnesses called and examined in open court, or before the judge at chambers, as the case may be.

2. The application for continuance was made upon the affidavit of the prisoner, stating that one Hiram Bernard was a material witness in his defense, and that he would contradict one Catharine Gannon, a witness for the prosecution; that said witness had testified on the former trial on behalf of the territory in reference to the prisoner's conduct on the evening and night of the alleged homicide, among other things, as follows, to wit: "He [referring to said defendant] made his bis-

cuits, put his biscuits in the oven, went into the room, and gathered up all the papers he could get, and made a bundle of them, and put them in his pocket." And in cross-examination further testified: "He [referring to the defendant] staid till 8 o'clock, till he put his biscuits in the oven, and went in and ransacked, and got a bundle of papers, and put them in his pockets. They were some papers that they had with their business." Said affidavit alleges that witness Bernard will contradict said witness Gannon in relation to the above evidence as follows, to wit: "That a few days after the death of Susan E. Manton, to wit, on the 4th day of March, 1887, the said Hiram Bernard was the keeper for the sheriff of the county of Deer Lodge, who had levied upon the property of the said Manton, and that said Bernard was in the room in the house where said Susan E. Manton died; that he was in the possession of said house for a period of at least ten days thereafter; that the witness Catharine Gannon, together with her son, was in said house when he took possession of said house as said keeper, and they remained there at least six days after the said Bernard took possession; that during that time the said Catharine Gannon searched all the drawers and places and shelves where papers and books were kept, and the said Bernard saw the said Catharine Gannon burn all the papers, documents and books that were found in said drawers, bureaus and other places, which were of any value, and at the same time she took the watch and jewelry that belonged to the deceased, and appropriated and kept them, and claimed with her son the possession and ownership of said house and premises; that afterwards the said Bernard, in company with H. R. Whitehill, one of the attorneys for the defendant, searched for all legal papers belonging either to Dennis Manton, the defendant, or the said Susan E. Manton, and were not able to find any papers of any value whatever, for the reason that the said Catharine Gannon had destroyed all the papers of value that were in the house." The court refused to grant the continuance, but with the consent of the county attorney allowed the affidavit to be read as the deposition of the witness Bernard. A careful analysis of the testimony set forth in the affidavit will show that it is wholly immaterial. The only point upon which he proposed to contradict her was that "he gathered up all the

papers he could get, and made a bundle of them, and put them in his pocket. They were some papers that they had with their business." We gather from the evidence in the transcript that deceased was the owner of the property, and the materiality of this evidence that he put some papers in his pocket lies in fact that it might shed some light upon a motive on the part of the prisoner to destroy the deceased, who was his wife. And it appears that the witness Gannon testified on the trial substantially as it is stated in the affidavit she did on the former trial. But we are unable to see how the testimony of Bernard could contradict her statement. He says, according to the affidavit, that, some time after the death of the deceased, he, as an officer, was in the custody of the house of the prisoner, and the witness Gannon was there, and he saw her burn "all the papers, documents and books that were found in said drawers, bureaus and other places that were of any value." How this contradicts the statement that the prisoner "gathered up all the papers that he could get, made a bundle of them, and put them in his pocket," it is hard to see. It is not stated what papers they were, nor that he got them out of the drawers, nor that the papers which she is alleged to have obtained from the drawers and bureaus, and burned, were the same she testified he gathered up. Both statements may stand together perfectly consistent. Besides, it is not disputed that the prisoner staid in the house all night after he came back from where the deceased was left, that he was there all the time after his wife was brought to the house, the next day, and until her death, which was some twenty-six hours, and how much longer before he was arrested the proof does not disclose. The fact that Mrs. Gannon may have burned the papers she found does not contradict the statement that some time before he gathered up all he could get pertaining to their business, and put them in his pocket. The testimony is too remote and irrelevant upon which to predicate an application for a continuance. But the court below, following the rule laid down in *Territory v. Perkins*, 2 Mont., 467, and *Territory v. Harding*, 6 Mont., 323, stated that he would continue the case unless the county attorney would consent that the affidavit should be read as the deposition of the absent witness, and, the county attorney consenting, the

motion was overruled. We are asked to re-examine the ground upon which these cases are based, and put a different construction upon our criminal practice act touching continuances on account of the absence of a material witness. We do not think this is a proper case in which to consider this question, but by our silence we do not wish to be understood as affirming those decisions. We think the continuance might have been properly disallowed upon the ground already indicated.

3. Objection is made to instruction 8, upon the ground that the words "the killing being proved" refer to cases where there is no conflict of testimony as to the manner of the death and the instrument used in the killing, and that the jury, by this instruction, were led to believe that, as soon as the death was proved, the burden of proving circumstances of mitigation or justification devolved upon the defendant. We are referred to Whart. Hom., § 669, in support of this position. In the section referred to the learned author is combating the doctrine that "when the mere act of killing is proved, without anything more, malice is presumed." "This," he says, "is an axiom handed down to us from the scholastic jurisprudence, and has no application to any case that can arise in a court for trial of real issues; for no such thing as a mere abstract killing of B. by A. can be proved." In other words, while he does not gainsay the truth of the proposition as an abstract principle of law, yet, in practice, it can never occur, for the reason that in the very circumstances attending the killing there will always be evidence either tending to prove or disprove the existence of malice. But the instruction in question is a precise copy of section 40 of the criminal law of this territory, and with us it has the sanction of legislative authority, and by force of the statute is the law. We do not agree with the counsel for the prisoner as to the kind of case the words quoted above refer. The language is, "the killing being proved," not admitted. It means that if the jury find the fact of the killing, and that the prisoner did it, then the burden of proving circumstances which mitigate the offense from murder to manslaughter, or justify the killing altogether, will devolve on the accused, unless the very evidence itself which proves the killing, and that it was done by the prisoner, also shows that it was manslaughter, or justifiable homicide. There was,

then, no error in this instruction. Instructions 10 and 11 are also objected to. They define manslaughter, voluntary and involuntary, in the language of the statute; and in a trial upon an indictment charging murder, which necessarily embraces manslaughter, it would be error to fail to give the jury instructions as to what constitutes manslaughter. And we will see further on that this instruction was proper under the facts of the case. The objection to instruction 20 is that it cannot be reconciled with instructions 10 and 11, defining manslaughter. When this case was before us a year ago, we defined the nature and character of the offense charged in the indictment. See case of *Territory v. Manton*, 7 Mont., 162. And we repeat there again, quoting from 2 Bish. Crim. Law, § 689, that "the doctrine on this subject is that wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting it is guilty of a felonious homicide." And it is immaterial "whether the action be of the mind or of the body; whether it operates solely or concurrently with other things; whether it was consented to by the person on whom it was operated or not; whether it was an unlawful confinement, or the leaving a dependent person in a place of exposure, or any omission of duty which the law enjoins." The very volition of the defendant which led him to refuse aid to his wife, when the law imposed the duty upon him to protect her, is transferred to the violence of the elements, and he is made to use their forces, and hence is responsible for the death they immediately caused. It is well to bear in mind that in this case it is an undisputed fact that the deceased was the wife of the prisoner; and it must be further borne in mind that the very essence of the charge in the indictment is his failure to do something to save his wife from perishing in the cold. The cold is charged to be the means of her death. The prisoner had it in his power to prevent it, and he wickedly and wilfully stood by and let her die. The gist of the offense charged is his passive inactivity when duty called upon him to protect his wife. Hence those portions of the definitions of voluntary and involuntary manslaughter which relate to the "sudden heat of passion," and the performance of an unlawful act, not felonious, "and the performance of a lawful act without due care and caution," are inapplicable, and may be

rejected as surplusage. But the instruction defining manslaughter as the "unlawful killing of a human being without malice or deliberation" was directly applicable to the facts of the case. In the case of death caused by criminal negligence it is difficult to draw the line of distinction between murder and manslaughter. Mr. Bishop, in discussing this subject, says: "If the act is one of negligence not clearly showing danger of life, yet, if death follows, the offense is only manslaughter; whereas, if the exposure or neglect is of a dangerous kind, it is murder. Ordinarily, if a husband should withhold necessaries from his wife, and she dies, it will be only manslaughter, since this act is not so immediately dangerous to life as the other. Whether death caused by neglect is murder or manslaughter is made to depend on the nature and character of the neglect." While instruction 20 makes the wilful omission of duty, which results in death, the test as to whether it is murder, yet the same instruction admonishes the jury that they must believe that all the other elements necessary to constitute murder must be proved beyond a reasonable doubt. In a previous instruction a full explanation of what it took to constitute murder had been given to the jury. While, then, this proposition is obscurely drawn, and the full statutory definition of manslaughter is given, we do not think there is any inconsistency between them, when we take such parts of the latter definition as are applicable to the case; and we feel the better satisfied with this conclusion, in view of the fact that the jury acquitted the prisoner of murder, and only found him guilty of manslaughter. *Parchen v. Peck*, 2 Mont., 573. Instruction 21 is objected to on the ground that it states a fact to the jury, and thereby invaded the province of the jury. It stated to the jury that they might take into consideration any previous difficulties and quarrels between the deceased and the prisoner as evidence of malice. In the case of *Territory v. Scott*, 7 Mont. 407, we sustained a similar instruction, and we refer to that case for the reasons of our decision. Instruction 22 is objected to on the ground that it directs the jury to consider the drunkenness of the deceased on the night of her exposure, to shed light upon the question as to whether she was of so violent a disposition on that occasion that the prisoner could not control her, and was thereby excused for

letting her lie out all night, when it is contended that the jury should have been told to consider it to determine whether deceased came to her death by drunkenness or by exposure to the cold. A sufficient answer to this objection is that the able counsel who represented the prisoner on the trial did not ask any such additional instruction of the court. Certainly the evidence is too slight upon which to predicate such an instruction to induce us to reverse this case upon that ground, when the counsel did not attach importance enough to it to ask it below. Thomp. Char. Jur., §§ 81, 127, and authorities there cited. The counsel for the prisoner observes as to instruction 32 that if "the facts stated in this instruction constitute murder, then the definition of that crime in the law books is wrong." This instruction is made to cover all the facts charged in the indictment, and covered by the evidence, and we think is correct in every particular; and the objection of counsel is a restatement in brief of the ground of his demurrer to the indictment, which we disposed of when this case was before us the other time.

4. The last objection made by the counsel for the prisoner is that the evidence does not sustain the verdict. Without entering into a review of it, it is sufficient to say that we think it abundantly sustains it. The prisoner allowed his wife to lie out on the ice, poorly clad, and within easy-calling distance of the house, all night, and perish with the cold. He had a hired man living with him, who was willing to help him, and they could have brought her to the house, notwithstanding the snow was from two to three feet deep. The best evidence of this is that they did do it the next morning, when it was too late. She languished speechless until the next day, and died. No effort was made to get her medical aid. It is true, the deceased had been drinking, and that this was probably the reason she was not able to reach the house herself; but the proof shows that they had gone together to Philipsburg that day, a distance of seven miles, on foot, and that they both drank together, and the prisoner was himself more or less intoxicated when he left her on the ice to spend the night, while he remained in the house near by. His drunkenness does not excuse him from the discharge of his duty to his wife as husband; nor does her drunkenness excuse him from the dis-

charge of his duty, especially when he drinks with her, and by example and precept contributes to her degradation. The prisoner has had two trials, and the present verdict, which finds him guilty of manslaughter, must stand. Let the case be affirmed.

BACH and LIDDELL, JJ., concur.

TERRELL v. STATE.

2 Pick. (86 Tenn.), 523.

MAYHEM: *What constitutes — Intent.*

1. A specific intent to maim is not necessary to conviction under the Code of Tennessee, section 5357, providing that a person who unlawfully and maliciously disfigures or maims another shall be, on conviction, imprisoned, etc.
2. The testimony of the prosecutor, corroborated by several witnesses, showed that defendant made a violent and unprovoked assault on the former, thereby severely injuring him. Defendant's unsupported testimony went to show provocation and apprehension of danger from the prosecutor when the assault was made. *Held*, that the evidence is sufficient to support a verdict of guilty.

TURNEY, C. J., and SNODGRASS, J., dissenting.

Error to circuit court of Weakley county; W. H. Swiggart, judge.

C. M. Ewing, for plaintiff in error.
Attorney-General Pickle, for the state.

CALDWELL, J. The plaintiff in error, Ned Terrell, stands convicted of the crime of mayhem, and is under sentence of two years' confinement in the penitentiary. The indictment charges him with having unlawfully, feloniously, wilfully and maliciously made an assault upon the prosecutor, James Wilson, and struck him in one eye with a stone, or some other hard substance, whereby the eye was put out, and the prosecutor was maimed and disfigured. It is shown in the proof, and admitted by the prisoner, that he struck the prosecutor in

one eye with "a half of a brick," and that the prosecutor was thereby rendered entirely blind, having previously lost the other eye.

On the trial of the case his honor, the circuit judge, quoted to the jury the statute under which the prisoner is presented, and then charged them further, and among other things, that "in order to convict the defendant in this case it must be shown by the proof that he did put out the eye of the prosecutor, as alleged in the indictment, by wilfully and maliciously striking him in the eye with the brick or other hard substance; and that it was done unlawfully,— that is, without lawful excuse," . . . and that if he did this "from feelings of malice toward the prosecutor . . . he would be guilty as charged." The prisoner's counsel requested the court to instruct the jury, in addition, that unless "the defendant did of his malice aforethought inflict the blow, with purpose or intent to put out the eye, or inflict some other mayhem on the prosecutor, then the defendant would not be guilty of mayhem." This request was refused by the court, and that refusal is assigned as error.

Upon this action arises the inquiry, *Is a specific intent to maim a necessary element of the crime of mayhem?* This precise question never having been decided in this state, its solution can be best arrived at by a brief review of some of the authorities and statutes upon the general subject. "Mayhem, at common law," says Mr. East, "is such a bodily hurt as renders a man less able, in fighting, to defend himself or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem." 1 Whart. Crim. Law (9th ed.), § 581. Anciently the judgment against the offender was that he should suffer loss of the same member of which he had deprived his victim. Id., § 583. Or, as elsewhere more briefly expressed, "the judgment was *membrum pro membro*." 1 Russ. Crimes, 719. "If the plaint be made against a woman who has deprived a man of his members, she shall have judgment to lose a hand, being the member wherewith she committed the offense." 1 Britt., cited in note 3, § 851, 2 Bish. Crim. Proc. Another writer defines the offense thus: "This maiheming is a dismembering of a man, or taking away some

member, or part of his bodie, or the use thereof; as when a wound, blow or hurt is given, or done by one person or more to another person, whereby he is the lesse able to defend himself in time of warre, or get his living in time of peace." Pulton, in note 2, § 1001; 2 Bish. Crim. Law (7th ed.). That a specific intent to commit mayhem upon the person dismembered was not necessary to constitute the offense of mayhem, at the time he wrote, is very forcibly illustrated in an example given by the author last quoted. He says: "If A. doe strike at B., and the weapon wherewith he striketh, breaking or falling out of his hand by force of the blow, doth put out the eyes of D., this shall be adjudged a maihem, for that A. hath an intention at first to doe some hurt in striking at B." Id. Mr. Roscoe, under the title, "Proof of the intent to maim, disfigure or disable," defines mayhem, and then says: "Though the primary intent of the offender be of a higher or more atrocious nature, viz., to murder, and in that attempt he does not kill, but only maims, the party, it is an offense within the fourth section of the recent statute; for it is a known rule of law that if a man intend to commit one kind of felony, and in the prosecution of that commit another, the law will connect his felonious intentions with the felony actually committed, though different in species from that he originally intended. 1 East, P. C. 400." Rosc. Crim. Ev., 733. The same rule of evidence was applied in a case "decided upon the Coventry act, . . . which, like the 9 Geo. IV. and the recent act contained the words 'with intent to maim or disfigure.'" Id.

The earlier American statutes were based more or less upon the Coventry act. "It is 22 and 23 Car. II., ch. 1 (A. D. 1670)," and enacts "that if any person or persons shall, on purpose and of malice aforethought, by lying in wait, unlawfully cut out or disable the tongue, put out an eye, . . . of any subject, with intention in so doing to maim or disfigure him, . . . that person or persons so offending . . . shall be declared to be felons, and suffer death as in cases of felony, without benefit of clergy." 2 Bish. Crim. Law, § 1003. The North Carolina act, passed in 1754, is as follows: "That if any person or persons, . . . on purpose, shall unlawfully cut out or disable the tongue, put out an eye, . . . of any subject of his majesty, in so doing to maim or dis-

figure, . . . the person or persons so offending . . . shall be, and are hereby, declared to be felons, and shall suf. fer as in cases of felony. . . ." Act of 1754, ch. 15 (Scott's Laws Tenn., p. 88). This act is substantially the same in legal meaning as the Coventry act, and differs from it in language only by the omission of the phrases "of malice aforethought," "by lying in wait," "with intention," and "without benefit of clergy." The legislature of Tennessee in 1801 passed a law identical in language with the North Carolina act of 1754, except that from the first line it omitted the words "on purpose," and in a proviso gave the offender the benefit of clergy, and the injured party an action for damages. Acts 1801, ch. 22, § 7 (Scott's Laws Tenn., p. 710). Six years later the general assembly of this state enacted another law with respect to the offense of mayhem, in which the terms of the Coventry act, in the description of the offense, were adopted almost literally, but the grade of the crime, and the punishment therefor, were greatly diminished.

That act was in these words: "That whosoever shall, on purpose and of malice aforethought, by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear or lip, or cut off or disable any limb or member, with intention of so doing to maim or disfigure any person, . . . shall, on conviction, be fined in a sum not exceeding $50, and be imprisoned not exceeding three months, for the first offense, and for the second offense such person shall be fined and imprisoned in manner aforesaid, and shall be disqualified to hold any office of honor, profit or trust, either civil or military, under the authority of this state." Acts 1807, ch. 73, § 13 (Scott's Laws Tenn., p. 1058).

Upon the same and other subjects it was enacted in section 55, chapter 23, Acts 1829, that "No person shall unlawfully and maliciously cut off the tongue or disable the tongue of another by clipping, biting or wounding. No person shall unlawfully and maliciously put out an eye, slit, cut off or bite off the nose, ear or lips of another, or any part of either of them, whereby any person shall be maimed or disfigured. No person shall unlawfully and maliciously cut off or disable the hand, arm, leg or foot of another, or any part of either of them, whereby the person so injured shall lose the proper

use of any of those members. No person shall unlawfully and maliciously shoot or stab another. No person shall unlawfully and maliciously, by cutting or otherwise, cut off or disable the organs of generation of another, or any part thereof. Whoever shall commit any of the offenses mentioned in this section shall undergo confinement in said jail and penitentiary house for a period not less than two nor more than ten years: proviso, if any of said offenses shall be done in self-defense, or without malice aforethought, the person charged shall be excused from the operation of this section." Car. & N. Laws, p. 325. Persons who "in personal combat bite off the finger or thumb" of their adversaries were exempted from the operation of this statute by section 1, chapter 84, Acts 1831 (Id., p. 358). This fifty-fifth section of the act of 1829 is the law of this state at this time, and upon its construction depends the question before us. On being carried into the code of 1859 it was changed in form and arrangement merely, by being subdivided according to subjects, viz.: Mayhem (sec. 4606), malicious shooting and stabbing (sec. 4608), and defense — the proviso — (sec. 4609). The amendment by the act of 1831 was made section 4607, as exceptions to the section preceding it. In the new code (by Mill & V.) these are sections 5357, 5358, 5359, 5360.

A marked change from the language of the former acts is readily observed in this act of 1829, and the change is not only noticeable in the form of expression, but it is material as affecting the meaning intended to be conveyed. The former acts, after describing the injuries, followed the description with the pregnant phrase, "with intention of so doing to maim or disfigure," or "in so doing to maim or disfigure," thereby indicating, it may be said with great plausibility, that an element of the offense should be a specific purpose or intention in the mind of the offender to maim or disfigure his victim, and not to inflict some other injury upon him. These phrases are entirely omitted from the act of 1829, and no words of the same or of similar import are substituted for them. The omission is an important one, and must have been made advisedly. The failure to include in the act words so usual in former acts could hardly have been the result of mistake or oversight, but the inference is fair that the omission was de-

liberately made for the very purpose of excluding the idea that a person who puts out the eye, or cuts off the tongue of another, or otherwise maims or disfigures him, in any of the forms stated, may be excluded from the penalty of the statute, because it may not be shown that he intended to inflict the particular injury charged and proven, instead of a different one. Whether or not the omission was in fact the result of a desire to exclude the idea mentioned, the eighty-second section repealed all existing laws within the purview of the act, and, if there had been no express repeal, the omission itself would have operated as a clear repeal by implication (*The Druggist Cases*, 1 Pickle, 450; *Poe v. State*, 1 Pickle, 495; *United States v. Tynen*, 11 Wall., 88), and in either case the act must necessarily stand upon its own terms, which manifestly do not call for or authorize an interpretation that would include such an idea.

The words characterizing the forbidden acts are "unlawfully and maliciously." They are used alike with respect to every offense mentioned in the section, and must be given the same significance as applied to each of them. They mean the same thing when applied to mayhem that they do when applied to malicious shooting or stabbing. "Unlawfully" always means without legal justification; but "maliciously" has different meanings, which it is not important now to give in detail. Its signification as used in the fifty-fifth section of the act of 1829 is well stated and illustrated in *Wright v. State*, 9 Yerg., 343, 344. Wright was indicted and convicted for malicious stabbing under that section, and on appeal in error to this court it was insisted, in his behalf, that the proof did not show that degree of malice necessary to constitute the offense charged. Judge Turley, delivering the opinion of the court, said: "It is true that the statute requires that this offense shall be committed with malice aforethought, by which is not meant such malice as is required by the third section of the same act to constitute the crime of murder in the first degree, but malice according to its common-law signification, which is not confined to a particular animosity to the person injured, but extends to an evil design in general, a wicked and corrupt nature, an intention to do evil." . . . "The question then arises, is the proof in this case of a character to jus-

tify the jury in having found the existence of malice according to the definition given? We consider it unnecessary to go into a minute investigation of the testimony on this point. It shows beyond a doubt that the prisoner stabbed Lewis Underwood, the prosecutor. Upon this proof the law presumes malice." With this approved interpolation, applied, as it must be, in reference to each of the offenses enumerated, the use of the word "maliciously" in the statutes is shown to afford no justification for the contention that the crime of mayhem can be committed only when the blow is stricken for the purpose of inflicting that particular injury upon the sufferer. The character of malice necessary to the crime of mayhem has in fact been held by this court to be the same as that defined in the case of malicious stabbing just quoted. *Werley v. State*, 11 Humph., 175. Wesley was convicted for the castration of his slave. In his defense it was shown that the slave was of very lewd character, and that his master's purpose was to reform him. Upon the facts it was argued that the necessary malice was wanting. The decision was that the act was unlawful, and, that being so, malice would be implied unless circumstances of provocation be shown to remove the legal presumption. The conviction was affirmed. No more do the concluding words, "whereby any person shall be maimed or disfigured," imply the necessity of a fixed design to maim or disfigure, as an element of the crime. Such an implication we regard as unnatural and unwarranted by anything appearing upon the face of the act, or any sound rule of interpretation. It is true those words should be used in the indictment,— that an indictment without them is bad; and it is also true that "maimed" is a word of art, which the law has set apart for the description of this particular offense, and which cannot be supplied by any other word. *Chick v. State*, 7 Humph., 165. But it by no means follows from all this that mayhem can be committed only when that specific crime is in the mind of the offender. In North Carolina, in the case of *The State v. Girkin*, 1 Ired., 121, the defendant was indicted for that he "unlawfully and on purpose did bite off the left ear of one James Watson, . . . with intent to disfigure the said James Watson. . . . The defendant's counsel insisted, . . . secondly, that it was necessary for the state

to prove malice aforethought, or preconceived intention, and that the act was done with an intent to disfigure." The defendant was found guilty, and, after an ineffectual motion for a new trial, appealed. Ruffin, C. J.: "Both parts of the second objection taken for the prisoner are in opposition to the cases of *State v. Evans*, 1 Hayw. (N. C.), 281, and of *State v. Crawford*, 2 Dev., 425, which establish that the intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute." 1 Archb. Crim. Pr. & Pl. (8th ed. by Pomeroy), 879, 880, note 1. We have not had access to those cases, or the statute upon which they were decided, but enough appears from Mr. Pomeroy's full note, just quoted, to clearly indicate that the North Carolina statute requires a specific intent to disfigure, and that proof of disfigurement meets even that requirement and puts the burden of exculpating himself upon the person charged. Upon a statute very much like our own, the supreme court of Texas recently held that a specific intent to maim is not necessary to constitute the crime of mayhem, and that the unlawful use of such means (a shot-gun) in the commission of the offense as would ordinarily result in maiming would raise a legal presumption of an intent to maim. *Davis v. State*, 22 Texas App., 45. Without further elaboration or discussion, we hold that a specific intent to maim is not, under our statute, a necessary ingredient in the crime of mayhem; and that the refusal of the trial judge to charge it to be so was right and proper.

It is next insisted that, even under the charge of the law as given to the jury, the verdict is not supported by the evidence. Upon this contention, the whole of the evidence has been given a very careful consideration by this court, but it is not deemed necessary to enter into a minute statement or discussion of it in this opinion. It is sufficient to say that the prosecutor's testimony makes a strong case of an unexpected, unprovoked, and violent assault upon him in the night-time, resulting, as already stated, in the destruction of his only eye, and rendering him totally blind. The only countervailing testimony is that of the defendant himself, introduced for the purpose of

showing provocation and apprehension of danger from the prosecutor when the blow was stricken. The other testimony in the record is in conflict with his statements, and corroborative of those of the prosecutor.

We are well satisfied with the verdict. Let the judgment be affirmed.

TURNEY, C. J., and SNODGRASS, J., dissent.

NOTE.— *What constitutes.*— Where the statutes provide that the maiming shall be purposely done, then an injury inflicted without the specific intent to maim or disfigure will not constitute the offense. *State v. Hair*, 7 Am. Crim. R., 369. Thus, under the code of Oregon, which provides, among other things, that "if any person shall purposely and maliciously, or in the commission or attempt to commit a felony, . . . cut or slit or mutilate the nose or lip . . . of another, such person shall . . . be punished by imprisonment in the penitentiary not less than one nor more than twenty years," the evidence must show beyond a reasonable doubt that the accused did the cutting, slitting or mutilation purposely, deliberately and designedly, unless done in the commission of attempt to commit a felony. In that case the defendant in a brawl bit off a piece of the prosecutor's lip. The court says: "Where parties unfortunately become involved in such broils, and one of them receives an injury to some of the organs enumerated in said section of the code, I do not think that it renders the party inflicting it liable to the penalty which that section imposes, although the injury be technically of the character therein mentioned. I do not believe that the legislature intended said provision to include cases arising under such circumstances. It evidently had in view a class of cases in which the conduct of parties was wanton, deliberate and cruel. The language of the section, 'If any person shall purposely and maliciously, or in the commission or attempt to commit a felony,' etc., implies something more than a wounding incidental to a fight. The statute extends the law of mayhem as it existed at common law to other subjects, although it does not use the term except in the title to the chapter of the code enacted by the legislature. *State v. Vowels*, 4 Or., 324. In that case the court by McArthur, J., said: 'It may not be amiss to state that this section (referring to said section 1735) is based upon the English statute of 22 and 23 Car. II., ch. 1, commonly known as the 'Coventry Act;' the circumstances which led to the passage of which are recounted by Lord Macaulay. Hist. Eng., vol. 1, 8vo. ed., p. 77. The 'Coventry Act' to which the learned judge referred was enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament. It enacted "'that if any person shall, of malice aforethought and by a laying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person,' etc., 'shall be guilty of felony,'" etc. The circumstances which led to the passage of the act, and its language, show conclusively the reason

and purpose of its adoption, and the nature and character of offense which it was intended to declare a felony and punish as such; and if the section of the code was based upon that act, as suggested in *State v. Vowels*, as it undoubtedly was, or upon a similar act of parliament passed subsequently thereto, then our conclusion, that it was intended to apply to a class of cases in which the conduct of the parties was wanton, deliberate and cruel, must be correct. Again, the word 'cut' was used in the same connection in said Coventry act, and in English statutes upon the subject passed subsequently, as it is used in said section of the code, and had received a legal construction long prior to the adoption of the section by the legislature of this state. It meant a wound made with a sharp instrument. Bishop, in his work on Statutory Crimes (2d ed.), § 315, says: 'Where the words "cut or stab" are used as in the before-mentioned English statute, they 'relate only to such wounds as are made by an instrument capable of stabbing or cutting,—stabbing being properly a wounding with a pointed instrument, and cutting being a wounding with an instrument having a sharp edge. And if the indictment be for cutting, evidence of a stab will not support the charge; for, as the statute uses the words in the alternate, 'stab or cut,' so as to distinguish them, the distinction must be attended to in the indictment.' Yet cutting or stabbing need not have been the purpose for which the instrument was manufactured. For example, a blow from the sharp claw of a hammer, or the sharpened point of an iron crow, may inflict a cut; but not from the blunt end of a hammer, or from a square iron bar, producing a contused or lacerated gash, or from the scabbard of a sword, or from the handle of a windlass. It was held in New Jersey that if the nose is bitten off it is cut off,—a conclusion not in accord with the English doctrine. Under 1 Jac. 1, ch. 8, § 2, employing the words 'stab or thrust any person,' Hawkins, J., says: 'The killing of a man with a hammer or such like instrument, which cannot come properly under the words 'thrust' or 'stab,' is not a killing, within the statute.'"

"I refer to the latter matter, not so much for the purpose of claiming that the construction by the English courts of the word 'cut,' as used in the English statutes referred to, should be adopted in the construction of the said provision of our code, but to show that such statutes are only intended to include cases where the act was done deliberately and intentionally. Using a sharp instrument to effect the cutting would imply intention and deliberation, which must be shown in some manner in order to authorize a conviction. This question was fully discussed in *Godfrey v. People*, 63 N. Y., 207. That case arose under the statute of that state upon the subject of mayhem, which is perhaps more pronounced, in requiring deliberation, than our code, though much of the reasoning of the learned court applies to t with the same force that it does to the New York statute. The evidence there tended to show that the accused and the complainant had been playing cards together, and got into a quarrel over the game, which resulted in a fight. The parties closed, and during the struggle the accused bit off a piece of complainant's ear. Miller, J., in delivering the opinion of the court, at page 211 of the case says: 'If the offense was committed within the meaning of the statute, it must have been done "on purpose," as well as with a "premeditated design." There is no real ground for claiming that there

was premeditation and a purpose existing at any time during the progress of the conflict when the passions of both parties were aroused, and there was no time or opportunity for recollection or deliberation. Such an assumption would be contrary to the natural inferences to be drawn from the circumstances and the situation of the parties at the time, and, looking at them, it cannot be fairly claimed that the prisoner intended to commit the offense of which he was convicted. An argument is made by the learned counsel for the prosecution to the effect that the doctrine of instantaneous malice, under the old law of murder, is applicable, and that the definition of premeditation, as applied to such a case, may be invoked. I cannot concur in this view. In cases of homicide, where the offense is committed by means of weapons, or by the use of violence sufficient to produce death, such a rule might well be applied, because every circumstance tends to show that the result was intended. But this differs widely from a case of simple assault and battery, where there was a hand-to-hand fight, without any weapon which could be used to maim or disable, and every intendment is against any such purpose. Another answer to this position is that the statute of mayhem in England, as well as in this state, was evidently intended to provide for cases where there was an antecedent and secret purpose to commit the act, and not for casual and sudden affrays, where the act was done in the heat of the strife, and with no direct evidence of any such intention.'

"In *Tully v. People*, 67 N. Y., 15, a case of mayhem by biting the complainant's thumb so as to permanently disable it, the court held that the evidence was sufficient to authorize the submission of the case to the jury. But there the evidence tended to show that the complainant was riding in a street-car; that the accused got into the car, and was put off by the conductor for not paying his fare; that he got on again, and forced his way into the car, exclaiming as he did so: 'Let me in, till I eat somebody.' After getting in, he caught hold of the conductor, and bit his thumb. Complainant requested him to be quiet, as there were ladies in the car, and they both sat down. After a few moments, the accused sprang up and struck complainant, and, as the latter arose, seized his nose with his teeth. Complainant put up his hand to protect his face, when the accused caught his thumb in his mouth, and began to chew it, and continued so to do until he was forced from the car by other passengers, hanging onto the thumb until he reached the platform. In the latter case the jury were justified in finding, not only that the act was done 'purposely and maliciously,' but by 'premeditated design,' as there was direct testimony tending to prove both facts. . . .

"I do not mean to be understood as holding that the crime of mayhem, under the statute, cannot be committed without the use of a knife or some similar weapon. The employment of any direct means in the accomplishment of either of the results mentioned in said section of the code, if made use of for that purpose, would be sufficient. The use of a weapon might not render the wound inflicted any more serious or painful to the party than if it were inflicted by the use of some of the physical organs. But a resort to a weapon, under such circumstances, would afford grounds for an inference that the act was done purposely and designedly." *State v. Cody*, 18 Ore., 506.

The knocking out of a front tooth is mayhem. *High v. State*, 26 Tex. App. 545, and cases. If, at a person's request, another maims him, both are guilty. *People v. Clough*, 17 Wend., 351; *Rex v. Wright*, 1 East, P. C., 396. If a man defending himself by blows goes no further than the law allows, and maims his assailant, he is not guilty. *Hayden v. The State*, 4 Blackf., 546. The injury must be a permanent one. The temporary disabling of a finger, an eye or an arm, is not sufficient to constitute the offense. *State v. Breley*, 8 Port. (Ala.), 472. The offense may be committed without an entire mutilation of the member; but the cutting off a small portion of the member, which can only be discovered by close inspection, is not mayhem. *State v. Abraham*, 10 Ala., 928. To bite is to "cut" within the meaning of the statute. *State v. Mairs*, 1 N. J. L. (Coxe), 453.

STATE v. WATSON.

(41 La. Ann., 598.)

MAYHEM: *Wounding — Indictment — Aider by plea of guilty.*

1. In pleading guilty to an indictment, the defendant confesses himself guilty in manner and form as charged in the indictment, and, if the indictment charges no offense against the law, none is confessed.
2. When the indictment charged the defendant with "feloniously" inflicting a wound less than mayhem, and omitted the statutory definition of the offense, *held*, that no judgment could be entered upon the plea of guilty, as the indictment charged no offense against the law. The law, to make the inflicting of the wound an offense, requires that it must be done maliciously and wilfully.
3. The word "feloniously" is not equivalent in meaning to "wilfully and maliciously." It has no well-defined meaning in American law, but is used in this state to describe more particularly offenses which were felonies at common law, or offenses of gravity which are declared felonies by statute law.
4. The offense charged against defendant was not felony at common law, nor has it been made one by statute.
5. Offenses must be charged in the words of the statute which describe them, or in words which convey the clear meaning of the language used in the statute.

Appeal from district court, parish of St. Landry; Lewis, judge.

Keneth Baillis, for appellant.
Walter H. Rogers, attorney-general, for the state.

McEnery, J. The defendant was indicted for feloniously inflicting a wound less than mayhem. The words "wilfully" and "maliciously," in Act 17 of 1888, which are used to describe the offense, were omitted from the indictment. The defendant pleaded guilty, and thereafter filed a motion in arrest of judgment, the first ground of which is that no judgment could be entered on the plea, as the indictment charged no offense known to the laws of Louisiana. The state appealed from the judgment sustaining the motion, and alleges that the plea of guilty cured all defects in the indictment, and that the word "feloniously" was equivalent to the words "wilfully and maliciously," found in the statute.

By a plea of guilty the defendant confesses himself guilty in manner and form as charged in the indictment, and if the indictment charges no offense against the law, none is confessed. 1 Whart. Crim. Law, § 532. "Feloniously" is a technical word, which was essential in every indictment at common law which charged a felony, which occasioned, on conviction, a forfeiture of lands or goods, to which was superadded other punishment. In American law it has no well-defined meaning, but it is used in this state to designate offenses which were declared a felony at common law, or offenses of considerable gravity, which are declared felonies by statute.

The offense with which the accused is charged is a statutory offense, and it was not a felony at common law and has not been declared one in the statute. The use of the word "feloniously" in the indictment was meaningless and surplusage. The offense charged should have been described in the words of the statute, or in words which convey the clear meaning of the language used in the statute. *State v. Williams*, 37 La. Ann., 776. The plea of guilty, therefore, entered by the defendant, was to a charge of inflicting a wound less than mayhem, not punishable under the law, unless it was done wilfully and maliciously.

In indictments where it is necessary to use "feloniously" to designate the offense as a felony, the omission of the words "with malice aforethought" will not be supplied by the employment of the word "feloniously." 1 Whart. Crim. Law, § 399. It has been held in an indictment for arson, in which the defendants were charged with feloniously setting fire to

a barn, that the word "feloniously" did not supply the omission of the word "maliciously;" and, also, when a statute makes criminal the doing of an act "wilfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously." Id., § 401, note.

We are of the opinion that the word "feloniously," used in the indictment, is not equivalent to, nor is it synonymous with, the words "wilfully" and "maliciously," in Act 17 of 1888, which describes the offense of inflicting a wound less than mayhem, and that the indictment does not charge an offense punishable under the laws of the state, and no judgment could be entered upon the plea of guilty.

Judgment affirmed.

STATE v. SCHEELE.

(57 Conn., 307.)

MURDER: *Defense of habitation — Malice — Instructions.*

1. Upon a trial for murder, where the evidence tends to show that the accused was actuated by malice, as well as by the motive of defense of his house and person from an attack for the purpose of an unlawful arrest, it is proper to charge the jury to find upon the whole question of motive, whether of defense or of malice.
2. Upon a trial for murder the jury were instructed as to the meaning of malice, the difference between express and implied malice, and the effect of unlawful killing without malice; and that, if defendant, without saying a word to the deceased, and while the deceased was at some distance from his house, and had made no assault upon it, shot at and killed him, such an act would not be a reasonable exercise of the right to resist an attack upon defendant's house for the purpose of unlawfully arresting him. *Held*, that a further instruction that "such killing, if done with express malice aforethought, . . . would be murder in the first degree," was proper, and not objectionable, as telling the jury in effect that, the shooting not being justifiable, the accused was guilty of murder in the first degree.
3. It is proper to instruct the jury that under such circumstances the killing would be an unreasonable exercise of the right of defense, where it is submitted to the jury to say what were the facts and circumstances, and whether the act of the accused was reasonable and without malice.
4. An instruction that if the killing was done on account of provocation in a sudden heat of passion caused thereby, and not of express malice,

it amounted only to manslaughter; but if the killing was the result of malice and deliberate and premeditated intent, it would be murder,—was not objectionable as telling the jury that, if the accused was defending his house or liberty, and acted with any deliberation whatever, and was not in a sudden heat of passion, they must find him guilty of murder.

PARDEE and BEARDSLEY, JJ., dissenting.

Appeal from superior court, Fairfield county; Torrance, judge.

Indictment of Jacob Scheele for murder in the first degree. Verdict of guilty, and defendant appeals.

D. B. Lockwood and *H. J. Curtis*, for appellant.

S. Fessenden, state's attorney, and *J. C. Chamberlain*, for the state.

CARPENTER, J. The facts of this case are stated in the finding as follows: Upon the trial of this cause to the jury it was shown by uncontradicted evidence that on the 25th day of January, 1888, at New Canaan, in Fairfield county, Scheele, the prisoner, shot and killed one Louis Drucker, of said New Canaan; that at the time of the killing Drucker had in his possession a warrant for the arrest of Scheele for the crime of violation of the laws relating to the sale of spirituous and intoxicating liquors; that Scheele was in his own house, with the doors and windows fastened against the entrance of Drucker, and that Drucker, having a short time before tried to enter the house, was with his assistants on the land of the prisoner, and in the act of approaching the house for the purpose of executing the warrant.

The state claimed, and offered evidence to prove, that at the time Drucker was a lawfully elected and qualified constable of New Canaan; that on said day he went to the house of Scheele for the purpose of lawfully arresting him upon the complaint, which he then had in his hand for service; that he tried the doors of the house and found them locked, and that some words passed between Drucker and the prisoner; that Drucker then went to the village of New Canaan for assistance, and returned to the house in about fifteen minutes, and on approaching within nineteen feet of the house the prisoner, without warning Drucker, or saying a word as to

his intention, fired a gun loaded with shot at Drucker, killing him instantly.

The state further claimed, and offered evidence to prove, that prior to the killing the prisoner had a quarrel with Drucker, and had a bitter feeling towards him, and had made threats against him, and planned to murder him; and in proof thereof, among other witnesses, offered as a witness Charles Seacord, who testified that on the 25th day of December, 1887, while in his custody under arrest, the prisoner asked him where the "damned Jew" was, meaning Drucker, saying: "I'll fix him so he will stay fixed, and he will not be dogging me around any more;" also Charles Griebel, who testified that, two weeks before the shooting, Scheele said to him that "Drucker, Hawley and others were troubling him, and that, if he could get rid of these men, he would be willing to die for it;" also Frank F. Sanford, who testified that he was at Scheele's house on Christmas day, 1887, and while there, and while Drucker was searching his house on a search-warrant, Scheele wanted to go to his room, saying that he "had something there which, if he had it, he would rip him [Drucker] up," and that he also said, "What they want in New Canaan was three men like them in Chicago;" and also Ezra S. Hall, who testified that after the killing, when he told Scheele that he had killed Drucker, he replied, "I don't care a damn. I am glad of it." The state also, for the purpose of showing deliberation and premeditation, offered as a witness Mary Banzhalf, who testified that, five minutes after Drucker had left the house the first time, Scheele began to nail up the windows of his house, and that he broke pieces of glass out of one of the windows in the second story, and that she saw a hand pull out the broken glass; and the state also offered evidence that Scheele fired the gun out of the window so broken.

The defense claimed, and offered the testimony of the prisoner to prove, that Drucker intended, if necessary, to enter the house by force, and to take him, dead or alive, and that he believed that he so intended to do. The defense also claimed, from the testimony of certain witnesses for the state, that Drucker, when approaching Scheele's house the second time, intended and was about to break into the house unlawfully, and arrest Scheele in an unlawful manner, and that Scheele so

believed, and was justified in so believing. The state denied this claim, and, from the whole evidence, claimed that Scheele neither believed, nor was justified in believing, that Drucker intended or was about to break into the house unlawfully, or to make the arrest unlawfully. The defense also claimed, and offered evidence to prove, that the prisoner was of unsound mind at the time of the killing; that, immediately after killing Drucker, he attempted to kill himself, by firing four small bullets from a pocket pistol,— one into his head, and three into his body; and by such action, and his conduct before and at the time of the shooting, claimed to have proved that he was incapable of forming a deliberate intent to kill; at least, incapable of forming an intent to commit the crime of murder in the first degree. The state claimed, and offered evidence to prove, that the prisoner was of sound mind at the time of the commission of the crime, and that he was capable of forming a deliberate and premeditated intent to take the life of Drucker, and also that Drucker had no intention to enter the house by force, or to make the arrest of the prisoner in any other than a lawful manner, and that there was nothing in the conduct or language of Drucker to indicate any such intention, or to induce such belief on the part of Scheele, and that Scheele did not in fact believe it. Upon the evidence so offered, the state claimed that Scheele wilfully, deliberately and premeditatedly, and of his malice aforethought, killed Drucker, and thereby committed the crime of murder in the first degree. The prisoner was convicted of murder in the first degree, and appealed to this court. The reasons of appeal relate to the charge to the jury, and the refusal of the court to charge as requested.

The part of the charge complained of in the second reason of appeal is as follows: "If you find that the deceased entered upon said land, and was approaching said house, for the purpose of breaking into the house to arrest the accused in an illegal manner, and the accused, under the circumstances, had reason to believe, and did believe, that the deceased was about to carry such purpose into immediate execution by an assault upon the house, the accused had the right to make all reasonable resistance to prevent the deceased from executing said purpose; and if you find that, under the circumstances, the

accused, without saying a word to the deceased by way of warning or otherwise, and while the deceased was at some considerable distance from the house, and had made no actual assault upon it, as claimed by the state, shot at and killed him, such an act would not be a reasonable exercise of the right of the accused to resist, under such circumstances; and such killing, if done with express malice aforethought, as I have explained it, would be murder in the first degree; but if done without such express malice aforethought, but with implied malice, would be murder in the second degree. It is for you to say, as a question of fact, from all the evidence in the case, what were the facts and circumstances under which the killing was done, and whether, under all the circumstances, what the accused did was reasonable and proper, and done without express malice; and you are to judge this man as the circumstances appeared to him at the time." Counsel for the defense claim "that, on the facts assumed by the court to be proved, the instructions given were not correct and adapted to the issue, or sufficient for the guidance of the jury in the case before them; for while the court charges the jury that the action of the prisoner in firing upon the deceased nineteen feet from the house, and without warning, is an unreasonable exercise of his right of defense, the court fails to say that, if the shooting was done in defense of house, person or liberty from an unlawful assault, or one about to be made, and from no other motive, the prisoner would be guilty of manslaughter." This claim assumes, what the record will not warrant, that the evidence was such as to require a charge upon the theory that the prisoner's sole motive was to defend his house and person by repelling an attack which he supposed was about to be made upon them by the deceased; for there was evidence, and pretty strong evidence, that the prisoner was actuated by express malice. If so, there was also the motive of revenge or the gratification of malice. The criticism is based upon the theory that it was the duty of the court to ignore all evidence tending to prove such a motive, and submit this part of the case to the jury on the motive of defense alone. The case did not call for that; therefore we think the court properly submitted to them the whole question of motive, whether of defense or of malice. If there

was express malice, there were necessarily motives apart from those of self-protection. It is conceded that motives of defense, in order to avail the prisoner, must have been the only ones; for counsel certainly do not go so far as to claim that, if there was occasion to defend person or property, or both, the prisoner might avail himself of that occasion to deliberately, and of his express malice, take the life of the assailant for other reasons, and incur no greater risk than the penalty for manslaughter.

"And such killing, if done with express malice aforethought, as I have explained it, would be murder in the first degree." This sentence is objected to, as telling the jury in effect that, the shooting not being justifiable, the prisoner is guilty of murder in the first degree. We do not think that that expresses fairly the meaning of the charge, the whole of which is to be taken together in determining its meaning. The court very fully and fairly explained malice to the jury, and the distinction between express and implied malice, and also an unlawful killing without malice; and the jury was distinctly told repeatedly that express malice was essential to the crime of murder in the first degree. We cannot interpret the charge as giving the jury to understand that an intent to take life unlawfully was necessarily equivalent to express malice, or that any form of killing without malice would be murder. It seems impossible that the jury could have received the impression that the killing, if without malice, could be murder in the first degree. The jury could not fail to understand that, if the shooting was done in defense of house, person or liberty from the apprehended assault, and without other motives,— consequently without malice,— but under such circumstances as to be an unreasonable exercise of the right of defense, the prisoner would be guilty of manslaughter only. But if it be conceded that the defense was entitled to a charge which would or might take from the jury the question of malice and require them to pass upon the case upon the theory that malice was wholly wanting, then we think that the jury were told, in substance, all that the defense now claims that they should have been told, in the court's response to the defendant's requests. But, aside from that, the jury were not required to take that view of the case, or to consider it in that

aspect, for they found, and must have found, that the killing was wilful, deliberate and premeditated; or, as the court expressed it, "of his express malice and out of the hatred of his heart."

It is also claimed that the court erred in stating, as a matter of law, that, under the circumstances of the case there outlined, the killing would be an unreasonable exercise of the right of defense. But counsel, in their requests and in their arguments, admit that it was an unreasonable exercise of the right of defense, for they claim that the offense was manslaughter; whereas if it had been a reasonable exercise of the right, the act was justifiable and not a crime at all. Moreover, the opinion expressed by the court was based on the assumption that the facts as claimed by the state were proved, and on that assumption was obviously correct. Again, the court submitted it to the jury "to say, from all the evidence in the case, what were the facts and circumstances under which the killing was done; and whether, under all the circumstances, what the accused did was reasonable and proper and done without express malice."

The third reason of appeal arises upon the court's response to the prisoner's seventeenth request to charge the jury, which request and answer are as follows: "If the jury find that the deceased was not in fact attempting to make a forcible and unlawful entry into the dwelling-house of the prisoner, yet if they are of opinion that the deceased and his party were on the point of unlawfully breaking in, or likely to do so, and under such circumstances as to raise a reasonable belief in the prisoner's mind that such was their intent, and that imminent danger of great bodily harm was threatened him, and under this belief he fired the shot, such circumstances are a sufficient provocation to make the killing manslaughter and not murder." To this the judge responded: "I charge that, gentlemen, with this limitation: If this killing, under the circumstances here claimed, was done on account of the provocation, in a sudden heat of passion, caused by such provocation, and not of his express malice and out of the hatred of his heart, that is the law. It would, under such circumstances, reduce the crime to manslaughter. But if, on the other hand, under the circumstances stated in this request, he had hatred in his heart to-

wards this man and intended to kill him, and the killing was the result of deliberate, wilful and premeditated intent, and not the result of this provocation, it would not reduce the crime to manslaughter at all, but in such case would be murder." It will be observed that one of the assumed facts on which this request is based is that there was a reasonable belief in the prisoner's mind that he was in "imminent danger of great bodily harm." That claim need not be considered in this connection because that was the subject of a distinct request, and the court charged as requested. We quote the request and charge: "If the jury find that the prisoner was occupying a dwelling-house, and resisted an unlawful attempt to enter his house by force, and fired the shot under such circumstances as would produce in his mind a reasonable belief of imminent danger of great bodily harm or death, the killing of his assailant is not criminal, but excusable;" to which the judge responded: "If you find such a state of facts to exist in this case, gentlemen, that is the law. If you find that this man, under the circumstances, within the language of this request, was occupying his dwelling-house, and resisting an unlawful attempt to enter the house by force, and that he fired the shot under such circumstances as would produce in his mind — judging him by the circumstances as they appeared to him — a reasonable belief of imminent danger of great bodily harm or death, the killing of his assailant is not criminal but excusable."

We return now to the seventeenth request. There can be no objection to the court's response to that. The jury were properly required to find whether the homicide was the result of passion and excitement caused by the provocation, or was the result "of his express malice and out of the hatred of his heart." Of course, the jury found the latter to be true. It is not a fair interpretation of the charge to say that the jury were told that if they found "that this man was defending his house, person or liberty, and acted with any deliberation whatever, and was not in a sudden heat of passion, then they must find him guilty of murder." There is another side to it. This particular portion of the charge — and in that it agrees with the tenor of the whole charge — instructed the jury to inquire whether "the killing was the result of deliberate, wilful and

premeditated intent, and not the result of this provocation;" and that, if it was, "it would not reduce the crime to manslaughter at all, but in such case would be murder."

The eighteenth request and the response thereto were as follows: "If the jury find that the deceased was not, in fact, attempting to make a forcible and unlawful entry into the dwelling-house of the prisoner, yet if they believe that the deceased and his party were on the point of breaking in or likely to do so, and under such circumstances as to raise a reasonable belief in the prisoner's mind that such was their intent, and that he would be powerless to prevent their entrance by the exercise of a less degree of force than that applied, or such a degree of force less promptly applied, such circumstances are a sufficient provocation to make the killing manslaughter and not murder." The instruction given was as follows: "Gentlemen, if you find the facts as here claimed, the law is so; with the limitation stated under the other request, that, under all the circumstances, the shooting was the result of a sudden heat of passion arising from this provocation; that the prisoner, under all the circumstances, had reason to be provoked; that, as he looked at it — as the circumstances appeared to him — he was suddenly carried beyond a control of his will by an excess of passion caused by such provocation, and that the shooting was not the result of malice." Here the defense called attention to the facts and circumstances tending to prove a provocation and on which the request was based, and asked the court to consider them without regard to the evidence tending to prove malice, and to say that such circumstances are a sufficient provocation to make the killing manslaughter and not murder. It was not the duty of the court to so charge without qualification or limitation, and such a charge would not have been adapted to the facts and claims of the parties. Here, too, the jury were properly told, in substance, to inquire whether the killing was with or without malice.

The prisoner's counsel, under the fourth head of their brief, enlarge upon the objections raised in the second and third heads. Here they admit that the law as given by the court may be a sufficiently correct statement, but claim that it fails to be correct when applied to a case like this, where a homicide is claimed to have been committed in defense of house, liberty

or person. The objections made by the defense, and the whole course of the argument, seem to imply a claim that, if the element of defense of property or person was involved in the act, the offense, as matter of law, could not be greater than manslaughter, no matter how strong the evidence might be of express malice. That cannot be the law. It was for the jury to say whether there was malice and consequent murder. In support of their claim counsel cite *Com. v. Carey*, 12 Cush., 246. In that case the prisoner had broken into the ticket office of a railroad company, but there was no evidence that he had stolen anything. The deceased, who was a constable, caught him in the ticket office and arrested him. The prisoner attempted to escape and was pursued by the deceased. The prisoner turned around with a pistol in his hand and told the deceased to go back or he would shoot him. The deceased stopped, but did not go back, and the prisoner shot him. On the sole ground that the deceased had no right to arrest him without a warrant, the crime he had committed not being a felony, the court held that the homicide was manslaughter and not murder. Shaw, C. J., said: "The court were of opinion, and proposed to instruct the jury, that if a prisoner is unlawfully arrested, and if, in resisting arrest or attempting to escape, he takes the life of the person so arresting him, although the act is not justifiable and amounts in law to a criminal homicide, yet it is not homicide with malice aforethought, which is necessary to constitute murder, but it will, in contemplation of law, be manslaughter. This was a principle somewhat technical, but yet well established by law, that although in many cases, and even in the present case, if the evidence already offered should remain uncontroverted, the act might be done under such circumstances of deliberate cruelty as would equal or surpass, in point of atrocity and moral turpitude, many cases recognized as murder, yet the prisoner must be tried by the rules of law, and not by the aggravation of the offense as tried and tested by another and different standard."

Thus the question whether it was murder or manslaughter depended upon the common-law distinction between felony and minor offenses,—a distinction without much significance at the present day, and one with which, presumptively, both

the prisoner and his victim were not familiar, — instead of upon the facts attending the homicide and the *animus* of the prisoner. Murder was then (in 1853) but one offense, having been divided into the first and second degrees five years later. As it was either a capital offense or manslaughter, we can appreciate the willingness, and even the desire, of the court to regard it as the lesser offense. But, aside from this, there was no evidence of previous ill-will or animosity towards the deceased, and the prisoner gave him warning, thus indicating a desire to escape without taking life; while, in this case, there was evidence of express malice, indicating a desire to take life, and the act was perpetrated without caution or warning. On the whole, we can hardly regard that case as a controlling authority.

In *State v. Patterson*, 45 Vt., 308, the court treats mainly of justifiable homicide in defense of one's dwelling-house. The question of manslaughter in such cases is indeed spoken of; but we do not find in that case any authority for the proposition that, if an officer is about to enter a house unlawfully, in the day-time, for the purpose of arresting the occupant for a misdemeanor, and the occupant, out of the hatred of his heart and of express malice, kills the officer, the crime, as matter of law, is manslaughter only. The law of self-defense, or the defense of one's domicile, does not require the giving to evil-minded persons an opportunity to take the life of another on such easy terms.

In *Brooks v. Com.*, 61 Pa. St., 352, a theft was committed in a house. Soon after, the owner and his brother pursued the thieves and overtook them. In attempting to arrest them the brother was killed. The prisoners were indicted for murder. On the trial the court was asked to charge that as the pursuers, not being public officers, had no authority to arrest, the arrest was illegal, and the killing was not murder, but manslaughter. The court refused so to charge. It was held not to be error, as so to charge would have taken the whole case from the jury. The syllabus says: "If the arrest had been illegal, it was still for the jury to determine whether the killing was without malice, and arose from a sudden heat upon the arrest." In the course of the opinion the court says: "An innocent man is unconscious of guilt, and may stand on

his own defense. When assailed under a pretense which is false, his natural passion rises, and he turns upon his assailant with indignation and anger. To be arrested without cause is to the innocent great provocation. If, in the frenzy of passion, he loses his self-control, and kills his assailant, the law so far regards his infirmity that it acquits him of malicious homicide. But this is not the condition of the felon. Conscious of his crime, he has no just provocation. He knows his violation of law, and that duty demands his capture. Then passion is wickedness, and resistance is crime. Neither reason nor law accords to him that sense of outrage which springs into a mind unconscious of offense, and makes it stand in defense of personal liberty. On the contrary, fear settles upon his heart, and, when he uplifts his hand, the act is prompted by wicked hate and the fear of punishment. . . . A sense of guilt cannot arouse honest indignation in the breast, and therefore cannot extenuate a cruel and wilful murder to manslaughter."

That case, in some of its features, resembles this, and especially in respect to the all-important fact that there is evidence of express malice; the existence of which, under the charge of the court, has been found by the jury. Of course, the observations in that case have no application to a case where an innocent man is being lawfully arrested. Nor do they apply in full force to the case at bar; but they are applicable to some extent. The officer was attempting to arrest the prisoner for a violation of the law relating to the sale of spirituous liquors. Whether guilty or innocent, it was his duty, as a law-abiding citizen, to submit to the arrest. Men generally, uninfluenced by passion, would have done so. Had he done so, he would have been discharged as innocent, or have received a comparatively light punishment for his offense, and no serious consequences would have resulted. His house would have received no harm, and his life and the life of the officer would have been saved. True, he was not bound to submit to an illegal arrest. He had a strict legal right to fortify himself in his castle, and to resist an attack upon it by all lawful means. If resistance by lawful means result in death, it is excusable homicide; if by unlawful means, and without malice, it is man slaughter; if by unlawful means, prompted by hate and malice,

and death in cool blood is intended, it is murder in the first degree. No man who is being wronged may take that occasion to deliberately murder the wrong-doer.

In *Rafferty v. People*, 69 Ill., 111, the prisoner was being arrested for violating a by-law of the city of Chicago, on a warrant signed in blank by a magistrate, and subsequently fiilled out by a sergeant of police, who gave it to a policeman to serve. The officer and the deceased attempted to arrest the prisoner, when the homicide occurred. It was held that the warrant was void, and the crime manslaughter only. The court says: "His name was inserted in the warrant by the sergeant of police, after it had been delivered to him by the magistrate, and consequently without authority. These facts, if found by the jury, should determine the character of the homicide to be manslaughter, unless the proof showed express malice towards the deceased." The existence of proof of express malice is what distinguishes this case from that. The same case was subsequently before the court (72 Ill., 37), and a portion of the syllabus reads as follows: "(4) If an officer be resisted and killed by one whom he is illegally attempting to arrest, and it appears that the party who does the killing was actuated by previous or express malice in so doing, such killing is murder, notwithstanding the illegality of the attempted arrest." "(7) Where a party procures a weapon for the express purpose of resisting an arrest, whether legal or illegal, by a particular officer, or by one of a particular class of officers, and such officer attempts to arrest him, and, before any violence is done or offered to him, he kills such officer with the weapon thus provided, the jury will be justified in finding that he was actuated by previous or express malice, and the killing is murder, notwithstanding the attempted arrest was illegal."

On the trial then under review were two important questions of fact: (1) Was the deceased participating in the attempted illegal arrest? (2) Was the prisoner actuated by express malice? The court, in its opinion, says: "But there is another view of the evidence which would entirely override the questions of illegal arrest, or O'Meara's participation in it, and that was the evidence of a previous or express malice. Only three days previously the prisoner declared, in substance, that

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no Bridgeport policeman should arrest him while he had a pistol. It appears that, although finding him in the saloon was a matter of pure accident, he was already prepared with the very weapon alluded to in his threat. These officers were Bridgeport policemen, and it appears that he did not use it upon the deceased merely because he was preventing his egress from the saloon; but, when he had shot him through the breast, then, without offering to go out of the door, he instantly turned around and fired two shots at Scanlon, who was back of him, and had no agency in preventing egress from the room, either by personal violence or constructively by guarding the door."

In the present case the prisoner testified that he believed that Drucker intended, if necessary, to enter the house by force, and that he intended to take the prisoner "dead or alive;" and that he believed that he intended so to do. Whether there was other evidence tending to prove that the officer intended great bodily harm we know not; but, as we have seen, the question whether the prisoner was in imminent danger of great bodily harm or death, or that he believed that he was, was submitted to the jury, and the verdict was an emphatic negative answer. The prisoner, therefore, cannot be regarded as defending his life or himself against great bodily harm, but simply as defending his house against an unlawful entry by parties whom he knew, in the day-time, for the purpose of executing an lawful warrant, and his person against an unlawful arrest by reason of such unlawful entry. If, in making such defense, the prisoner had not intended to kill the deceased, but had, by an unreasonable defense, unintentionally killed him, the crime would have been manslaughter. If the prisoner had warned him of his intention, had commanded him to desist, had given him a reasonable opportunity to desist before shooting, the defense could hardly have been regarded as greater than manslaughter. Now, take the case as it was. There was evidence tending to prove that, prior to the killing, the prisoner had a quarrel with Drucker, and had a bitter feeling towards him, and had planned to murder him. He asked one witness where the "damned Jew" was, meaning Drucker, saying: "I'll fix him so he will stay fixed, and he will not be dogging me around any more." About two weeks before the

shooting he said to another witness that "Drucker, Hawley and others were troubling him, and that, if he could get rid of these men, he would be willing to die for it." On one occasion, while Drucker was searching his house on a search-warrant, he wanted to go to his room, saying he "had something there which, if he had it, he would rip him up." He also said: "What they want in New Canaan was three men like them in Chicago." Another witness testified that, five minutes after Drucker left the house the first time, the prisoner began to nail up the windows of his house, and that he broke pieces of glass out of one of the windows in the second story. The state also claimed to have proved that he fired the gun from the window so broken. Now, suppose that the jury believed this evidence, as they must have done. Is it possible that the offense in law, by reason of the defense of his house, and of his person from such unlawful arrest, is manslaughter only? Is that the protection which the law throws around its officers? May any one who has murder in his heart, and desires to kill an officer, and who is about to be arrested for a misdemeanor, fortify himself in his dwelling-house, and on the approach of the officer, without notice or warning, shoot him, "of his express malice, and out of the hatred of his heart?" A majority of the court think that the case was properly submitted to the jury, and therefore find no error.

PARK, C. J., and LOOMIS, J., concurred.

PARDEE, J. (*dissenting*). The accused offered evidence tending to prove, and claimed that he had proved, that the deceased intended to use sufficient force to effect an entrance into the house, and take him dead or alive; that he so believed; also that he believed, and had reason for believing, that the deceased intended, and was about to effect, an unlawful entrance into the house, and unlawfully arrest him. These claims upon the part of the accused were supported by admissible testimony, which testimony it was within the legal power of the jury to believe, if they saw fit so to do. Therefore it was a possible fact in the case that the deceased did so intend, and the accused did so believe, and that his action was wholly the result of such belief; and upon such possible fact he asked the court to in-

struct the jury as to his legal rights. The court charged the jury as follows: "If you find that the deceased entered upon said land, and was approaching said house, for the purpose of breaking into the house to arrest the accused in an illegal manner, and the accused, under the circumstances, had reason to believe, and did believe, that the deceased was about to carry such purpose into immediate execution by an assault upon the house, the accused had the right to make all reasonable resistance to prevent the deceased from executing said purpose; and if you find that, under the circumstances, the accused, without saying a word to the deceased by way of warning or otherwise, and while the deceased was at some considerable distance from the house, and had made no actual assault upon it, as claimed by the state, shot at and killed him, such an act would not be a reasonable exercise of the right of the accused to resist, under such circumstances, and such killing, if done with express malice aforethought, as I have explained it, would be murder in the first degree; but if done without such express malice aforethought, but with implied malice, would be murder in the second degree. It is for you to say, as a question of fact, from all the evidence in the case, what were the facts and circumstances under which the killing was done, and whether, under all the circumstances, what the accused did was reasonable and proper, and done without express malice; and you are to judge this man as the circumstances appeared to him at the time."

If a person approaches the house of another with the intent to make an unlawful entrance by force, and an unlawful arrest of the owner, who is therein, the latter, having reason for believing such to be his intent, and that he is about to carry it into effect, may, for the sole purpose of preventing the execution of such unlawful intent, make resistance sufficient in degree and in time to prevent it. He is under no legal obligation to admit the unlawful intruder, or flee from the house, and permit him to effect an unlawful entrance. If the resistance is neither greater in degree nor earlier in time than is necessary, and it results in the death of the assailant, it is justifiable homicide. And the slayer is to be judged as the circumstances really appeared to him at the moment. If the resistance is unnecessarily great in degree or early in time,

and therefore unreasonable, and therefore unlawful, and results in the death of the assailant, it is manslaughter. It is not murder either in the first or second degree, although the act is the result of premeditation and intent, if such premeditation and intent include nothing more than defense against the unlawful attack. The court had previously instructed the jury that, "to constitute murder in the first degree, there must have been in the mind of the accused, at the time of the homicide, a deliberate, specific intent to kill, as this is an essential element of this crime. Such a specific, wilful, deliberate intent to kill would constitute express malice aforethought." In effect, therefore, the jury were instructed that if they should find this killing to have been the result of unnecessary force, or to have been unnecessarily soon, and therefore unlawful, it would be murder in the first degree, if it was done in coolness and with premeditation. But, as a matter of law, it is possible for a man to be very cool, deliberate and determined in defending his house from an unlawful entry by force, for the purpose of making an unlawful arrest of himself, even to the killing of the assailant,— by force found to have been unnecessary in degree and time, and therefore unlawful,— and yet not to be guilty of murder in the first degree. If the premeditation and intent are the result of previous hatred and malice, and are in any degree based upon revenge for past injuries, and not wholly upon protection from present danger, and if the present danger is used only as an opportunity for such revenge, the killing is murder in the first degree.

The jury are to determine in all cases as to the foundation of the premeditation and intent; also, under instructions by the court as to the rule of law, to determine the fact as to the reasonableness or unreasonableness of the force used in repulsion. It cannot be said, as a matter of law, that, under any and all circumstances, the killing of such assailant, even without warning, and when twenty feet distant from the house in his approach, was unreasonable, and therefore unlawful, and therefore murder or manslaughter in some degree. It is for the jury to say, under instructions as to the rule of law, if a warning was necessary, and if the killing at twenty feet distant was unnecessary.

In *Com. v. Carey*, 12 Cush., 246, the facts were as follows:

One Heywood, a constable, without a warrant, had arrested Carey for a misdemeanor,—a degree of crime for which, in Massachusetts, a man could not be arrested by an officer without a warrant. Carey broke away from Heywood, and ran off. Heywood pursued him. Carey knew he was a constable. Carey carried a pistol in his hand, which he once or twice pointed at his pursuer, but said nothing. After running about two hundred rods he made a stand, and told Heywood, who was within twenty feet of him, to go back, or he would shoot him. Heywood stopped, but refused to go back. Carey took aim and fired. The ball took effect in the constable's abdomen, and he died in eighteen hours. Shaw, C. J., stated that "the court were of opinion, and proposed to instruct the jury, that if a prisoner is unlawfully arrested, and if, in resisting the arrest or attempting to escape, he takes the life of the person so arresting him, although the act is not justifiable, and amounts in law to a criminal homicide, yet it is not homicide with malice aforethought, which is necessary to constitute murder; but it will, in contemplation of law, be manslaughter. This was a principle somewhat technical, but yet well established by law, that although, in many cases, and even in the present case, . . . the act might be done under such circumstances of deliberate cruelty as would equal or surpass in point of atrocity and moral turpitude many cases recognized as murder, yet the prisoner must be tried by the rules of law, and not by the aggravation of the offense, as tried and tested by another and different standard."

In *Com. v. Drew*, 4 Mass., 395, Parsons, C. J., said: "It is a rule of law that, where the trespass is barely against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon. . . . If any man, under color or claim of legal authority, unlawfully arrrest, or actually attempt or offer to arrest, another, and if he resist, and in the resistance kill the aggressor, it will be manslaughter." In *Rafferty v. People*, 69 Ill., 111, the marginal note is: "It is a general rule that when persons have authority to arrest or imprison, and, while using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance. But, . . . if the officer exceed his authority,

the killing of the officer, in such a case, by the person sought to be arrested, will not be murder, but manslaughter only." See, also, 3 Greenl. Ev. (14th ed.), § 123; 1 Bish. Crim. Law (7th ed.), § 858; Whart. Crim. Law (4th ed.), § 975. In *Pond v. People*, 8 Mich., 150, it is said, in the marginal note: "A man assaulted in his dwelling is not obliged to retreat, but may use such means as are absolutely necessary to repel the assailant from his house, or prevent his forcible entry, even to the taking of life; and, if the assault or breaking is felonious, the homicide becomes at common law justifiable, and not merely excusable." "The law does not require the necessity for taking human life to be one arising out of actual and imminent danger, in order to excuse the slayer, but he may act upon a belief, arising from appearances which give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken. The guilt of the accused must depend upon the circumstances as they appear to him, and he will not be held responsible for a knowledge of the facts, unless his ignorance arises from fault or negligence."

In 2 Bish. Crim. Law (7th ed.), § 707, it is said: "The defense of the dwelling-house stands on a different ground, and, though the question has at some periods of our law been in part under a cloud, it may now be deemed to be reasonably clear, that, to prevent an unlawful entrance into a dwelling-house, the occupant may make defense to the taking of life, without being liable even for manslaughter. Of course a defense may be of a sort which will constitute manslaughter, or even murder."

In *State v. Patterson*, 45 Vt., 308, it is said in the marginal note: "The idea that is embodied in the expression that 'a man's house is his castle' is not that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant or members of his family, and, in order to accomplish this, the assailant attacks the castle in order to reach the in-

mates. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshhold and prevent him from breaking in by any means rendered necessary by the exigency, and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault." I think there is error in the charge.

BEARDSLEY, J., concurred.

NOTE.— *Defense of habitation.*— In the early times, our forefathers were compelled to protect themselves in their habitations by converting them into holds of defense; and thus the dwelling-house was called a castle. And from this necessity has grown up the familiar doctrine, that, while a man keeps the doors of his house closed, no other man has the right to break in, under any circumstances; except in particular cases when it becomes lawful for the purpose of making an arrest of the occupant, or the like,— cases which it is not within the present line of discussion to consider. And from this doctrine springs another, namely, that the person within the house may exercise all needful force to keep the aggressor out, even to the taking of his life. 2 Bishop, Crim. L., 653. A man's house is sacred for the protection of himself and family, in the sense that an assault on the house can be regarded as an assault on the person only in case the purpose be injury to the person of the occupant or members of the family. *State v. Patterson*, 45 Vt., 308; *People v. Payne*, 8 Col., 341. But the exercise of the right must not exceed the bounds of mere defense and protection. *Blake v. State*, 3 Tex. Ct. App., 581. If a man on entering his own house is assaulted by an intruder, and he kills his assailant to save himself from death or great bodily harm, he is excusable. *State v. Harmon*, 78 N. C., 515; *Pond v. The People*, 8 Mich., 150. And even the lodger or the inmates therein may be justified. *State v. Patterson, supra.* But no man can defend his property, other than his dwelling, by the use of deadly weapons. *State v. Underwood*, 1 Am. Cr. R., 251. But where a party entitled to the joint use and occupancy of a well went to his well to draw water for his family, and, being violently attacked, killed his assailant, it was held that a retreat by such assailed party was not necessary to justify the killing. *Haynes v. State*, 17 Ga., 465; *Tweedy v. State*, 5 Iowa, 433. To the contrary, *People v. Harper*, 1 Edm. (N. Y.) Sel. Cas., 180. There must be a reasonable ground of apprehension of imminent danger to the person or property. *Carrol v. State*, 23 Ala., 28. But the owner need not flee to avoid the injury, and may meet the assailant at the threshold, and use means fatal to the assailant, if necessary to protect himself from death or great bodily injury. *State v. Patterson*, 45 Vt., 308. Where a trespasser goes with the intent and the means to commit a felony, if necessary, to accomplish the end intended, the owner of the property may repel force by force. *People v. Payne*, 8 Cal., 341. The title to a piece of land

being in dispute, the defendant placed upon the premises some posts, intending to build a fence. The deceased went with the other claimant of the land and began to remove the posts, being armed with a pistol, which he drew upon the defendant, who then shot him. *Held*, that the homicide was justifiable. Id. And while one threatened is not obliged to flee from his home the danger must be imminent. *Nolan v. The State*, 81 Ala., 11. Nor does the right of self-defense justify the owner to pursue and kill the intruder after he has retreated. *State v. Conally*, 3 Oreg., 69. It is held in Iowa that one may take life in order to protect his home. *State v. Middleham*, 62 Iowa, 150. Also *State v. Peacock*, 4 Ohio St., 333. Where several persons, in a threatening manner, assemble before a man's house, threatening to break in and commit violence, he will not be justified in shooting till he warns them off, but otherwise if they actually advance on him or actually strike him. *Spires v. Barrick*, 14 Up. Can. (Q. B.), 424. And a partner in his place of business has the same right to protect it. *Jones v. The State*, 76 Ala., 8. Where a man, returning to his house at night, found it fastened against him, broke open the door, entered, and in the combat which ensued he killed the intruder, it was held excusable. *State v. Martin*, 30 Wis., 216. Where a man had warning that two persons were coming in the night-time to commit violence, which they did, and while in the act he struck one with a poker and killed him, it was held justifiable. *Brown v. People*, 39 Ill., 407. Where several persons, in a threatening manner, assemble before a man's house threatening to break in and commit violence, he will not be justified in shooting till he warn them off; but otherwise if they actually advance on him or actually strike him. *Spires v. Barrick*, 14 Up. Can. (Q. B.), 434.

The killing of another is justifiable only when the entry into a habitation is made in a violent, riotous or tumultuous manner, for the purpose of offering violence to some person therein or committing a felony by violence. *People v. Walsh*, 43 Cal., 450. So the owner, his friends and neighbors, or his servants and guests, may arm themself for resistance. *Com. v. Drew*, 4 Mass., 391. A lodger may justify killing a person endeavoring to break in to commit a felony. *Rex v. Cooper*, Cro. Car., 544; *State v. Patterson*, 45 Vt., 308; *Carroll v. State*, 23 Ala., 28. An assailed person is not bound to retreat out of his own house or to secrete himself to avoid violence. *Pond v. People*, 5 Mich., 150. To justify a man in shooting another who has entered at a window in the night-time, without first notifying him to desist or inquiring as to his purpose, there must be circumstances calculated to arouse the fear of a reasonable man, or indicating a danger so urgent or pressing as to excuse the instantaneous use of a dangerous weapon. *People v. Walsh*, 43 Cal., 447. Wherever a person's property is situated, he is entitled to use violent means to repel from it a violent attack. *Com. v. Daly*, 4 Pa. L. J., 50; *State v. Harmon*, 78 N. C., 515. The prisoner, in attempting to remove, from land which he claimed as his, the deceased, who had entered, and partly erected a house thereon, became engaged in a fight, and killed him. *Held*, on the trial for the homicide, that the violence was unjustifiable, and therefore that evidence of title in the prisoner was immaterial, and inadmissible. *People v. Honshell*, 10 Cal., 83.

What a man may not do directly he may not do indirectly. A man may not therefore place instruments of destruction for the protection of his prop-

erty, where he would not be authorized to take life with his own hands for its protection. *State v. Moore*, 31 Conn., 479. The right to take life in the defense of property, as well as person and habitation, is a natural right; but the law limits its exercise to the prevention of forcible and atrocious crimes, of which burglary is one. Id. Breaking and entering a shop in the night season with intent to steal is by the Connecticut law burglary; and the placing of spring-guns in such a shop for its defense would be justifiable if a burglar should be killed by them. The right of defense of habitation does not extend to an intruder when within the house. *McCoy v. State*, 3 Eng., 451. So it is manslaughter to kill a visitor who has gained peaceable admission, though he refuses to leave when ordered out. *McCoy v. State*, 4 Eng., 451. If an intruder refuses to leave when ordered, he may be ejected by as much force as is necessary for the purpose. *Reins v. People*, 30 Ill., 356. Provided no greater force than necessary is employed. *People v. Paine, supra.* Where the master of a house attempts to use violence at the outset in expelling an intruder, and he is slain, it is only manslaughter in the slayer, if there is no previous malice. *McCoy v. State*, 8 Ark., 451. Where A. was killed by the owner while trying to break into a warehouse for the purpose of taking by force some tobacco which he claimed, it was held justifiable. *Parrish v. Com.*, 81 Va., 1.

State v. Baldwin.

(79 Iowa, 714.)

Murder: *Abortion — Dying declarations.*

1. An indictment which in one count charges that defendant committed an abortion on deceased with instruments, and thereby caused her death, and in the other count that he used drugs for the purpose, is not void for duplicity, since it only charges one offense, in accordance with Code of Iowa, section 4300, which declares that an "indictment must charge but one offense, but it may be charged in different forms to meet the testimony."
2. An indictment which charges that defendant attempted to perform an abortion on a woman, thereby causing her death, but does not allege an intent to take her life, charges murder in the second degree only.
3. Where an indictment charges murder in the first degree, the state may waive a trial as to that degree and claim a conviction for murder in the second degree.
4. Whether dying declarations are admissible is a question for the court, to be determined in view of the circumstances under which they were made.
5. Evidence that deceased, whose dying declarations are offered in evidence, was at the time she made them in a dying condition; that she had expressed to her physician a fear of dying, and asked if he could

do anything for her; that he told her of her symptoms, but promised to do what he could; that she heard him express the opinion that she might die at any time; and that she repeatedly expressed a belief that she would die,— is sufficient to show that she was conscious of impending death, and had given up all hope of recovery.

6. On indictment of "Lawson Baldwin" for murder, committed in an attempt to perform an abortion, dying declarations of deceased: "He is the cause of my death. Oh, those horrible instruments! Laws. is the cause of my death,— he is my murderer. They abused me terribly,"— are not admissible, since they may have referred to defendant as the seducer, and not as concerned in the abortion.

Appeal from district court, Jefferson county; H. C. Travers, judge.

The indictment returned against the defendant is in two counts, the charging part of each part being as follows: "The said Lawson J. Baldwin, on or about the 28th day of June, in the year of our Lord 1885, in the county aforesaid, in and upon the body of Mattie Rodabaugh, then and there being, wilfully, feloniously, premeditatedly, and with malice aforethought, did commit an assault with some instruments to the grand jury unknown, then and there held in the hands of the said Lawson J. Baldwin; and then and there said Lawson J. Baldwin did wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, thrust into the body and puncture and lacerate the womb and private parts of said Mattie Rodabaugh, then and there and thereby wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, inflicting upon the body, womb, and private parts of the said Mattie Rodabaugh, who was then and there a pregnant woman, mortal wounds, the number of which is to the grand jurors unknown, of which mortal wounds the said Mattie Rodabaugh, in Van Buren county, Iowa, on the 8th day of July, A. D. 1885, then and there did die. And the grand jurors aforesaid further aver and charge that the said defendant, Lawson J. Baldwin, at said time and place, and in the manner and by the means aforesaid, thrust into the body, womb, and private parts of the said Mattie Rodabaugh, said unknown instruments, with intent to produce a miscarriage of said Mattie Rodabaugh, the said miscarriage not being necessary to save the life of said Mattie Rodabaugh, contrary to and in violation of law. *Second Count.* The said Lawson

J. Baldwin, on or about the 28th day of June, in the year of our Lord 1885, in the county aforesaid, in and upon the body of one Mattie Rodabaugh, a pregnant woman, then and there being, wilfully, deliberately, feloniously, premeditatedly, and with malice aforethought, did commit an assault, and then and there the said Lawson J. Baldwin did wilfully, deliberately, premeditatedly, and of his malice aforethought, and with intent to produce the miscarriage of said Mattie Rodabaugh, administer and cause to be taken by the said Mattie Rodabaugh, certain drugs, substances and medicines, to the grand jurors unknown, the same not being necessary to save the life of the said Mattie Rodabaugh, then and there being, and thereby wilfully, deliberately, premeditatedly, and of his malice aforethought, causing the said Mattie Rodabaugh, by means of said drugs, substances and medicines, to sicken and languishingly live, and on the 8th day of July, A. D. 1885, in Van Buren county, state of Iowa, to die, contrary to and in violation of law." The defendant having pleaded not guilty, the case was tried to a jury, and a verdict of "guilty of murder in second degree" returned. Defendant moved for a new trial, and in arrest of judgment, which motions were overruled and judgment entered on the verdict; to all of which the defendant excepted, and from which he appeals.

M. A. McCoid and *W. A. Work*, for appellant.

John Y. Stone, attorney-general, and *J. S. McKemey*, special prosecutor, for appellee.

GIVEN, J. 1. Our attention is first directed to the overruling of defendant's motion in arrest of judgment. The grounds of his motion are that the indictment is void for duplicity "in that it charged the offense in two inconsistent groups of facts;" that the indictment charges murder in the first degree, and defendant was put upon trial thereunder for murder in the second degree; that the offense charged, as disclosed in the evidence, is one of necessity before the fact, and the indictment does not disclose any party with whom defendant is charged to have associated in the commission of the offense, and because on the whole record no legal judgment can be pronounced. "The indictment must charge but one offense, but it may be

charged in different forms to meet the testimony." Code, § 4300. There is but one offense charged in this indictment, the murder of Mattie Rodabaugh. In the first count it is charged to have been committed with some instrument to the grand jurors unknown, and in the second by administering and causing to be taken certain drugs, substances and medicines to the grand jurors unknown. We do not think that either count charges murder in the first degree, as neither charges an intent to take life. *State v. Gillick*, 7 Iowa, 312; *State v. Johnson*, 8 Iowa, 525. We think the indictment charges murder in the second degree, and therefore the defendant was rightly put upon trial for that offense. If the indictment did charge murder in the first degree, the state would certainly have the right to waive a trial as to that degree, and claim a conviction for any lesser degree embraced in the charge. Such a case would differ materially from those referred to, wherein the party was put upon trial for a higher degree than that charged. There is a view of the testimony, and probably the most tangible one, that would make the defendant guilty as an accessory before the fact if guilty at all. Code, § 4314, is as follows: "The distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid or abet its commission, though not present, must hereafter be indicted, tried and punished as principals." It follows from this provision of the statute that there was no variance between the charge in the indictment and the testimony. We discover no reason in the record why a legal judgment could not be pronounced, and therefore conclude that there was no error in overruling defendant's motion in arrest of judgment.

2. On the trial the court admitted, over defendant's objections, testimony as to statements made by Mattie Rodabaugh, deceased, as her dying declarations. The grounds of defendant's objections were that it was not shown that deceased was conscious of her danger, and had given up all hopes of recovery at the time of making the statements; that she was not conscious and sane at the time; and that the statements are not declarations of admissible facts. "The rule is well settled that dying declarations, to show the fact itself and

the person by whom the mortal injury was inflicted, can only be given in evidence when they are made under a sense of impending death. . . . It must appear that they were made by the person injured in the full belief that he should not recover. . . . It must satisfactorily appear that, at the time of making them, the deceased was conscious of his danger, and had given up all hopes of recovery. . . . It is not necessary to prove by expressions of the deceased that he is apprehensive of immediate death, if it appears that he does not expect to survive the injury." *State v. Nash*, 7 Iowa, 378; 6 Amer. & Eng. Cyclop. Law, "Dying Declarations," and cases cited therein. The circumstances under which the declarations were made are to be shown to the judge; it being his province, and not that of the jury, to determine whether they are admissible. The courts uniformly hold that the competency of such testimony is to be determined by the judge, in view of the surrounding and attending circumstances. *State v. Elliott*, 45 Iowa, 487. Deceased became ill at the house of Aaron Culbertson, in Fairfield, from where she was taken, July 2d, to her father's house some miles distant. Dr. Pitt Norris, who was called to attend her, pronounced her beyond the hope of recovery. She continued to grow worse until the time of her death, July 8th. On the day the doctor was called she expressed to him a fear of dying, and wanted to know if he could do anything for her, and he said her symptoms were just as bad as they could be, but that he would do everything he could for her. He says: "I do not know whether it cheered her up or not. I formed and expressed the opinion that she might die at any time, at the first and subsequent visits that day, and she heard me express it." On the day she was brought home, and repeatedly thereafter, she expressed to her father and others the belief that she was going to die, and on one or two occasions she expressed a desire to live. In view of her condition, what was said to her by her physician and others, and her own expressions, we think she was conscious of her danger, and had given up all hope of recovery from the time she was brought home.

3. Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under a solemn belief of impending death. They are

restricted to the act of killing, and to the circumstances immediately attending it, and form part of the *res gestæ*. When they relate to former and distinct transactions, and embrace facts and circumstances not immediately connected with the declarant's death, they are inadmissible. They are admissible only to those things to which the deceased would have been compelled to testify. They must relate to facts, and not mere matters of opinion or belief. 6 Amer. & Eng. Cyclop. Law; *State v. Clemons*, 51 Iowa, 274. There is no question but that the declarations relied upon were spoken with reference to the defendant. They are as follows: "He is the cause of my death. Oh, those horrible instruments! Laws. is the cause of my death,—he is my murderer. They abused me terribly."

We infer from the record that one of the theories of the prosecution, and probably the only one, was that defendant had begotten the deceased with child, and that he attempted to produce an abortion upon her by the use of instruments or drugs, or that he procured some one else to do so, and that death resulted. We also understand one theory of the defense to be that the deceased produced or attempted to produce an abortion upon herself that caused her death. We have seen that the declarations are restricted to the act of killing, and to the circumstances immediately attending it, and that they form a part of the *res gestæ;* that when they relate to former and distinct transactions, and embrace facts or circumstances not immediately relating to or connected with the declarant's death, they are inadmissible. These declarations did not necessarily refer to any attempt to produce an abortion. They are as plainly referable to the former relations of the parties. If it be true that the defendant had begotten the deceased with child, then her declarations were such as she might naturally make in her extremity, about her seducer, without intending to charge him with any more than her seduction. The expression, "Oh, those horrible instruments!" may indicate that instruments were used, but in no wise charges the defendant with having used them or aided in their use. We have seen that dying declarations must relate to facts, and not to mere expressions of opinion or belief. It has been held that where a person dying from a gun-shot declares that "A. shot me. A. killed me. A. is my murderer," — would be ad-

missible as the statement of a fact because of the circumstances. To say under such circumstances, "A. is my murderer," would not be an expression of opinion with respect to the degree of the homicide, but a statement of the fact that A. had inflicted the mortal wound. Not so, however, with these declarations. They cannot be considered as stating as a fact that defendant had anything to do with attempting to or producing an abortion. "The rule that dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it, is one that should not be relaxed. Declarations at the best are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly stated. As to dying declarations there can be no cross-examination. The condition of the declarant in his extremity is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be important to know. Hence all vague and indefinite expressions, all language that does not distinctly point to the cause of death and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible." *State v. Center*, 35 Vt., 378. Our conclusion is that the court erred in admitting these declarations, and that such ruling was prejudicial to the defendant. As for this reason the judgment of the district court must be reversed, we need not further notice the errors assigned, as those not considered will not arise in a retrial. Reversed.

NOTE.—*Death from intermediate cause.*—Murder is defined by Coke to be "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied." 3 Int., 47. The killing may be by any act, direct or indirect, which causes death. So if one unlawfully inflicts a wound upon another not necessarily mortal, and from which he would have recovered but for the erroneous treatment of his physician, it is murder. *Sharp v. The State*, 51 Ark., 147. Upon this phase of the question Chief Justice Bigelow, in *Com. v. Hackett*, 2 Allen, 141, said: "The well-established rule of the common law would seem to be that if the wound was a dangerous wound,— that is, calculated to endanger or destroy life,— and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or

improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. 1 Russ. Crimes (7th Amer. ed.), 505; Rosc. Crim. Ev. (3d ed.), 703, 706; 3 Greenl. Ev., § 139; *Com. v. Green*, 1 Ashm., 289; *Reg. v. Haines*, 2 Car. & K., 368; *State v. Baker*, 1 Jones (N. C.), 267; *Com. v. McPike*, 3 Cush., 184. The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound, or its unskilful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But, however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy, in many cases of homicide, to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment."

In *Reg. v. Holland*, 2 Moody & R., 351, "it appeared by the evidence that the deceased had been waylaid and assaulted by the prisoner, and that, among other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated." At the end of two weeks lock-jaw followed as the result of the wound, and caused his death. It was held that the prisoner was guilty of murder.

Mr. Greenleaf, in his work on Evidence (§ 139), says: "If death ensues from a wound given in malice, but not in its nature mortal, but, which being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for, if the wound had not been given, the party had not died."

Mr. Bishop, in his work on Criminal Law, says: "But where the wound is not of itself mortal, and the party dies in consequence solely of the improper treatment, not at all of the wound, the result is otherwise. . . . But we should not suffer these propositions to carry us too far; because, in law, if the person dies by the action of the wound, and by the medical or surgical action, jointly, the wound must clearly be regarded sufficiently a

cause of the death; and the wound need not even be a concurrent cause. Much less need it be the next proximate one; for, if it is the cause of the cause, no more is required." 2 Bish. Crim. Law (7th ed.), § 639; *State v. Morphy*, 33 Iowa, 270; *Kee v. State*, 28 Ark., 155; *Smith v. State*, 50 Ark., 545.

But the death must in some substantial degree be imputable to the defendant's act. *Com. v. Costley*, 118 Mass., 1. And it must occur within a year and a day from the time of the act or injury. *State v. Orrell*, 1 Dev., 139; *People v. Aro*, 6 Col., 207; *People v. Kelly*, id., 210; *State v. Mayfield*, 66 Mo., 125; *Edmondson v. The State*, 41 Tex., 496; 2 Bishop, 681. But it may be committed by a series of acts at different times. *Com. v. Stafford*, 12 Cush., 619. And so, although it was not necessarily mortal, yet if the person dies in consequence, even though his death was hastened by previous sickness, it is murder. *People v. Ah Fat*, 48 Cal., 61; 1 Wharton, C. L., 158.

State v. Lewis.

(20 Nev., 333.)

MURDER: *Insanity as a defense — Burden of proof — Insane delusion — Evidence.*

1. EXCLUSION OF EVIDENCE — HARMLESS ERROR. — The exclusion of apparently irrelevant questions is not error where the bill of exceptions does not show that they were introductory to material and relevant facts.
2. INSANITY — ACTS OF DEFENDANT SUBSEQUENT TO HOMICIDE. — When insanity has been pleaded in defense to a prosecution for murder, acts of defendant subsequent to the homicide indicating insanity are admissible only when they tend to prove that he was insane at the time of the homicide.
3. SAME. — The exclusion of certain questions is harmless error, when anything advantageous to the party asking them that could have been answered to them was brought out in other parts of the witness' testimony.
4. NON-EXPERTS AS WITNESSES. — Witnesses who are not experts may testify to their belief as to the sanity or insanity of accused without giving the facts upon which their belief is based.
5. SAME. — A person who had known accused for four months, had seen him every day during that time, had sat at the same table and eaten with him once or twice, had observed his manner of speech and conversation, had seen him in the evening and night before the homicide, and had had considerable conversation with him on the day after, is a competent witness as to sanity of accused.
6. TEST OF CRIMINAL RESPONSIBILITY. — A man who has sufficient reason to know that the act he is doing is wrong and deserves punishment is legally of sound mind, and is criminally responsible for his act.

7. BURDEN OF PROOF.— Insanity as a defense to crime must be established by a preponderance of evidence.
8. INSANE DELUSION.— An insane delusion is an incorrigible belief, not the result of reasoning, in the existence of facts which are either impossible absolutely or are impossible under the circumstances of the particular case.
9. SAME — WHEN IT WILL EXCUSE CRIME.— An insane delusion is not a defense to a prosecution for crime unless it would excuse the crime if the facts about which it exists are true.

Appeal from district court of Elko county; R. R. Bigelow, judge.

J. W. Dorsey and *J. A. Plummer*, for appellant.
J. F. Alexander, attorney-general, for the state.

HAWLEY, C. J. Appellant was convicted of murder in the second degree for the killing of George Piccoli, and was sentenced to the penitentiary for the term of his natural life. Upon the trial he relied upon two separate and distinct defenses: (1) Self-defense; (2) insanity. The various questions presented for our determination relate solely to the plea of insanity. In order to thoroughly understand the nature of the objections urged by counsel, and to fully comprehend the rulings of the court thereon, it will be necessary to give a brief statement of the facts concerning the homicide and a synopsis of the testimony bearing upon the question of appellant's insanity, as the rulings of the court must, to a great extent, be determined with reference to the particular facts and circumstances that were introduced at the trial.

Appellant was the foreman of the Tripoli mine at Bullion, in Elko county, and had been employed in that capacity for about four months prior to the homicide. Piccoli, the deceased, was a laborer in the same mine. The men boarded and lodged at Highland, about two miles distant from Bullion. About two weeks prior to the homicide, Piccoli quit working in the mine on account of the bad air therein. After he quit work, appellant sent him word that he need not return. On the evening of September 2, 1887, there was a dance in Highland which was very generally attended. After the dancing was over several young men, including appellant and deceased, went into a saloon near by and treated each other. Piccoli

was very drunk. Appellant was sober. Piccoli was sitting on the top of the counter with his feet hanging down. Appellant was standing at the end of the counter. Piccoli said in a loud voice: "People in this place don't like me because I am an Italian." Several persons present said (among the number was appellant): "You are mistaken." Piccoli, then directing his remarks to appellant, said: "I can work in a mine with you anywhere." Appellant replied: "You have no money that says so." Piccoli said he had, placing his hand on his hip pocket. Appellant then said: "You are a liar if you think so." Piccoli replied: "You are a bastard," or words to that effect. Appellant stepped back and picked up a chair, raised it, and was in the act of striking, when others interfered, and appellant was removed from the saloon. This difficulty occurred between the hours of 2 and 3 o'clock on the morning of the 3d of September. Appellant, after his removal from the saloon, went to different places in Highland for the purpose of getting a pistol. Failing to obtain one he started alone and walked to Bullion. There, without the knowledge of any other person, he secured a pistol, and in company with Fred. Loschenkohl returned to Highland. On the way he repeated to Loschenkohl what he claimed to be the facts of the difficulty in the saloon, differing to some extent from the testimony of other witnesses as given at the trial. He stated that Piccoli called him into the saloon to take a drink, but he thought it was for a row; that he called Piccoli a s—— of a b——, instead of a liar (appellant in his testimony denies this part of the statement), and gave a different version of some of the other minor and unimportant details. After mentioning to his companion the efforts he had made to get a pistol in Highland, he said: "I am prepared for him now." He further stated that "he was going to kill Piccoli;" that "a man who called him a bastard could not live." Loschenkohl remonstrated with him; tried to persuade him to stop, and told him to think of his mother and sisters, and to consider the trouble he would give them. Appellant then said: "I may not kill him, but I will make him get down on his knees and apologize." As they neared Highland appellant requested Loschenkohl to stay behind, because Piccoli was behind some of the trees on the road-side and might shoot, and he did not

want any one to get hurt for him. Then he began to hurry up, and out-traveled his companion, and came to Mrs. Roach's cabin about two hundred feet ahead of him. Mrs. Roach testified that appellant looked strange; that she did not recognize him when she first saw him running up; that she said to him there was something the matter; that, after a few inquiries about the whereabouts of the saloon-keeper (Jimmy Hamilton), he turned around and said, "Defend yourself;" then she heard the report of the pistol. It appears that Piccoli was standing near his cabin-door when the first shot was fired; that he ran into his cabin and closed the door; that appellant then ran up to the window of the cabin and fired one shot through the window; that he then went into the cabin and fired three shots when Piccoli was in a stooping or fallen position on the floor; that appellant then went out of the cabin and in a few minutes came back, "put his pistol behind Piccoli's head and fired another shot; that Piccoli did not speak a word after the shot was fired through the window. The homicide occurred about half-past five o'clock,—just about daylight. Appellant, after the homicide, talked freely about it to every one he met. One witness said: "He acted as though he ought to receive a reward, and as though everybody ought to be proud of him." To several persons he said "he had only killed a rattlesnake." To many his actions seemed strange and peculiar. Shortly after the shooting he started to return to Bullion alone; but two persons caught up with him, and accompanied him and delivered him to the justice at Bullion. On this return trip he repeated the whole story of the quarrel and final shooting. Among other things he said "he was not sorry for himself, but was for his relations and friends;" that "he had killed him, and he was neither drunk nor crazy when he did it." The next day, when the sheriff took him into custody, he again voluntarily made substantially the same statements, repeating that he had not done anything he was sorry for; that he had a mother and sisters, and felt sorry for the trouble it would cause them, but was not sorry for killing the man; that "no man could call him a bastard and he and that man live." The latter remark was made to many other persons. One witness testified that "he said if there was a jury in the world to hang him for what he had

done he was willing to hang." Appellant at the time of the homicide was twenty-eight years of age.

On the part of the defense several witnesses, who had known appellant for many years, testified that at times they considered him mentally unsound. The following reasons, among others, were given why they considered him insane, viz.: That in laying a track in the mine and curving the iron he would insist on the curve going in the opposite direction from which it should, and then, after trying it, he would see that he was wrong, and then roll up his eyes and laugh; that he insisted that it was unnecessary to timber any mine; that at times he was moody without cause, and would state things as true having no foundation in reason; that he had two or three times tried to commit suicide; that twice, when he was engaged as a laborer in the mines at Eureka on the day shift, he reported himself for work in the evening, just as though he had had his night's sleep, with his dinner bucket with him; that at such times he seemed to wander around as if he did not know what he was doing, but when he was spoken to about it he would go right off; that he was subject to spells of melancholy; that when moody and sullen he desired to be by himself; that he was at times eccentric and unreasonable in his conversations and actions; that at such times he talked at random, incoherently and unnaturally. Independent of these occasional peculiarities, he was considered a bright young man of average ability and intelligence, and possessed a good deal of delicacy and refinement. It was also shown that he had been the unfortunate victim of a series of accidents from early childhood to years of manhood; that the effect of the injuries he had thus received was such that when he was sick or unduly excited he would have delirium; his head would ache; and that these attacks continued and increased as he grew older. Appellant was a witness in his own behalf, and his testimony tended to show that at the time of the homicide he was laboring under the delusion that some of the persons employed at the Tripoli mine had entered into a conspiracy to take his life, and that they had hired Piccoli to kill him, and that he was compelled to kill Piccoli, and did kill him, in order to save his own life, in necessary self-defense.

The witnesses in rebuttal on the part of the state testified

that he was a competent and faithful workman; that his acts, conduct and conversations at the various times they had known him were rational and natural; that on the evening before and morning of the homicide he was excited and nervous; that in their opinion he was sane and knew right from wrong. Upon this statement of facts, as shown by the record on appeal, we shall proceed to notice in detail the various assignments of error relied upon by appellant for a reversal of the judgment.

The objections urged against the rulings of the court in excluding portions of the testimony of Mrs. Bates, J. Henderson and P. Webber, witnesses for appellant, will be considered together. Mrs. Bates, the mother of the appellant, had testified at length and with great minuteness of detail in regard to the numerous accidents and spells of sickness that had befallen her son, and the effects thereof upon his mind, from the time of his birth in 1858 up to 1875, when he left home, and started out into the world to make a living for himself. She then, in answer to questions, stated that after the homicide she came to Elko, went into the jail, and said: "My son, my son, what is this?" and he was walking up and down, and he said: "It is a terrible thing to be confined in this manner;" and he said, "I want you to do me a favor," and I said, "What is that? I came to see you, and help you out of this trouble." Here counsel for the state objected to the conversation in the jail, on the ground "that it might be manufactured testimony," and "that it is hearsay." This objection was sustained by the court. Appellant's counsel excepted to the ruling and stated that the conversation was "offered to show the mental condition of the defendant at the time of the interview, and as tending to show that he was insane at the time of the conversation with the witness." J. Henderson testified that appellant had been in his employ about two months; that he had seen him in Bullion after the difficulty, and saw him in jail at Elko a day or two afterwards; that he had a conversation with him there about the employment of some one to represent him in the case. At this point similar objections, rulings and statements were made. The witness Webber was a brother-in-law of appellant, and had given testimony concerning certain peculiarities of appellant towards his mother and sisters, when counsel asked the following questions: "What

has been the feeling of the defendant in respect to the children, so far as exhibited by him by his actions? Have you noticed the defendant's actions, his manner, his conduct and his expressions in relation to his sisters and to your children heretofore? Has there been a change in the defendant's deportment, and his manner in relation to and toward his sisters, his mother and his nieces,—your children,—to your knowledge?" Each question was objected to on the ground "that it is immaterial and irrelevant, and that it may be manufactured testimony." The objections were sustained. No statement was made by appellant's counsel as to the purpose of these questions.

These various rulings of the court are presented in a very unsatisfactory manner. We are left to grope our way in darkness. No question was asked, answer given, or statement made, that enables us to determine what the nature of either conversation was, or what particular bearing, if any, the answer to either question would have had upon the issue of appellant's sanity or insanity. It is not claimed that the conversations or questions were offered for the purpose of enabling the witnesses, or either of them, to state any facts upon which to lay the foundation for a question as to their opinion as to appellant's sanity or insanity. No such questions were asked of either of these witnesses. The most that can be said is that it is within the realm of imagination that the conversations and answers to the questions might have been relevant. In the absence of any knowledge, or of any facts upon which knowledge could be based, as to what the matter was, and the failure to affirmatively show the materiality and relevancy of the conversations and questions, we do not feel justified in reversing the case upon the ground that it is possible to imagine error in these rulings. It is as easy to imagine that the court did not err as to presume that it did. If presumptions are to be indulged in, then the rule of law is that it is our duty to presume in favor of, rather than against, the action of the district court. It is the duty of appellant, in a criminal as well as in a civil case, affirmatively to show error. In order, therefore, to show that the excluded evidence was important, and that the court erred in its ruling, counsel should have stated just what they expected

to show, and then, if the court ruled it out, should have embodied the facts in a bill of exceptions, so as to fairly and clearly present the point; otherwise the court cannot say that the rejection of the conversation or answers to the questions was prejudicial to appellant.

Counsel claim that the court sustained the objections to the testimony of the witnesses Bates and Henderson upon the sole ground that the conversations occurred subsequent to the homicide. If so, then this fact ought to have been affirmatively shown. "Upon the question of sanity at the time of committing an offense, the acts, conduct and habits of the prisoner at a subsequent time may be competent as evidence in his favor. But they are not admissible as of course. When admissible at all it is upon the ground either that they are so connected with or correspond to evidence of disordered or weakened mental condition preceding the time of the offense as to strengthen then the inference of continuance, and carry it by the time to which the injury relates, and thus establish its existence at that time; or else that they are of such a character as of themselves to indicate unsoundness to such a degree or of so permanent a nature as to have required a longer period than the interval for its production or development." *Com. v. Pomeroy*, 117 Mass., 148. If the acts, conduct and habits of the defendant after the homicide are to be thus restricted, is not the same reasoning as sound, or of greater strength, in favor of a limitation upon the admission of his subsequent conversations? They should not be admitted as a matter of course. It is doubtful testimony at best, and, if ruled out, the error, if any, must affirmatively appear. It will not be denied that a mere narration or statement of a defendant, after the commission of a crime, having no connection with the issue, is inadmissible. In *State v. Hays*, 22 La. Ann., 40 (the leading case relied upon by appellant), this principle is expressly recognized. The difference between that case and this is, that there it was affirmatively shown by the record that the court ruled out the subsequent conversations on the express ground that they were not admissible because made subsequent to the homicide, and were not a part of the *res gestæ*, while in this case there is no such showing. What the court said in *State v. Hays* was with a view of fur-

nishing a guide for the *nisi prius* courts in the trial of such cases, and is an authority to the effect that subsequent conversations tending in their nature to show the condition of defendant's mind are admissible in evidence. There is nothing said in the opinion that militates against the views we have expressed, and on the other hand there is, as before stated, a clear recognition of the principle we have announced concerning the admission of such testimony. To justify a reversal upon the ground of the exclusion of the testimony referred to it ought to have in some manner been made to appear that the conversations had some special significance indicating either mental disease, or tending in some degree to show an unsound mind or insanity upon the part of appellant.

J. A. Plummer, one of the attorneys employed by appellant, was a witness in his client's behalf, and testified that he visited him in the jail almost daily from the time of his arrest up to the first trial of the case, and noticed his manner, expression and tone of voice, with a view to discover his mental condition, and "to make a study of him." It is claimed that the court erred in refusing to allow this witness to answer the following questions: "(1) From the consultations you had with him, did he impress you in a natural way or otherwise? (2) During your conversation with him, was his appearance and manner, actions and conversation, natural or unnatural, rational or irrational? (3) During any conversation with him that you may have had at any time, has he ever manifested any remorse or regret for having killed Piccoli? (4) Did you ever notice, in your talk with him, any incoherence in his remarks, or foolish and silly talk?" Although these questions were ruled out as improper, yet the witness was permitted, by another line of questions, to substantially answer all of them except the third. We quote from the record. "Question. What was the condition of his nerves and organism, as manifested by his actions and appearances? Answer. I should say that he was decidedly nervous. He seemed to be so nervous that there was a constant jerking of his nerves. Q. Can you illustrate? A. I can illustrate his actions better by doing as he did than by words. I can explain it by saying he was unstrung, nervous, excitable, in constant motion. Q. Was it about the trunk or head? A. It was principally about the

head and shoulders, and he kept moving his limbs around and stepped one way and then another; but I noticed the motion was more irritated around his head and shoulders." This explanation of appellant's conduct, acts and manner enabled the jury to understand the condition of his mind as well as if the witness had answered the questions *seriatim* and given his opinion as to appellant's sanity or insanity. If, therefore, any error occurred, it was cured by the answers which the witness was allowed to give. With reference to the third question it is equally apparent that there was no error in ruling it out that was prejudicial to appellant. All the testimony, without contradiction, tended to show that he never manifested any remorse, or expressed any regret, save the trouble it would give others, at having killed Piccoli. It is therefore fair to presume that the testimony of this witness, if admissible, would have been simply to the same effect. If it were otherwise, its tendency might have been prejudicial, as tending to show that his reasoning powers were not destroyed, and that he was conscious of the responsibility of his act.

The only testimony tending to support the plea of insanity was that of non-expert witnesses who were acquainted with appellant. No objection was made to this character of testimony when introduced by the defense; but when the prosecution, in rebuttal, introduced similar testimony to establish the sanity of appellant, objections were made to the following questions asked of several witnesses, who testified as to their knowledge of appellant, viz.: "(1) From his appearance, actions, condition and conversation at such times as you noticed him, was he sane or insane? (2) In your opinion, did he know the difference between right and wrong at that time?" The grounds of the objections were that no foundation had been laid for the questions; that it was not shown that the witness was competent to answer them; and that the testimony was irrelevant, incompetent and immaterial. These objections were overruled, and the witnesses gave their opinions that appellant was sane, and that he knew the difference between right and wrong. We shall treat the second question as a simple repetition of the first one. If the right and wrong test is a proper one — which we shall have occasion to discuss when we consider the instructions — then the question was

proper, as the answer thereto would tend to show whether appellant was sane or insane. *Clark v. State*, 12 Ohio, 483; *Powell v. State*, 25 Ala., 29. We do not understand appellant's counsel to claim that the opinions of witnesses, not experts, as to the sanity or insanity of a defendant accused of crime, are not admissible in evidence, although they have cited several cases that adhere to that doctrine. Their contention is that "the incidents and circumstances, the actions, the assertions, the conversations and the declarations producing the impression upon the witness' mind are first to be laid before the jury, and then the witness may be allowed to state the impressions created thereby and dependent thereon." Can this position be maintained? As a general rule it is undoubtedly true that it is the facts which a witness gives of the conduct, acts, manner and conversations of the defendant which constitute the greatest value of his testimony, and that the testimony of a witness having but a limited knowledge upon these matters ordinarily has but little, if any, weight with the jury; but it is not true that a witness is bound to give, or that he can in all cases give, the glare of the eye, the wild look, the peculiar expressions or strange demeanor of the defendant. There are many cases where the mental condition of a person depends as much, or more, upon his looks and gestures, connected with his acts, conduct or conversation, as upon the words and actions themselves; and it would often be difficult, and sometimes impossible, for the witness to intelligently give all the details upon which his opinion is based. The law does not require it.

There was no strict rule applied as to the general knowledge of the witnesses introduced by the defense. Great latitude was allowed upon both sides. Some of the facts stated by the witnesses for the defense, and upon which their opinions were based, did not even tend to establish insanity in the remotest degree; and the reasons given by some for their opinions were very weak, and in a few instances so unreasonable and absurd as to be unworthy of mention. On the other hand, some of the witnesses who testified on the part of the state had such a brief acquaintance with and limited knowledge of the appellant as to deprive their testimony of any special weight or value. The witness Hume, against the admission

of whose opinion the argument of counsel is principally based, testified that he had only known defendant for about four months prior to the homicide; that he saw him every day during the summer; that he generally met him as he went to breakfast; that he sat at the same table, and ate with him once or twice; that he had noticed him around the house; that he observed his manner of speech and conversation; that he saw him in the evening and night before the homicide; that on the morning after the homicide he went to Bullion with him and had considerable conversation on the way. The question to be determined by the jury was as to appellant's sanity or insanity at the time of the homicide. The testimony as to the condition of his mind at times previous and subsequent thereto is admissible solely upon the ground that it tends to show the mental condition at the time of the homicide. The acquaintance of this witness with appellant, although slight, embraced a very important period of time. He saw him just before and immediately after the commission of the act. His knowledge seems to have been sufficient to enable him to form and express an opinion, and we cannot say that he did not have sufficient opportunities to arrive at a correct conclusion in regard to the condition of appellant's mind. When the opinions of such witnesses, from the necessities of the case, are received as evidence, the weight of their testimony does not depend so much upon the number as upon the intelligence of the witnesses and their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts and circumstances testified to in support of their opinions. It would, perhaps, be difficult to lay down any general rule establishing precisely the requisite knowledge which a witness must possess in order to justify or warrant the expression of an opinion. It may, however, be safely said that if the witness has had sufficient observation to enable him to form a belief upon the question he is a competent witness. The admissibility of this character of testimony must necessarily be left, to a great extent, to the discretion of the presiding judge; and when the testimony is admitted, unless it clearly appears that there has been an abuse of that discretion, the appellate court ought not to interfere. In *Baldwin v. State* the court said: "Before a witness should

be received to testify as to the condition of mind it should appear that he had an adequate opportunity of observing and judging of capacity. But so different are the powers and habits of observation in different persons that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than it has in fact enabled the observer to form a belief or judgment thereon; and the weight of his opinion must depend upon a consideration of all the circumstances under which it was formed." 12 Mo., 238. In *Brown v. Com.* the court, in discussing this question, said: "Exactly what is meant by the expression in some cases, when such evidence has been admitted, that 'the witnesses must detail the facts upon which the opinion is based, we do not find explained.' If the admissibility of the opinion as evidence must depend upon the facts from which it is formed, it is manifest that there is a question for the court antecedent to its introduction, and that to promulgate a general rule as to the amount and quality of the evidence that should satisfy the court in every case would be impossible. The court must be satisfied that the witness has had an opportunity, by association and observation, to form an opinion as to the sanity of the person in reference to whom he is to speak; but as to the extent and character of the evidence, no better rule can be established than to leave it within the discretion of the court. . . . It must vary with the circumstances of each case, and by these circumstances the jury must determine for themselves the weight to which the opinion may be entitled. It is not intended that the admissibility of the evidence shall be made to depend upon the ability of the witness to state specific facts from which the jury may, independent of the opinion of the witness, draw a conclusion of sanity or insanity, for it is the competency of the opinion of the witness that is the subject of inquiry. The ability of the witness to detail certain facts which are in themselves substantive evidence of the condition of the mind may add very greatly to the weight of the opinion given in evidence, but they will not of necessity affect the question of competency." 14 Bush, 405. See, also, *Colee v. State*, 75 Ind., 513; *Goodwin v. State*, 96 Ind., 558; *Choice v. State*, 31 Ga., 467; *Powell v. State*, 25 Ala., 29; *Ford v. State*, 71 Ala., 397; *People v. Pico*, 62 Cal., 53; *People v. Levy*, 71

Cal., 623; *People v. Fine*, 77 Cal., 147. In the light of the facts of this case, and of the authorities upon this subject, we are of opinion that the court did not err in allowing the witnesses for the state to answer the questions and give their opinions as to appellant's sanity or insanity at the time they knew him.

The instructions refused and given are of unusual length, covering over one hundred pages of the transcript. The objections urged by counsel do not, however, relate as much to the form and phraseology as to the general rules given as safe and proper guides to the jury. It is claimed that the court erred: *First*, in instructing the jury that the "right and wrong test" was the proper one upon which the question of the defendant's sanity or insanity should be determined; *second*, in instructing the jury that the burden of proof rested upon the defendant to establish the plea of insanity by a preponderance of evidence to the satisfaction of the jury; *third*, upon the questions of insane delusions. It is proper to state in advance that there has been a great diversity — an irreconcilable conflict — of opinion upon each of these points. In order to properly and intelligently determine these questions, raised for the first time in this court, we have taken the time, pains and patience to read and carefully examine all of the great number of cases to be found in the court of last resort in the several states. In all that we may have to say in regard to the disputed and debatable questions it must be distinctly understood that our object is to determine whether or not the general tests and rules, as laid down in the instructions given by the court, are proper, as applied to the particular facts of this case. In arriving at this determination we shall endeavor to keep constantly in view the vital and important truths that the advancement made in medical science, the progress of a better and more extended knowledge of the subject of insanity, and a clearer sense of legal duty and of Christian obligations, have relaxed to a great extent the harsh, unjust and cruel rules of the early cases in England, where it was held that for a man to be insane he must have no more reason than a brute, an infant or a wild beast; that the law, in its humane and benevolent treatment of the unfortunate insane, has kept pace with the enlightened progress of the age; that the plea

of insanity is not, and should not, when fairly presented and honestly relied upon, be looked upon with disfavor; that it is entitled to as much consideration as any other plea that is founded in justice, reason, humanity and common sense; and that juries can be as safely trusted with a fair investigation of the questions relating to this plea as of any other controverted questions of fact. As there are several different kinds of insanity, and different degrees of each particular kind, and the features thereof assume so many different forms, it will readily be seen that no general rule, absolutely universal in its application and unchangeable in its phraseology, can be laid down as a proper guide for juries to follow in every conceivable case where the question of insanity is raised. Cases may arise, exceptional in their character, where the rules ordinarily applied as tests of insanity would have to be raised so as to meet the peculiar facts of the particular case. But because such cases may occur, or have existed, it does not by any means or method of sound reasoning follow that no general rule can be given that will be applicable to a great majority of cases. With these general observations, pertinent to each of the points stated, we shall now proceed to consider them separately in the order we have designated, although they are, of course, more or less blended together in the instructions as given by the court, and are frequently united in the discussions in many of the authorities.

At the request of the prosecution the court instructed the jury as follows: "(1) To establish a defense on the ground of insanity it must be clearly proved that, at the time of committing, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The true test of insanity is whether the accused, at the time of committing the crime, was conscious that he was doing what he ought not to do; and if he was conscious that he was doing, and acted through malice or motives of revenge, he cannot avail himself of the defense of insanity. (3) The true test of criminal responsibility, where the defense of insanity is interposed,—the test binding upon the jury,—is: Was the accused, at the time of doing the act complained of, if you find that he

did it, conscious of the act he was doing? Did he know that it was wrong for him to do it. Had he at the time the power of distinguishing good from evil, right from wrong, as to the act he was doing? Had he the mental capacity to appreciate the nature and quality of the act he was doing, or to know that it was a violation of the rights of another? If another person had committed the act, would he have appreciated the wickedness of it? If he had the capacity thus to appreciate the character, and to comprehend the probable consequences, of his act, he is responsible to the law for such act. If he did not have such capacity, and did not thus appreciate the nature and quality of the act he was doing, he is not responsible to the law for such act, and is not guilty of any crime." The court, of its own motion, instructed the jury that (1) "the true test of criminal responsibility, where the defense of insanity is interposed, is whether the accused had, at the time he killed the deceased, sufficient use of his reason to understand the nature of the act he was committing and to understand that it was wrong and contrary to law for him to commit it. If this was the fact, he is criminally responsible for it, whatever peculiarities be shown about him in other respects; whereas, if his reason was so defective in consequence of mental disorder, generally supposed to be caused by brain disease, that he could not understand what he was doing, or that what he was doing was wrong, he should be treated as an irresponsible person. In other words, did he at the time know that he was killing a man, and that such killing was wrong and contrary to law? If so, he was responsible for his acts, no matter what peculiarities or eccentricities or disorders of the mind may have existed upon other subjects, or at other times." (2) In referring to the right and wrong test in connection with the question of insane delusion, the court instructed the jury as follows: It may aid you in coming to a conclusion as to the defendant's condition of mind at the time of the killing, to determine what was his ordinary or usual condition of mind. Was his permanent, ordinary and usual condition such, in consequence of disease, that he was unable to understand the nature of his actions, or to distinguish between right and wrong in his conduct? Was he subject to insane delusions that destroyed his power to so distinguish, and did this continue down to and em-

brace the act for which he is tried? If so, was he simply an irresponsible lunatic; or, on the other hand, had he the ordinary intelligence of sane people, so that he could distinguish between right and wrong as to his own actions and the actions of others? If you are satisfied that his chronic or usual condition was that of sanity, at least so far that he knew the character of his own actions, and whether they were right or wrong, and was not under any permanent insane delusions, which destroyed his power of discrimination between right and wrong as to them, then the only inquiry remaining is whether there was any special insanity connected with this killing."

We are of opinion that these instructions, as applied to the facts of this case, are unobjectionable. They correctly declare the general principles of law as announced in the great weight of authorities upon this subject. The general test that, if a man has capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question, and has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and should be held criminally responsible for his acts, is approved in a majority of the cases. The qualifications stated in the instructions: "Had he at the time the power of distinguishing good from evil?' and "Was he subject to insane delusions that destroyed his power to so distinguish?" and other explanations and qualifications stated therein, render it unnecessary to discuss some of the distinctions to the general test, as applied in some of the authorities. It is enough to say that the instructions, taken in their entirety, are correct, and that the general principles announced therein are sustained in the following states and authorities, viz.: Arkansas, in *Williams v. State*, 50 Ark., 511. California, in *People v. McDonell*, 47 Cal., 134. Delaware, in *State v. Danby*, 1 Houst. Crim. Cas., 166; *State v. West*, id., 371; *State v. Dillahunt*, 3 Har. (Del.), 533. Georgia, in *Roberts v. State*, 3 Ga., 310; *Choice v. State*, 31 Ga., 424; *Anderson v. State*, 42 Ga., 32; *Humphreys v. State*, 45 Ga., 190; *Brinkley v. State*, 58 Ga., 296. Kansas, in *State v. Mowry*, 15 Pac. Rep., 282. Maine, in *State v. Lawrence*, 57 Me., 574. Maryland, in *Spencer v. State*, 69 Md., 37. Massachusetts, in *Com. v. Rogers*,

7 Metc., 500. Minnesota, in *State v. Shippey*, 10 Minn., 223 (Gil., 178). Mississippi, in *Bovard v. State*, 30 Miss., 600; *Cunningham v. State*, 56 Miss., 269. Missouri, in *State v. Huting*, 21 Mo., 464; *State v. Redemeier*, 71 Mo., 174; *State v. Erb*, 74 Mo., 199; *State v. Kotovsky*, id., 247; *State v. Pagels*, 92 Mo., 300. Nebraska, in *Wright v. People*, 4 Neb., 407. New Jersey, in *State v. Spencer*, 21 N. J. Law, 197. New York, in *Freeman v. People*, 4 Denio, 28; *Wills v. People*, 32 N. Y., 715; *Finanagan v. People*, 52 N. Y., 467; *Moett v. People*, 85 N. Y., 374. North Carolina, in *State v. Brandon*, 8 Jones (N. C.), 463; *State v. Haywood*, Phil. (N. C.), 376. Ohio, in *Farrer v. State*, 2 Ohio St., 70; *Loeffner v. State*, 10 Ohio St., 599; *Blackburn v. State*, 23 Ohio St., 146. Pennsylvania, in *Com. v. Freeth*, 5 Clark, 455; *Com. v. Mosler*, 4 Pa. St., 266; *Prown v. Com.*, 78 Pa. St., 123. South Carolina, in *State v. Bundy*, 24 S. C., 445. Tennessee, in *Stuart v. State*, 1 Baxt., 179. Texas, in *Thomas v. State*, 40 Tex., 63; *Clark v. State*, 8 Tex. App., 359; *Leache v. State*, 22 Tex. App., 279. Virginia, in *De Jarnette v. Com.*, 75 Va., 878. In the district and circuit courts of the United States, viz.: *United States v. Holmes*, 1 Cliff., 117; *United States v. McGlue*, 1 Curt., 8; *United States v. Shults*, 6 McLean, 121; *Guiteau's Case*, 10 Fed. Rep., 168; *United States v. Young*, 25 Fed. Rep., 710; *United States v. Ridgeway*, 31 Fed. Rep., 144; *United States v. Faulkner*, 35 Fed. Rep., 730; *Territory v. Catton*, 16 Pac. Rep., 902. The following authorities either deny the correctness of the general test, or claim that modifications thereof should be made, viz.: Indiana, *Stevens v. State*, 31 Ind., 485; *Bradley v. State*, id., 492. But see *Walker v. State*, 102 Ind., 511. New Hampshire, *State v. Pike*, 49 N. H., 399; *State v. Jones*, 50 N. H., 369. Illinois, *Hopps v. People*, 31 Ill., 390; *Dunn v. People*, 4 Am. Crim. Rep., 52.

Upon whom is the burden of proof? The court, at the request of the prosecution, instructed the jury that the defendant "is presumed to be sane until the contrary is shown, and a doubt upon this question alone should not acquit, for insanity is an affirmative proposition, and the burden of proving it is upon the defense." "With regard to the methods of proof by which the defense of insanity may be established, the law from considerations of public policy, the welfare of society, and the safety of human life, proceeds with great cau-

tion, and has adopted a certain standard by which the insanity of the party on trial may be proved when relied upon. The burden of proving insanity rests upon the defendant, and, to warrant you in acquitting him solely upon that ground, his insanity at the time of committing the homicide — if you find that he did commit it — must be established by a preponderance of proof. The evidence of insanity must outweigh and overcome the presumption of, and evidence in favor of, sanity in some appreciable degree, and render it more probable that he was insane than that he was sane. Insanity, being a fact to be proved by the defendant, must be established by evidence in the case with the same clearness and certainty as any other fact alleged by the defendant in his defense; that is to say, the proof must be such in amount that, if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane. Insanity is not proved or established by simply raising a doubt as to whether it exists or not." The court, of its own motion, instructed the jury that "the defendant is presumable to be sane until proven insane. In determining whether the defense of insanity has been made out, you must decide whether the evidence for or against it outweighs. If the evidence tending to show insanity outweighs that against, it is proven; if the proof against it outweighs, then it is not proven. If not proven, it is out of the case; if proven, it takes its place along with other received proof; and if, upon the whole evidence, as thus settled, there is any reasonable doubt of guilt, either in existence or degree, the defendant must be given the benefit of such doubt, either to acquit or reduce the grade of the crime."

In regard to the burden of proof in cases of this kind there are three separate, distinct and well-defined theories: (1) The defendant must prove his insanity beyond a reasonable doubt. (2) The presumption of sanity prevails until it is overcome by preponderance of evidence showing the defendant's insanity to the satisfaction of the jury. (3) If any evidence is introduced tending to prove that defendant is insane, the state is bound to prove and establish his sanity, like all other elements of the crime, beyond a reasonable doubt. The first theory is sustained in Delaware (*State v. Pratt*, 1 Houst., 268), and in

New Jersey (*State v. Spencer*, 21 N. J. L., 197). But see *Graves v. State*, 45 N. J. L., 359; 4 Am. C. R., 386. The second and third are each supported by a formidable array of respectable authorities, and have been respectively discussed with great learning and ability by the most eminent jurists in the United States and in England. The second — the one adopted in this case — is sustained in the following states, and authorities therein, viz.: Alabama, in *Boswell v. State*, 63 Ala., 308; *Ford v. State*, 71 Ala., 385; *Parsons v. State*, 81 Ala., 597; Vol. 10, Chi. L. N., 59; *Gunter v. State*, 83 Ala., 96. Arkansas, in *McKenzie v. State*, 26 Ark., 335; *Casat v. State*, 40 Ark., 523; *Coates v. State*, 50 Ark., 330; *Williams v. State*, 50 Ark., 511. California, in *People v. Myers*, 20 Cal., 518; *People v. Coffman*, 24 Cal., 230; *People v. McDonell*, 47 Cal., 134; *People v. Wilson*, 49 Cal., 14; *People v. Bell*, id., 488. Connecticut, in *State v. Hoyt*, 46 Conn., 337. Georgia, in *Choice v. State*, 31 Ga., 424; *Humphreys v. State*, 45 Ga., 190; *Fogarty v. State*, 80 Ga., 450. Idaho Territory, in *People v. Walter*, 1 Idaho, 391. Iowa, in *State v. Felter*, 32 Iowa, 50; *State v. Bruce*, 48 Iowa, 530; *State v. Trout*, 74 Iowa, 545. Kentucky, in *Graham v. Com.*, 16 B. Mon., 594; *Kriel v. Com.*, 5 Bush, 372; *Brown v. Com.*, 14 Bush, 401; *Ball v. Com.*, 81 Ky., 662. Louisiana, in *State v. Burns*, 25 La. Ann., 302; *State v. Coleman*, 27 La. Ann., 692. Maine, in *State v. Lawrence*, 57 Me., 582. Massachusetts, in *Com. v. Rogers*, 7 Metc., 504; *Com. v. Heath*, 11 Gray, 303. Minnesota, in *Bonfanti v. State*, 2 Minn., 132 (Gil., 99); *State v. Grear*, 29 Minn. 225. Missouri, in *State v. Huting*, 21 Mo., 476; *State v. McCoy*, 34 Mo., 535; *State v. Klinger*, 43 Mo., 127; *State v. Smith*, 53 Mo., 270; *State v. Redemeier*, 71 Mo., 176; *State v. Erb*, 74 Mo., 204; *State v. Pagels*, 92 Mo., 300. North Carolina, in *State v. Starling*, 6 Jones (N. C.), 366; *State v. Willis*, 63 N. C., 26; *State v. Vann*, 82 N. C., 636. New Jersey, in *Graves v. State*, 45 N. J. Law, 359. Ohio, in *Loeffner v. State*, 10 Ohio St., 616; *Bond v. State*, 23 Ohio St., 357; *Bergin v. State*, 31 Ohio St., 115. Pennsylvania, in *Ortwein v. Com.*, 76 Pa. St., 415; *Lynch v. Com.*, 77 Pa. St., 213; *Brown v. Com.*, 78 Pa. St., 128; *Meyers v. Com.*, 83 Pa. St., 141; *Pannell v. Com.*, 86 Pa. St., 268; *Sayres v. Com.*, 88 Pa. St., 291. South Carolina, in *State v. Paulk*, 18 S. C., 514; *State v. Bundy*, 24 S. C., 439. Texas, in *Webb v. State*, 5 Tex. App., 607; *Clark v. State*, 8 Tex. App.,

359; *Webb v. State*, 9 Tex. App., 491; *King v. State*, id., 557; *Johnson v. State*, 10 Tex. App., 578; *Leache v. State*, 22 Tex. App., 279; *Massengale v. State*, 24 Tex. App., 181. Virginia, in *Boswell's Case*, 20 Grat., 874; *Baccigalupo v. Com.*, 33 Grat., 817. West Virginia, in *State v. Strauder*, 11 W. Va., 823; *State v. Robinson*, 20 W. Va., 740. The third theory is sustained in Illinois, in *Hopps v. People*, 31 Ill., 393, overruling *Fisher v. People*, 23 Ill., 293; *Chase v. People*, 40 Ill., 358. Indiana, in *Polk v. State*, 19 Ind., 170; *Stevens v. State*, 31 Ind., 491; *Guetig v. State*, 66 Ind., 95; *McDougal v. State*, 88 Ind., 27. Kansas, in *State v. Crawford*, 11 Kan., 42; *State v. Mahn*, 25 Kan., 187. Michigan, in *People v. Gurbutt*, 17 Mich., 9. Mississippi, in *Cunningham v. State*, 56 Miss., 273. Nebraska, in *Wright v. People*, 4 Neb., 407. New Hampshire, in *State v. Bartlett*, 43 N. H., 224; *State v. Pike*, 49 N. H., 399; *State v. Jones*, 50 N. H., 370. New York, in *People v. McCann*, 16 N. Y., 58; *Brotherton v. People*, 75 N. Y. 159; *Moett v. People*, 85 N. Y., 380. Tennessee, in *Dove v. State*, 3 Heisk., 349.

It will, from this review, be seen that there is a large majority of the decided cases in the United States in favor of the theory given in the instructions in this case. The question ought not, however, to be decided simply upon the ground of the greater number of the authorities. In many of the cases which adhere to the third theory it is earnestly and ably contended by learned judges, whose opinions have ever been entitled to great respect and consideration, that the burden of establishing the killing and the malicious intent is always upon the prosecution; that there cannot, logically, be any separation of the ingredients of the crime so as to require a part thereof, only, to be established by the state, and the balance to be established by the defendant; that the idea that the burden of proof ever shifts in a criminal case is unphilosophical and at war with fundamental principles of criminal law; that the rule established by a majority of the decided cases strips the defendant of the presumption of innocence which the law has given him as a shield throughout the entire proceedings, until the verdict of the jury establishes the fact, beyond a reasonable doubt, that he not only committed the act, but that he did so with malicious intent.

We are of opinion that the weight of reason, as well as the

decided preponderance of the authorities, is opposed to these views. It is undoubtedly true that it is incumbent upon the prosecution to prove every fact that is material, and necessary to constitute the crime of which the defendant is accused, which, of course, includes the sanity of the defendant; but is it not equally true that the burden of proving his sanity is fully met by the presumption of law "that every person is of sound mind until the contrary appears?" If this be true, then it is not a harsh, unphilosophical or inhuman rule that requires a defendant, who seeks to avoid the punishment which the law imposes upon him for the crime he has committed, by means of the defense of insanity, to rebut the presumption of sanity by proof that is satisfactory to the jury. Insanity being in its nature an affirmative defense, does it not necessarily follow that, where the insanity of the defendant is established by the presumption of law, or by the testimony of witnesses, or by both, the defendant, in order to overcome this presumption or testimony, must establish his insanity by a preponderance of the evidence?

The presumption of the law in favor of innocence is essential, not only to the sanity of the individual accused of crime, but is absolutely necessary for the protection and security of society, and it is universally recognized in the trial of all criminal cases. But there are other legal and well-recognized presumptions, sanctioned by law and approved by the wisdom of ages, which are equally as important and as indispensable to individuals and to the well-being, safety and protection of society, and equally as necessary for the proper administration of justice in the trial of criminal cases. Within this category prominently stands the presumption of sanity. "Every man is presumed to be sane." Is not this presumption as necessary and as universal in its application as the presumption of innocence? Ought not proof to be required to rebut the other? When an individual has committed an offense, without any excuse or justification, and attempts to shield himself from the legal consequences of his act on the ground that he was insane when he committed the deed, the law ought to demand of him such a degree of evidence in support of this defense as will, at least, satisfy the jury that when he committed the act he was not responsible for his acts be-

cause he was insane. "This rule is founded in wise policy, and is obviously necessary for the protection of society, as much so as that which requires satisfactory evidence to rebut the presumption of innocence. Besides the character of the presumption, its necessary operation in almost every transaction of life, and its almost universal application in civil as well as criminal cases, there are other cogent reasons for this requisition of clear and satisfactory evidence in support of a defense in criminal cases grounded alone upon insanity. In ordinary defenses, want of malice, sudden heat and passion and so forth, when, by reason of the killing, the burden of proof rests upon the accused to rebut the legal presumption of malice, the facts relied on are usually a part of the transaction, or so directly connected with it, and so simple and few, that they are readily comprehended and appreciated by a jury, and no jury will convict in such cases whilst a rational doubt is entertained as to the reality and merit of the defense relied on, notwithstanding the burden of proof may be, by legal presumptions, cast upon the accused. But the plea of insanity is peculiarly liable to abuse, it can be so easily concocted, and facts admissible as evidence in its support, so readily manufactured by the accused. The latitude of inquiry in such cases is almost boundless. It does not, as other defenses, depend upon the proof of facts comprehensible to ordinary minds, and connected remotely or immediately with the tranaction under investigation; but in its support facts having no connection with the transaction, only so far as they may tend to show general or previous insanity of the accused, but happening long anterior to the commission of the offense for which he was tried, and the opinions of learned and scientific men upon such facts, are admissible as evidence. It not unfrequently occurs that this plea is resorted to as a last extremity, with a view of introducing under the latitudinous range of inquiry a multitude of facts and opinions not directly relevant, but strictly admissible, to produce confusion and doubt in the minds of jurrors, and interpose thereby obstacles to the attainment of just verdicts. The only safe rule in such cases is to require in support of such defense satisfactory evidence that at the time of the commission of the act the party accused was insane. Less than that ought not to suffice, nor with less is the law content." *Graham v. Com., supra.*

If we now analyze the subject we shall find that this is the only safe conclusion for society, while it is just to the prisoner. Soundness of mind is the natural and normal condition of men, and is necessarily presumed, not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act, contrary to the known nature of the race of which he is one. He must be treated and adjudged to be a reasonable being until a fact so abnormal as a want of reason positively appears. It is, therefore, not unjust to him that he should be so conclusively presumed to be sane until the contrary is made to appear on his behalf. To be made so to appear to the tribunal determining the fact, the evidence of it must be satisfactory, and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature. It cannot, therefore, be said to be cruel to the prisoner to hold him to the same responsibility for his act as that to which all reasonable beings of his race are held, until the fact is positively proved that he is not responsible. *Ortwein v. Com., supra.*

Are the instructions given upon the subject of insane delusions erroneous? The instructions given upon this point, as well as others, are very lengthy, and cover almost every conceivable question that could be presented. We omit all of the instructions asked by the prosecution and given by the court, and quote such portions of the court's charge as will convey a definite idea of the general principles embodied in all of the instructions upon the subject of insane delusions as follows, viz.: An insane delusion is an unreasonable and incorrigible belief in the existence of facts, which are either impossible absolutely, or impossible under the circumstances of the individual. A man, with no reason for it, believes that he is the owner of untold wealth, or that he has invented something which will revolutionize the world, or that he is the president or the king, or God or Christ, or that he is dead, or that he is immortal, or that he is inspired by God to do something. These delusions are as real to the demented person as anything about him can be. He knows it the same as he knows his own existence. The important thing to which I wish to call your attention is that an insane delusion is never the result

of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and foolish resolutions, but he cannot reason himself, or be reasoned or persuaded, into insanity or insane delusions. The insane delusion does not relate to mere sentiments or theories, or abstract questions in law, politics or religion. All these are subjects of opinions which are beliefs founded upon reasoning or reflection. These opinions are often absurd in the extreme. Men believe in animal magnetism, spiritualism and other like matters, to a degree that seems unreason itself to most other people; and there is no absurdity in relation to religious, political and social questions that has not its sincere supporters. These opinions result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient *data*, ignorance of men and things, fraudulent imposture, and often from perverted moral sentiments; but still they are opinions founded upon some kind of evidence and reasoning, and liable to be changed by better external evidence or sounder reasoning, but they are not insane delusions.

This portion of the court's charge is copied from *Guiteau's Case*, 10 Fed. Rep., 170. It has been generally approved wherever discussed, though it is said in *Parsons v. State*, 81 Ala., 591, that "the case in its facts is so peculiar as scarcely to serve the purpose of a useful precedent." These instructions were supplemented by a reference to the testimony in the case. "For instance, the defendant has testified that Piccoli had attempted to kill him by placing giant powder in a certain place in the mine. Now, if he believed this (which is for you to determine), and his belief was based upon something that he had seen in the mine, or had heard from others, and was the result of a consideration of the facts and of reasoning, it was not an insane delusion, and was not caused by insanity, no matter whether in your judgment there was or was not sufficient evidence to justify him in coming to this conclusion. If there was sufficient evidence to justify him in coming to this conclusion, then the reasoning was sound; if not, then it was unsound; but in either case, if the belief was the result of reasoning, it was not the product of insanity, and

is no evidence of insanity. There is some evidence in the case to the effect that the defendant stated that he had killed Piccoli because he had called him a bastard. Supposing this to be true, and also that the defendant really entertained the belief that he would be justified in killing any one who called him a bastard, this would not be an insane delusion, but would be a mere belief; nor, if the defendant knew that the law did not permit one to kill another under those circumstances, would the entertainment of such a belief in any manner excuse him; and, as before stated, if he knew that the law held such killing to be a crime, his belief, if he entertained it, that a jury would not convict him therefor, would constitute no excuse whatever. You have heard the defendant testify that he believed that Fred Franks had hired Piccoli to kill him; that he knew this from the fact that he had a certain conversation with Dr. Henderson, and had seen a hundred dollars in Piccoli's possession, and from other evidence, which altogether convinced him that such was the case. If by this system of comparison of facts and reasoning therefrom he had convinced himself that such was the case, this would not be an insane delusion, but would be a mere opinion or belief that might or might not be true." After a like comparison and conclusion with reference to the belief of defendant that it was unnecessary to timber a mine, and his wishing to bend a mining track in a wrong direction, and a further illustration of the belief of defendant that Piccoli intended to kill him, to the effect that if this belief was formed upon what he had seen and heard, and was the result of such reasoning upon facts, then it was not an insane delusion, but a belief based upon evidence, and that when men reason the law requires them to reason correctly as to their duties, the court, upon this point, concludes its charge as follows: "Supposing that this belief that defendant claims to have had that the deceased intended to kill him was really an insane delusion, as I have defined it, and was not a belief to which he had come from considering the circumstances, then what is the law applied to such a situation as this? It is that when a person labors under a partial delusion only, and is not in other respects insane,—that is, is not insane upon all subjects,—he must be considered in the same situation as to responsibility as if the facts with re-

gard to which the delusion exists were real. But, as I have before stated, if it was a fact that Piccoli did really intend to kill Lewis, this would not justify Lewis in hunting him up and killing him, when, until he had so hunted him up, his danger, if any, was neither immediate, imminent nor impending; and if you find that defendant did go to where Piccoli was for the purpose of killing him, and that until he had so done he was in no imminent, immediate or impending danger, then the fact that he had an insane delusion that Piccoli intended to kill him constitutes no justification or excuse."

It may be that the definitions concerning an insane delusion were not the best that could be given. A few terse, vigorous and pointed instructions would doubtless have been better; but elaboration of correct principles is not necessarily erroneous, although there may be cases where it tends more to confuse than to enlighten juries. The real objections urged by counsel relate to the last portion of the instructions above quoted. Several of the cases we have cited upon other points, as well as cases to be found upon the point under consideration, refer to the trial of McNaghten for the killing of Edward Drummound, which at the time created throughout England a great degree of interest, and resulted in having the case submitted by the house of lords to fifteen judges upon certain questions. Lord Chief Justice Tindal, in referring to the one applicable to this point, said: "The fourth question which your lordships have proposed to us is this: 'If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?' To which question the auswer must, of course, depend on the nature of the delusion. But, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune and he killed him in revenge for such supposed injury,

he would be liable to punishment." 10 Clark & F., 211. This decision is vigorously attacked in Ray's Medical Jurisprudence of Insanity, section 34 *et seq.;* where the author says that "such a remarkable doctrine as this can have sprung from only the most deplorable ignorance of the mental operations of the insane." On the other hand, in Wharton & Stille's Medical Jurisprudence, section 126, it is said: "So far as the law thus stated goes (and it is stated with extreme caution), it has been always recognized as binding in this country." In Browne's Medical Jurisprudence of Insanity the author approves the decision in *McNaghten's Case,* and, in the course of the discussion, says: "The rule that the nature of the delusion is always to be considered in relation to the nature of the act; that when the facts which are falsely believed are such as would, if they had really existed, have justified the act, the act shall be justified, and when they are such as, even supposing they were true, would not have justified the act of which the prisoner is accused, then his act is criminal,—seems to us to be open to none of the objections which are urged against it." Ludlow, J., in charging the jury in *Com. v. Freeth, supra,* said: "If this spirit of delusion existed, the act charged against the prisoner must be the direct result of this delusion, and the delusion must have been directly connected with the act driving him to its commission, and must have been such a delusion, which, if it had been a reality instead of imagination, would have justified him in taking life." See, also, *Baldwin v. State,* 12 Mo., 231; *Boswell v. State,* 63 Ala., 320; *Cunningham v. State,* 56 Miss., 277; *State v. Mewherter,* 46 Iowa, 100; *Com. v. Rogers,* 7 Metc., 503. Dr. Wharton says that the charge of Judge Cox in *Guiteau's Case* has "gone a great way to finally establishing the rule that delusions, to constitute a defense, must be objective as distinguished from subjective. They must be delusions of the senses, or such as relate to facts or objects, not mere wrong notions or impressions; and the aberration in such case must be mental, not moral, and must affect the intellect of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong continuing to exist, although it may be in a perverted condition. To enable them to be set up as a defense to an indictment for a

crime, they must go to such crime objectively, *i. e.*, they must involve the object at which the crime is directed;" and the editor expressed the hope that the charge "will exercise a salutary influence in the administration of justice in the future in cases of premeditated homicide, and that the long conflict of medical science, speculative at most, with its fine distinctions of mental and moral aberration, transmission by descent, physical convolutions of the brain, etc., against legal science, based as it is on common sense and reason, upon the subject of human responsibility, will speedily approach an end, and criminals be subject to a reasonable legal test of responsibility for crime." It is, perhaps, expecting too much of men skilled in the science of medicine, and learned in the jurisprudence of the law, that they will unanimously agree upon the tests necessary to establish insanity, or that they will unite upon any definite rule as to the degree of responsibility of men who may be partially insane, or as to the burden of proof in such cases; yet it does really seem that, with all the lights of reason and authority now to be found upon the subject, there ought not to be any longer so much doubt and confusion. It is gratifying, at least, to know that there is a disposition upon the part of many of the ablest writers upon this subject, medical and legal, to make an earnest effort to harmonize many of the conflicting views which now exist.

The principles we have announced, and the rules we have followed, are believed to be legal, just and reasonable to the defendant, proper for the fair and impartial administration of justice, safe for the interests of society, and necessary for the protection and welfare of the community at large. The judgment of the district court is affirmed.

Muscoe v. The Commonwealth.

Murder: *Resisting arrest — Police officer.*

(86 Va., 443.)

1. If the ordinance of the city of Charlottesville, providing that every policeman, when any offense is committed within the town, shall try to detect and arrest the offender, confers greater power on policemen in

respects to arrests than is conferred by the general laws on constables, and authorizes them to arrest without warrant, for misdemeanors not committed in their presence, it is void; and, on trial for murder in killing a police officer of that city who was trying to arrest defendant, without warrant, for an alleged past misdemeanor, an instruction, based on such ordinance, that a police officer has no right to arrest without warrant, except for offenses committed in his presence, or where he has cause to suspect that a felony has been committed, "or in pursuance of legal ordinances of the city of whose police force he is a member," is misleading and erroneous.

2. A subsequent instruction, leaving it entirely to the jury to say whether or not the arrest of defendant by deceased was legal, is reversible error, though by the same instruction the jury are told that a police officer who exceeds his powers in making an arrest is a trespasser, and that one may resist an unlawful arrest, but are not told what the police officer's powers are, except as in the former instruction.

Error to corporation court of Charlottesville.

William Muscoe, *alias* William Jordan, was convicted of murder in the first degree. His motion for new trial was denied, and he was sentenced to death, and brings error. G. T. Seal, the deceased, was a policeman of the city of Charlottesville, and was shot and killed by defendant while he was arresting the latter, without a warrant, for a misdemeanor not committed in deceased's presence.

The following ordinances of the city of Charlottesville were shown in evidence: "(6) Every policeman shall endeavor to preserve the peace of the town, and to prevent the commission of offenses. When any offense is committed in the town, he shall earnestly endeavor to detect and arrest the offender, and he shall strive to enforce every ordinance prescribing any fine or punishment. (7) All vagrants, or persons without visible means of support, found within the limits of the town, shall at once be arrested by the police, and, upon conviction of said offense, shall be punished as provided by law." The third and fourth instructions given by the court were as follows: "(3) That a police officer has no right to arrest a person without a warrant, unless it be for an offense committed in his presence, or where he has cause to suspect a felony has been committed, or in pursuance of legal ordinances of the city of whose police force he is a member, empowering him to make such an arrest in some specified case. (4) That a police officer acting beyond the scope of his authority in making an arrest

is a trespasser, and a person is authorized to resist an unlawful arrest, whether the attempt be made by a police officer or a private citizen; but the jury must decide from the evidence whether the attempted arrest is unlawful or not."

Jas. H. Hayes, for the plaintiff in error.
R. A. Ayres, attorney-general, for the commonwealth,

Lewis, P. We are of opinion that by its third and fourth instructions the corporation court misdirected the jury, and that for this error the judgment must be reversed and a new trial awarded. The third instruction is erroneous, because there was no "legal ordinance of the city" empowering the deceased to arrest the prisoner, without a warrant, for a misdemeanor not committed in his view, and the instruction was therefore calculated to mislead and confuse the jury. The seventh ordinance, relating to vagrants, may be laid out of view, as the charge upon which the deceased arrested the prisoner was not vagrancy, but petit larceny. It is contended, however, that the sixth ordinance applies to the case, and authorized the arrest. But we do not think so. The ordinance does, indeed, provide on its face that every policeman, when any offense is committed in the town, shall endeavor to detect and arrest the offender; but, if this was intended to confer upon the police force of the city greater authority with regard to arrests than constables possess, the ordinance is ineffectual for any such purpose, for, to that extent, it is not warranted by the charter of the city, or by any statute, and is in contravention of the general law of the state, and therefore void. An ordinance, to be valid, must be reasonable. It must not be oppressive, and, unless plainly authorized by the legislature, it must not be inconsistent with the general principles of the common law, particularly those having relation to the liberty of the people or the rights of private property. It is an established principle that a municipal corporation, deriving its powers, as it does, from legislative grant, can exercise no power not expressly, or by fair implication, conferred upon it, and hence, as the authorities uniformly hold, any doubt arising out of the terms used by the legislature must be resolved in favor of the public. *Thompson v. Lee Co.*, 3 Wall., 327;

Kirkham v. Russell, 76 Va., 956; 1 Dill. Mun. Corp. (3d ed.), § 91, and cases cited. Indeed the legislature has expressly enacted that, where the council or authorities of any city or town are authorized to make ordinances, the same must not be inconsistent with the constitution and laws of the United States or of this state. Code 1887, § 5, subd. 15. The provisions of section 1038 of the code, which, in general terms, authorize the councils of cities and towns to make ordinances, to appoint officers, and to define their powers and duties, are to be construed in the light of these principles; and, so construing them, we must hold that the police force of Charlottesville have no greater authority in apprehending persons charged with crime than the general laws of the state confer upon constables. Section 1034 of the code declares, specifically, that the powers and duties of town sergeants, within their respective jurisdictions, shall be the same as those of constables; and if, by subsequent sections, the legislature had intended to authorize city councils to confer upon police officers greater powers in respect of arrest, the intention would doubtless have been expressed in clear and unmistakable terms. By the general laws of the state, which upon this subject are, for the most part, the common law, a constable may, *virtute officii*, without warrant, arrest for felony, or upon reasonable suspicion of felony, and for misdemeanors committed in his presence, and take the offender before a magistrate, to be dealt with according to law. Peace-officers may also, without warrant, enforce the ordinary laws of police by the arrest of vagrants and drunken and disorderly persons, and detain them for the action of the proper police magistrates. But in general, in cases of misdemeanor, a constable, or other peace-officer, cannot, any more than a private person, justify the arrest of the offender without a warrant, when the offense was not committed in his presence. 2 Hawk. P. C., ch. 13; 1 Chit. Crim. L., 20; 1 Bish. Cr. Pro. (3d ed.), § 181; 7 Am. & Eng. Cyclo. L., 675; 1 id., 734; 1 Dill. Mun. Corp. (3d ed.), § 210, and cases cited. Indeed, not only must there be a warrant in the class of cases last mentioned, but, to justify the arrest, the officer must have the warrant with him at the time. *Gilliard v. Laxton*, 2 Best & S., 362; 110 Eng. Com. L., 363; *Regina v. Chapman*, 12 Cox, C. C., 4. The provisions of the code author-

izing the county courts of the state to appoint a special police for their respective counties, and defining the powers and duties of such special police, have no bearing on the present case. Code, §§ 3922, 3927. It is clear, therefore, that the latter part of the third instruction is, as we have said, misleading, and ought not to have been given.

The objection to the fourth instruction is, that it leaves it entirely to the jury to say whether the arrest of the prisoner by the deceased was legal or not; whereas the question, what is a legal arrest? is a mixed one of law and fact, and must therefore be determined by the jury upon the facts of the particular case, under suitable instructions from the court as to the law. *Davis v. Russell*, 5 Bing., 354; 15 Eng. Com. L., 463. The court ought, therefore, to have explained to the jury what constitutes a legal arrest, and then left it to them to say whether, upon the evidence before them, the arrest in question was legal or not. As it was, they were left without any positive rule to guide them to a correct conclusion. It is obvious that the question whether the arrest in question was legal or not is a vitally important one in the case. If the arrest was legal, the prisoner had no right to resist it. If it was illegal, he had. A person, undoubtedly, has a right to resist an illegal arrest, and if, in so doing, he kills the person who undertakes to arrest him, he is guilty of manslaughter only, unless the circumstances show malice, in which case he is guilty of murder, for the law excuses the act only to the extent that it is presumed the accused acted, not with malice, but from the excitement of the moment. 2 Bish. Cr. L. (7th ed.), §§ 652, 699; *Briggs v. Commonwealth*, 82 Va., 554; *Regina v. Chapman*, 12 Cox, C. C., 4; *Roberts v. State*, 14 Mo., 138; *Rafferty v. People*, 72 Ill., 37. In the present case, it is not pretended that there was any other legal authority for the arrest of the prisoner by the deceased, on the charge of petit larceny, without a warrant, than the sixth ordinance above mentioned, and it is certain the verbal order of the mayor of the city for his arrest conferred no such authority. A justice of the peace, or a mayor of a city or town having similar powers, may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence, but this power extends no

further. In all other cases he must issue his warrant, in writing, to apprehend the offender. Arrest without warrant where a warrant is required, is not due process of law, and arbitrary or despotic power no man possesses, under our system of government. 4 Bl. Com., 292; 1 Chit. Crim. L., 24; *Board v. Schroeder*, 58 Ill. 353; *State v. James*, 78 N. C., 455.

It is true the court, in the instruction under consideration, told the jury that a police officer who exceeds his powers in making an arrest becomes a trespasser, and that a person may lawfully resist an illegal arrest. But what those powers in the present case were the jury were not told, or, at least, they were not told in such a way as to enable them to understand them; for while, in the third instruction, they were told, in effect, that a police officer has no right to arrest a person, without a warrant, for a misdemeanor committed in his absence, yet the subsequent language of the instruction on the same point was misleading and erroneous, as we have seen; and the effect of what was said in the first part of the fourth instruction, above referred to, was practically destroyed by the accompanying declaration, that the jury were the judges of whether the arrest in question was legal or not, which was equivalent to telling them that what had just been said was merely advisory, and not authoritative, and therefore that they were neither legally nor morally bound to regard it, just as, in the third instruction, they were virtually told that they were to decide whether the ordinances of the city were legal or not, which was a question, not for the jury at all, but for the court exclusively, as much so as is a question relating to the constitutionality of a statute. So that the tendency of the instructions was to perplex and mislead the jury, instead of aiding them to a correct conclusion; and this, undoubtedly, was error, for which the judgment must be reversed. As was said by Judge Richardson, speaking for the court, in *Honesty's Case*, 81 Va., 283: "The accused has a right to a full and correct statement by the court of the law applicable to the evidence in his case, and any misdirection by the court, in point of law, on matters material to the issue, is ground for a new trial." And, in a still more recent case, it was said by the court, as in *Montague's Case*, 10 Gratt. (Va.), 767, it had been previously decided, that where any legal right has been denied

to a party on trial for a criminal offense, or any of the safeguards thrown around him by law for his protection have been disregarded, as where an erroneous instruction is given, or a correct one refused, it is not for this court to say what might or might not have been the effect upon the case of the accused; that the law will intend prejudice, if it be necessary to enable him to exercise his right to have the judgment of the court reviewed in the appellate tribunal, and will hold it impossible, in such a case, to say that a fair and impartial trial had been had. *Vaughan's Case*, 85 Va., 671. The case must, therefore, go back for a new trial, and, as it must go back on account of the misdirection of the court, we express no opinion as to the weight of the evidence, nor would it be proper to do so. We will only add that we find no error in any of the instructions given by the court except those above mentioned, and, in view of what has been already said, we deem it unnecessary to consider *seriatim* the instructions offered by the prisoner, and refused.

Judgment reversed.

STATE v. TOOLE.

(106 N. C., 736.)

NUISANCE: *Obscene songs — Indictment.*

1. When a ribald song containing the stanza charged in the indictment is sung in a loud and boisterous manner on the public streets, in the presence of divers persons then and there present, and such singing continues for the space of ten minutes, this is a nuisance, though the special words charged may not have been repeated.
2. When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective the judgment will be supported by the good count; and, in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other counts, unless the error was such as might or could have affected the verdict on them.
3. A defendant has the right to require a separate verdict to be rendered on each count, as he has the right to require the jury to be polled; but this is a privilege, and there is not error unless the defendant asks for a separate verdict, or that the jury be polled, and is refused. He waives the right to insist on them, if not asked for in apt time.

SHEPHERD and AVERY, JJ., dissenting.

This was an indictment for nuisance tried before Meares, J., and a jury, at August term, 1889, of Mecklenburg criminal court. There were two counts in the indictment, and a general verdict of guilty. The first count charged the loud and boisterous use of a single profane sentence in a public place, etc., and its repetition for the space of ten minutes, to the common nuisance, etc. The second count charged the singing in a loud and boisterous manner on the public streets, etc., of an obscene song, setting out five lines thereof, and the repetition thereof, for the space of ten minutes, in presence of divers persons then and there present, to the common nuisance. The indictment was in the usual form, and no objection was taken thereto. On the first count there was evidence tending to show that the profane expression as charged therein was used once; that it was on the public street, in hearing of divers persons, and defendant continued to talk in a loud and boisterous manner; but there was no evidence that this expression was used more than once, or that any other profane words were used. On the second count there was evidence by the state that on the public street, in the hearing of divers persons present then and there, the defendant passed along singing a ribald song in a loud and boisterous manner, in which occurred the five lines charged; that the singing of such vulgar and obscene song continued for the space of ten minutes, and was loud enough to be heard by many persons, but witnesses could not say whether the words charged were repeated. The defendant offered evidence to contradict the state's witnesses on both counts, and asked the court to charge: "If the defendant uttered the words set forth in the first count only a single time, she would not be guilty; and, likewise, if she uttered the words set forth in the second count only one time, she would not be guilty." The court refused so to charge, and defendant excepted. The jury returned a general verdict of guilty. From the judgment pronounced the defendant appealed, assigning as error the exception above stated.

The Attorney-General, for the state.

CLARK, J. (*after stating the facts as above*). Four witnesses for the state testified that the defendant passed along a

thickly-settled street in the city of Charlotte, singing the obscene song set forth in the second count in a boisterous manner, and loud enough to have been heard in several houses; that such loud, boisterous and obscene singing continued for the space of ten minutes, but they could not testify that the particular words set out in the bill were used more than once. The defendant testified that she did not sing such song, and also introduced several witnesses who testified that they lived in that neighborhood, near enough to have heard her, and that they did not hear her singing the song as charged. We think it was not error for the court to refuse to instruct the jury, as asked, that "if the defendant uttered the words set forth in the second count only one time she would not be guilty." The use of the vulgar stanza set out, if uttered as part of a longer song of similar tenor, extending over a period of ten minutes, along a public street, would be a nuisance, even though the identical words set out may not have been repeated. If this were not so, the perpetrators of such conduct could not be punished unless the hearers are quick enough of ear to catch, and tenacious of memory to retain, the whole of a vile song which disgusts them, and not even then unless there was repetition. The nuisance complained of, in effect, is the loud and boisterous singing for ten minutes of an obscene song, containing the stanza charged, on a public street, in the hearing of divers persons then and there present. This, though done only on a single occasion, may be a nuisance. *State v. Chrisp*, 85 N. C., 528.

There having been a general verdict of guilty on two counts for offenses punishable alike, it is immaterial to consider, as to the other count, whether there was error committed or not, unless it was such error as might or could affect the verdict of guilty on the second count; and such is not the case here. When there are several counts in the bill, and there is a general verdict of guilty or not guilty, that is a verdict as to each of the counts of guilty or of not guilty, as the case may be. If it is a general verdict of not guilty, the defendant is entitled to his discharge. If it is a general verdict of guilty upon an indictment containing several counts, charging offenses of the same grade, and punishable alike, the verdict upon any one, if valid, supports the judgment; and it is im-

material that the verdict as to the other counts are not good, either by reason of defective counts, or by the admission of incompetent evidence or giving objectionable instructions as to such other counts, provided the errors complained of do not affect the valid verdict rendered on this count. "To require each distinct though cognate offense to be placed in a separate indictment is to oppress the defendant, by loading him with unnecessary costs, and exposing him to the exhaustion of a series of trials, which the prosecution would encounter with unwaning strength, and with the benefit derived from a knowledge of its own case, and that of the defendant." In criminal cases the practice of uniting counts for cognate offenses has always been encouraged, not merely because in this way the labor of the courts and the expenses of prosecution are greatly diminished, but because it relieves defendants of the oppressiveness which would result from the splitting of prosecutions. Whart. Cr. Pl. (9th ed.), § 910. Indeed, with this view, the court will, in a proper case, require a consolidation of separate indictments, and treat them as counts in one bill. This was done in the famous tea suits before Judge Washington, in which a separate libel was brought for each of one thousand chests of tea alleged to have been smuggled. In *State v. McNeill*, 93 N. C., 552, the court sustained the consolidation of four separate indictments, and treated them as four counts in one indictment. It is usually a benefit to defendants to combine several counts in one trial. When the defendant thinks he will be damaged by the joinder of several counts in the same indictment, it is open to him to move to quash, or to require the solicitor to elect upon which count he will proceed. *State v. Reel*, 80 N. C., 442. Each count is in fact and theory a separate indictment. *United States v. Malone*, 20 Blatchf., 137. In *State v. Johnson*, 5 Jones (N. C.), 221, it is held that a second indictment may be treated as a second count. To the same effect, *State v. Brown*, 95 N. C., 685; *State v. Watts*, 82 id., 656; and even though they charge different felonies. *State v. Reel*, *supra*. A general verdict of guilty is a verdict of guilty on each and every count. Whart. Cr. Pl. (9th ed.), §§ 292, 758, 771, 907, and cases there cited; also *Hawker v. People*, 75 N. Y., 487; *Kane v. People*, 8 Wend. (N. Y.), 203; *Moody v. State*, 1 W. Va., 337. Indeed, the authorities are uniform and numerous to this effect.

Where the offenses are distinct the court can impose a sentence on each count, but where it is a stating of the same offense in different ways only one sentence should be imposed. *Commonwealth v. Birdsall*, 69 Pa. St., 482; *Commonwealth v. Sylvester*, Brightly, 331; Whart. Cr. L. (ed. 1868), 417, 421; *State v. Hood*, 51 Me., 363; *Crowley v. Commonwealth*, 11 Metc. (Mass.), 575; *Eldredge v. State*, 37 Ohio St., 191. If only one sentence is imposed, this is treated as a discontinuance as to all but one verdict. It is open to defendant to have the jury render a separate verdict upon each count and to have also a separate sentence on each if he so desires. If he make no objection to a general verdict, and only one sentence is imposed, it has always been held in this state that, if one or more counts are defective, the sentence will be supported by the good count, if there be one. *State v. Morrison*, 2 Ired. (N. C.), 9; *State v. Miller*, 7 id., 275; *State v. Williams*, 9 id., 140; *State v. Speight*, 69 N. C., 72; *State v. Bailey*, 73 id., 70; *State v. Beatty*, Phil., 52. The same rule prevails generally. Whart. Cr. Pl. (9th ed.), § 292; 1 Chit. Crim. L. (4th Am. ed.), 640; Bishop, Cr. Pr., 841. Lord Mansfield, in *Grant v. Astle*, 2 Doug., 730, regrets that this rule did not apply in civil cases also, which it could not do under the practice then obtaining, of a single issue. And a general verdict of guilty will be sustained though the counts are inconsistent. *State v. Baker*, 63 N. C., 276; *United States v. Pirates*, 5 Wheat. (U. S.), 184. Where there are several counts, and evidence was offered with reference to one only, the verdict, though general, will be presumed to have been given on that alone. *State v. Long*, 7 Jones (N. C.), 24; *State v. Bugbee*, 22 Vt., 32. For the same reason, in *State v. Stroud*, 95 N. C., 626, it is held by Ashe, J., that a general verdict of guilty upon two counts will be sustained if the evidence justifies either. The objection made in that case was that certain evidence was not admissible, and, therefore, that the instruction to the jury was erroneous upon one of the counts. The court, in the opinion, says that it makes no difference if the evidence was applicable to either count. To the same effect is *Hudson v. State*, 1 Blackf. (Ind.), 317. The same general principle as to verdicts upon indictments containing several counts is laid down by Mr. Justice Davis in *State v. Smiley*, 101 N. C., 709, and Mr. Justice Shepherd in *State v. Allen*, 103 N. C., 433, the two latest cases on the subject. In opposition

to the numerous authorities to the same effect is *State v. McCauless*, 9 Ired. (N. C.), 375, which seems to distinguish the case where the error complained of is an erroneous charge as to one of the counts; but we fail to see the force of the reasoning. As we have seen, when there is a general verdict on several counts held by the court below to be valid, and some of the counts are held invalid in this court, the judgment is supported by the valid count. *State v. Morrison*, 2 Ired. (N. C.), 9, and other cases *supra*. And when incompetent evidence is admitted as to one count the judgment is imputed to be given on the other count. *State v. Stroud* and *State v. Smiley*, *supra*. We see no difference whether the verdict on the count assailed is invalid upon those grounds or for erroneous instructions. The principle is this: that when there is a general verdict of guilty upon a bill containing several counts, there being as many verdicts of guilty as there are counts, if the offenses are punishable alike and of the same grade, any one of the verdicts, if valid, supports the judgment, and defendant cannot complain. *State v. Dawkins*, 32 S. C., —; *S. C.*, 10 S. E. Rep., 772. It cannot be said that the judge imposed the sentence upon the objectionable count or verdict, for the law places it on the valid count and unobjectionable verdict; nor that his judgment was increased by reason of the number of the counts, for, so long as the judgment upon the valid verdict is within the limits allowed by law for the offense charged in it, this court cannot find error. It is consonant to precedent and the reason of the thing, that, when there is a verdict against a defendant to which no error can be assigned, and a judgment is pronounced thereon within the limits allowed by law, such verdict and judgment should not be disturbed by reason of defects, whether in the indictment, the evidence or the instructions, alleged as to other verdicts against the same defendant; and it can make no difference whether such other verdicts are in other indictments or on other counts in the same indictment, if there are such errors as do not and cannot affect a valid verdict.

In the present case the defendant was charged in separate counts for different offenses, but of the same grade, and punishable alike. She might have been tried in two separate indictments, but she made no objection, and the court had the

discretion to try in one action. By the general verdict there stand two verdicts of guilty against her. As to one, no valid objection has been raised, and the judgment upon it is such as the law authorizes. She is not entitled to a new trial upon that, and it can serve no good purpose to give or refuse a new trial as to the other verdict, which is surplusage. If there was error, it was error immaterial to the verdict on the second count; and, there being but one sentence, it is placed upon the sound verdict, as it would be placed upon the sound count, if the other were defective. It would put the state to a great disadvantage, and greatly increase the difficulties and technicalities which already hamper the administration of justice upon the merits, if, when a defendant is tried upon several counts (which practice is favored to save defendants unnecessary costs), and found guilty upon all, a slight error in the judge's charge upon one count, in no wise affecting the trial on the other counts, should be allowed to vitiate the verdicts on all the other counts, though no error whatever can be found against the verdicts thereon. The rule herein stated can work no hardship to defendants, for they can always move to quash, or to require solicitor to elect, which motion, it is to be taken, the presiding judge, in all proper cases, will allow. *State v. Reel, supra; Carlton v. Commonwealth*, 5 Metc. (Mass.), 532. The defendant also has the right to require a separate verdict to be rendered on each count, if he doubts that the general verdict of guilty applies to all; and, if he does not ask to have this done, he cannot afterwards be heard to complain. *State v. Basserman*, 54 Conn., 88. It is like the right to have the jury polled, which is waived unless asked for at the time. *State v. Young*, 77 N. C., 498.

Affirmed.

SHEPHERD, J. (*dissenting*). The defendant was indicted in two counts for distinct offenses. It is conceded that the court erred in refusing to give the defendant's prayer for instruction, to the effect that the testimony was insufficient to sustain a conviction on the first count. There was a general verdict of guilty; and it is, I think, improperly held by the court that the defendant must lose the benefit of her exception because she did not request the court to require a sepa-

rate finding upon each count. This, it seems to me, is a novelty in the criminal practice of this state, and so opposed to the general principles controlling criminal trials that I am constrained to enter my dissent. I concur in nearly all of the general propositions laid down in the opinion of the court, but deny that they have any application to the case before us.

It is undoubtedly true that where there is a general verdict of guilty, and some of the counts are defective, the law presumes that the conviction was upon the good counts; but this is held only upon motions in arrest of judgment, in which it is assumed that there was evidence upon the good counts, and that no error was committed on the trial.

It is also conceded that where there are defective counts, and evidence is offered as to the good counts only, it will be presumed that the verdict was upon the good counts, and a general verdict will be sustained on a motion for a new trial. *State v. Long*, 7 Jones (N. C.), 24.

In none of the cases cited in the opinion was it decided that a general verdict will be sustained, upon motion for a new trial, where it appears that the court has erroneously instructed the jury, or where there is not sufficient testimony to sustain a conviction upon all of the counts, and especially upon all of the good ones. The error of the court consists, I think, in a failure to observe this fundamental distinction. The jury may have believed only the testimony bearing upon the count which was the subject of the erroneous charge, and yet we are called upon to assume that they acted only upon testimony relating to the second count. This, as I have remarked, is something new in the criminal practice in North Carolina, and is, in my opinion, not only unsupported by reason or authority, but is directly opposed to the rulings of this court. It has generally been understood that when a defendant makes his objection to testimony, or presents his prayer for instruction, in apt time, that he has done all that can reasonably be required of him, and that it is the duty of the court to conduct the trial to a proper conclusion. In lieu of this plain and well-settled practice, it is now proposed to make it the duty of the defendant to interfere and assist the court in extricating itself from an erroneous ruling, upon the penalty of losing the benefit of his exceptions.

Sympathizing, as I do, with the policy of trying cases upon their merits, and relieving the administration of the criminal law of many useless refinements and technicalities, I fail to see what evil is to be remedied, or good accomplished, by the present ruling of the court. In this case the judge erred, the defendant excepted, and, having this express notice that the objection was to be insisted upon, the solicitor failed to *nolle prosequi* the first count, or to ask for a separate verdict, and the court failed to direct such a verdict, although it might have done so *ex mero motu*. Where is the public exigency that requires the defendant to act in such a case, instead of the court, which has committed the error? I know of no authority in support of such a complete reversal of the positions of the state and the defendant in a criminal prosecution. It is clearly not found in the opinion of the court. Nearly all of the numerous authorities cited therein relate only to the general principles which I have conceded, and there are but five cases which seem to be relied upon in support of the particular question here presented. *State v. Smiley*, 101 N. C., 709, only decides that upon a motion in arrest of judgment a general verdict will be sustained if "either count be good." This, as we have seen, is conceded, and it is plain that the case has no bearing upon the question under consideration. Equally inapplicable is *State v. Allen*, 103 N. C., 433. In that case there was no error in the rulings of the court, and the only point decided was, that a general verdict would be sustained in an indictment for larceny and receiving. The only case which, I think, at all approaches the point, is *State v. Stroud*, 95 N. C., 626. An examination of that case will disclose that there was no exception whatever to the admission of testimony, and the court held that there was no error in any of the rulings of the judge. How, then, can such a case be regarded as authority upon a question which can only arise where there has been some erroneous ruling on the part of the court? What was said, therefore, by the learned justice who delivered the opinion can only be regarded as a *dictum;* and, as the two counts were based upon the same transaction, and the evidence was applicable to both, it is not very clear that the remarks of the justice furnish sufficient ground to warrant the inference which is sought to be drawn from

them. It cannot be seriously contended that the case decided the point which we are considering.

In *Hudson v. State*, 1 Blackf. (Ind.), 319, the indictment contained two counts — "one charging Hudson with shooting an Indian; the other, with aiding and assisting another man in stabbing him." The court held that "evidence of the aid and assistance charged in the second count was sufficient to support the charge of shooting set out in the first count," and a general verdict of guilty was sustained. How a case in which there is sufficient evidence to warrant a finding upon both counts is authority in one where there is only sufficient evidence to sustain a finding upon one count, I am unable to understand. This is all that the case decides, and it does not, therefore, apply to the question under discussion. I now come to the remaining case, which is *State v. Basserman*, 54 Conn., 92, in which it was said that it is the duty of defendant, in a case like ours, to ask for a separate verdict upon each count. These remarks, like those in *Stroud's Case*, were unnecessary, as the court expressly decided that the testimony in question was not only competent, but had not been objected to. Thus it is seen that there are only these two *dicta* — one of which is not at all clear — to be found in all of the cases cited which tend to sustain the decision of the court. It is not a little strange, if the position is correct, that no direct authority, either from the text-books or the reports, can be found in its support, and yet it is proposed, in the absence of any exigency requiring it, to overrule an express decision of this court, and work a very great change, in an important particular, in the conduct of jury trials in criminal cases. The decision of the court in *State v. McCauless*, 9 Ired. (N. C.), 375, is directly in point. Indeed, the case is precisely like ours in every respect. Pearson, J., for the court, says: "We think his honor erred in the instructions given. It is insisted that the defendants being properly convicted upon the second count, that will sustain the judgment, notwithstanding the error in the charge in reference to the first count. It is true, when one count in an indictment is defective, and another count is good, and there is a general verdict, a motion in arrest cannot be sustained, for the good count warrants the judgment, and, although the

punishment is discretionary, the judgment is presumed to have been given upon the good count. In this case both counts are good. There was error in the instruction given on one of the counts, by reason whereof the defendants were improperly convicted upon that count, and are entitled to a *venire de novo*." In *State v. Williams*, 9 Ired. (N. C.), 150, the same principle is affirmed by Ruffin, C. J. Eight of the counts were defective, and it was contended that, as to these, there was error in the charge, and that there should be a new trial, there having been a general verdict. The court said: "For, it is argued, the case is not within the rule that there may be judgment on an indictment containing defective counts, if there be a good one, because that proceeds on the ground that there was evidence to authorize a conviction upon each and all of the counts, whereas here the jury were told, it is said, that they might convict upon all, if they thought the prisoner guilty upon any one. If that be true, there ought to be a *venire de novo*, certainly; for, unquestionably, the eight counts are bad in which a taking without conveying, and a conveying without a taking, are respectively charged." The court sustained the conviction only because it appeared that the trial judge had in his charge "explicitly put these counts (the defective ones) out of the case." The irresistible inference to be drawn from the opinion is, that if these counts had not been put out of the case the general verdict would not have been sustained.

I prefer to stand by the decisions of these distinguished jurists, especially as they seem to be in accord with the true spirit of the practice governing the administration of the criminal law, and there is no advantage, in any respect, to be gained by departing from them. No harm can come to the state by the existing practice, as it is always, as I have said, in the power of the court to direct separate findings upon each count, or for the solicitor to *nolle prosequi* the count upon which there has been an erroneous ruling.

COMMONWEALTH v. MILLER.

(139 Pa. St., 77.)

NUISANCE: *Instructions — Discretion of court as to view and as to argument of counsel thereon.*

1. Where defendants are charged with maintaining a public and common nuisance by operating an oil refinery in a city, which emitted noxious and offensive vapors, and in which are stored and used inflammable, explosive and dangerous oils and gases, it being denied that the business is a public and common nuisance, the character of the location when the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, are proper matters for consideration by the jury in determining whether it is a public nuisance. *Huckenstine's Appeal*, 70 Pa. St., 102; *Commonwealth v. Reed*, 34 id., 275, followed.
2. The court charged that these facts had "weight, and are to be considered in determining the degree of the injury produced, and whether the effects are so annoying, so productive of inconvenience and discomfort, that it can be said to be really so prejudicial to the public as to be a nuisance," but further stated that they were "no defense to an indictment for erecting and maintaining a nuisance." *Held*, that this was not an adequate presentation of the defense.
3. A doubt that would cause one to pause and hesitate is, if fairly derived from the evidence, a reasonable one within the meaning of the criminal law, and an instruction to the jury that "it is such a doubt as would influence or control you in your actions in any of the important transactions of life," is erroneous.
4. While a request by defendants that the jury be allowed to view the alleged nuisance and see its situation and surroundings, and observe its operations, before passing upon them is a reasonable one, it is within the discretion of the court to refuse it.
5. It is also within the discretion of the court to refuse permission to counsel for defendants to comment to the jury upon the fact that counsel for the commonwealth refused to join in the request for examination of the premises by the jury; objected to it; and objected also to such comment.

Appeal from court of quarter sessions, Allegheny county; Christopher Magee, judge.

A. D. Miller, Sr., A. D. Miller, Jr., and R. B. Miller were indicted on four counts for maintaining a public nuisance. At the trial it appeared that they own and operate an oil refinery, situated on the Ohio river in the city of Allegheny, and that the establishment was originally built about thirty years

before, and for twenty years had been the property of the defendants. The city had grown up around it, and a number of manufactures and establishments of various kinds extend along the river front, both above and below the refinery. There are also private residences in its vicinity. The territory is a populous one. The establishment is a large concern, employing seventy-five men, and representing an investment of $300,000. The refinery is filled with the appliances required in the business, and contains explosive and inflammable material. In July or August, 1889, two tanks upon the premises were destroyed by a fire, which was accompanied by a serious explosion, and required the services of the fire department twenty-four hours before its extinguishment. After this occurrence a bill in equity was filed to enjoin the further operation of the works and is still pending. Witnesses for the commonwealth testified that a continuous stench permeated the atmosphere, producing headache and nausea. It was variously described as suggesting "rotten eggs," "burning gum boots," "putrifying substances," and as "a pungent, acid, acrid smell." It was claimed that the odor was emitted by the refinery. The defense denied that the stench proceeded from their establishment, and called witnesses who testified that there was no process in the refinery which could cause such a stench; that it had no trace of petroleum; that, covering the period during which it was noticed, experiments were being made in the vicinity in another establishment in purifying and refining lima oil, which was not used by defendants, and which produced a smell such as the commonwealth's witnesses described; that the sulphur arising from the blast furnaces, the burning oil and sand from the foundries, the deposits of night-soilers on the banks of the river in the immediate vicinity, were each and all capable of emitting the smell complained of. Experts were also called who testified that explosions can occur only where the tanks are almost empty, and never when they are full; that there is no such explosive force as gunpowder has, but the rapid combustion, which is called "explosion," has but the slightest force, restricted in its operation to the immediate vicinity. Defendants requested permission for the jury to visit the refinery when in operation and examine the premises, which was objected to by counsel for the commonwealth. The

court refused to make the order. Counsel for defendants attempted to comment to the jury upon the objection of the commonwealth to this proposition, but counsel for the prosecution "objected," and the objection was sustained. Verdict, guilty. Motions for a new trial and in arrest of judgment were overruled, and defendants were each sentenced to pay a fine of six cents to the commonwealth and the costs of the prosecution and to abate the nuisance. Defendants obtained a special allocation and appealed.

S. Schoyer, *George Shiras, Jr.*, and *S. B. Schoyer*, for the appellants.

W. B. Rodgers, *Geo. Elphinstone* and *John S. Ferguson*, for the appellee.

WILLIAMS, J. The defendants own and operate a refinery where crude petroleum and its products are prepared for market. There are four acres within the inclosure, fronting on the Ohio river. The Pittsburg & Western Railroad passes in front of it, along the river's edge. The Cleveland & Pittsburg Railroad runs upon the street directly in the rear. The city of Allegheny, like its sister city, Pittsburg, owes its growth and prosperity to the extent of its manufacturing interests, and the river front is almost wholly given over to these great industries. The indictment charges that the defendants' refinery is a public and common nuisance, because of the emission therefrom of certain noxious and offensive smells and vapors, and because the oil and gases stored and used therein are inflammable, explosive and dangerous. The jury, under the instructions of the court, found the defendants guilty, and the sentence which has been pronounced requires the abatement or destruction of a plant in which some $300,000 are said to be invested, and which gives employment to seventy-five men. The assignments of error are quite numerous, but the important questions raised are few. The first four assignments, the sixth, ninth, tenth and sixteenth, may be considered together, as they relate more or less directly to the same subject. The learned judge had his attention directed by the written points to the definition of a public nuisance, and to the circumstances under which the defendants' refinery

had been established and maintained for many years; and he instructed the jury that the character of the location when the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, were no defense to an indictment for nuisance. Among the expressions used by him are the following: "It is no defense to an indictment for a common nuisance that the business complained of has been in operation many years." "I do not think the size of an establishment makes any difference." And again: "Neither is it a defense in any measure that the business is a useful one," etc. If it had been an admitted or an established fact that the business of the defendants was a common nuisance, and they had attempted to justify its maintenance, these instructions would have been appropriate; but the question before the jury was whether the business was a nuisance. The decision of that question depended upon a knowledge of all the circumstances peculiar to the business — the place, its surroundings, and the employment of the persons in the vicinity. While no one of these, nor all together, would justify the maintenance of a nuisance, they might be sufficient, and they certainly were competent evidence from which the jury might determine whether the defendants' refinery was a common nuisance at the place where it was located, and this was the question to be determined by the trial. They might make, therefore, or contribute to make, a defense to the indictment trying. This distinction between an effort to justify an admitted or established nuisance and a denial that the business complained of amounts to a nuisance was evidently in the mind of the learned judge, but in the haste that attends jury trials he failed to place it clearly before the jury. He did say that the facts referred to had "weight, and are to be considered in determining the degree of the injury produced, and whether the effects are so annoying, so productive of inconvenience and discomfort, that they can be said to be really so prejudicial to the public as to be a nuisance;" but, following an explicit statement that these same facts were "no defense to an indictment for erecting and maintaining a nuisance," such as they were then trying, the jury was left without an adequate presenta-

tion of the defense. That such facts are proper for consideration and may make a defense has been long and well settled. Wood, Nuis., § 430. The same rule was applied in this state in *Huckenstine's Appeal*, 70 Pa. St., 102; and in *Commonwealth v. Reed*, 34 id., 275. The character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle. *Wood v. Sutcliffe*, 8 Eng. L. & Eq., 221. In the case last cited Lord Cranworth referred to a case at *nisi prius*, in which he had instructed the jury to consider not only whether the quantity of smoke complained of would amount to a nuisance, considered abstractly, but "whether it is a nuisance to a person living in Shields," which was the name of the town in which the business was conducted. It was in this respect that the instructions complained of in the first, second and third specifications were inadequate. They gave the general rule without the qualifications which the situation of the defendants' refinery entitled him to. The right to pure air is in one sense an absolute one, for all persons have the right to life and health, and such a contamination of the air as is injurious to health cannot be justified; but in another sense it is relative, and depends upon one's surroundings. People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts by reason of noise, dust, smoke and odors, more or less disagreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants had a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city, and the manner of the use of the river front for manufacturing purposes. If, looked at in this way, it is a common nuisance, it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve.

The fifteenth assignment relates to the definition of a "reasonable doubt." The learned judge said: "It is such a doubt as would influence or control you in your actions in any of the important transactions of life." He did not say that a doubt

that would cause one to pause and hesitate was, if fairly derived from the evidence, a reasonable one within the meaning of the criminal law, but that it must be one that would control one's conduct in the important transactions of life. Our actions are determined by the preponderance of considerations. We doubt, hesitate, examine, balance the argument for and against the given action, and act as the preponderance indicates. A doubt that would control our actions in the important transactions of life would be one that was so strong as not to be overcome by the balancing process. Such a doubt would be practically an unconquerable one. It would lead us not simply to refrain from acting, but to act.

The twelfth and thirteenth assignments relate to the request of the defendants that the jury be permitted to view the alleged nuisance, and see its situation and surroundings, and observe its operations, before passing upon them. This was a reasonable request, and, in view of the magnitude of the interest involved, it is difficult for us to understand why it was not granted by the court. It was, however, a matter fairly within the discretion of the court, and we cannot say that it was an abuse of that power to refuse the application upon anything now before us. Much the same thing may be said of the action of the court in refusing permission to defendants' counsel to comment upon the action of the commonwealth in objecting to the proposed view of the premises. So much depends on what is said, and the connection in which it stands, that it should be a clear case of infringement upon the right of counsel to comment upon the incidents of the trial to induce us to interfere with the discretionary control of the trial judge. It appears by the thirteenth assignment that as counsel for the defendants were addressing the jury they proposed to comment on the action of the commonwealth's counsel in refusing to join in the request for an examination of the premises by the jury, and in objecting thereto, and that counsel for the commonwealth "objected to the propriety of such comment." The objection was sustained, and the comments were not allowed to proceed. The fact that an application was made by the defendants, objected to by the commonwealth, and denied by the court, was within the knowledge of the jury, because it had transpired, as we un-

derstand, in their presence. It was a fact that, for some purposes, might properly be referred to as an incident of the trial, by counsel, but, like other facts, it might be commented upon in an improper manner, or used for an improper purpose; and, in the absence of precise information upon the subject, we must presume that the learned judge exercised a proper supervision over the argument. We think the indictment is sufficient in form to sustain a verdict, and the verdict rendered is applicable to all the counts, and was, no doubt, so intended by the jury, but, for the reasons given, the judgment cannot be sustained.

Judgment reversed.

STATE v. HOUSTON.

(103 N. C., 383.)

PERJURY: *Qualification and disqualification of electors.*

1. The oath prescribed for electors by the Code, section 2681, omits some of the essential requisites to voting contained in the constitution, and is confined to those indispensable qualifications set out in article 6, section 1, of the constitution. The oath does not extend to disqualification incident upon conviction for crime.
2. Under the Code, section 2681, the voter swears to his possessing the qualifications of an elector. Under the Code, section 2684, he swears that he has not lost the right to vote by any provision of the constitution or laws which takes that right from him.
3. Therefore, where an indictment charged the defendant with perjury, in that he swore, at the time he *registered as a voter*, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a duly qualified voter, he having been convicted of larceny in 1884, and the judgment suspended on such conviction, *held*, that the indictment was properly quashed.

[4. By Smith, C. J., concurring: Under the constitution, article 6, section 1, a person does not forfeit his rights as an elector by a mere verdict of guilty, or a confession, when indicted for a felony, etc.; but, in order that such forfeiture shall attach, such verdict or confession must be followed by a judgment of the court against the accused. Where one is convicted of a felony, but the judgment is suspended, he does not forfeit his rights as an elector. Therefore, the indictment in this case should have been quashed, because it appeared on its face that the judgment was suspended on the "conviction" charged in the bill.]

Appeal from superior court, Buncombe county.

Indictment of Houston, for perjury in swearing before a registrar, when making application to be registered as a voter, preparatory to the exercise of the electoral franchise, that he was "a duly-qualified voter," when in fact he was not so duly qualified and entitled to be registered; he having been theretofore convicted of larceny by the verdict of a jury upon which judgment had been suspended. A motion to quash the indictment was allowed on the ground of its insufficiency in form to warrant a conviction and sentence, and the state appeals.

T. F. Davidson, attorney-general, for the state.

DAVIS, J. The oath administered is contained in section 2681 of the code, and is in these words: "I, —— ——, do solemnly swear that I will support the constitution of the United States and the constitution of the state of North Carolina; that I have been a resident of the state of North Carolina for twelve months, and of the county of —— for ninety days; that I am a duly-qualified elector, and that I have not registered for this election in any other precinct, and that I am an actual and *bona fide* resident of —— township; so help me God."

The inquiry that presents itself is as to the meaning and force of the words "a duly-qualified voter," contained in said oath, in the taking of which the perjury is alleged to have been committed; and whether, in their connection, they embrace more than the original conditions, on which depended the right to be admitted to the registry as a competent voter. There is an omission in the form of the oath of some of the essential requisites prescribed in the constitution, such as naturalization of one alien-born, which the term may supply; and thus the oath is confined, as suggested, to those indispensable qualifications set out in the constitution (art. 6, § 1), and does not extend to the loss of the franchise consequent upon the commission of and conviction for crime. This construction is supported by the form of the oath directed to be taken, under section 2684, where a registered voter is challenged. It is made the duty of the judges to explain to the person offering

to vote the required qualifications, and to ascertain by examination if he possesses them, and then to administer the oath therein set out, in which, among other specific prerequisites, are the words, "that you are not disqualified from voting by the constitution and laws of this state." In the former, the voter swears to his possessing the qualifications of an elector; in the latter, that he has not lost the right by any provision in the constitution and under the law which takes it from him. The last oath points distinctly, as the first does not, to the disqualification which may arise under the constitution. We are therefore of the opinion that the oath administered to the defendant did not embrace the alleged grounds of disqualification, and that, for this reason, there was no error in the ruling of his honor in quashing the indictment.

SMITH, C. J. Concurring in the opinion of the court that no false oath has been taken in this case upon the allegations contained in the indictment, I think, and in this my convictions are strong, the ruling may be sustained on the ground, as I understand the record, upon which it was predicated in the court below, and this is, that a judgment upon conviction is essential to the deprivation of the electoral franchise. The section of the constitution in question, after enumerating the required qualifications for a voter, proceeds to say: "But no person who, upon conviction or confession in open court, shall be adjudged guilty of felony or any other crime infamous by the laws of this state, and hereafter committed, shall be deemed an elector, unless such person shall be restored to the rights of citizenship in a manner prescribed by law." Now, upon a fair and reasonable interpretation of this highly penal clause, which, besides the punishment inflicted for the crime, affixes the personal disability, can it be extended to a mere verdict establishing guilt, or do these consequences follow the rendition of the judgment, and result from it? The able and efficient attorney-general contends that the conviction alone and of itself is sufficient, without further action in the cause, to annex to the person of the elector the specified disqualifications, and withdraws from him at once the right, as a voter, to participate in any election thereafter held for the choice of public officers, or for any other purpose affecting the interests of the

public. In support of this view are cited and relied on the cases of *Commonwealth v. Lockwood*, 109 Mass., 325, and *State v. Alexander*, 76 N. C., 231.

The cases have one feature in common, and refer to the exercise of executive clemency towards the convicted criminal, *in misericordia*. The case from Massachusetts puts a meaning upon the word "conviction" that confines it to the action of the jury alone. Yet when the results are to reach beyond the punishment proper prescribed for the offense, and work a change in the political *status* of the offender — a deprivation of personal rights — the opinion pauses, and the eminent judge (Gray) who delivers it uses this qualifying language: "When, indeed, the word 'conviction' is used to describe the effect of the guilt of the accused, as judicially proved in one case when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the plea of *autrefois convict*, or of the effect of guilt judicially ascertained as a disqualification for office." He proceeds to give this meaning to the word, when in the constitution it is provided that no person convicted of bribery or corruption in obtaining an election or appointment "shall hold a seat in the legislature or any office of trust or importance in the state government."

I see no just reason for distinguishing in principle the consequences flowing from the criminal act, in the conditions under which and the proof by which they are to be extended to the disability to give evidence and the disability to vote. In my opinion, the same rule must govern in each. The doctrine is that the party, in case of incompetency to testify (in the language of Mr. Greenleaf), "must have been legally adjudged guilty of the crime" (the very words used in the constitution); "and this is not done in rendering the verdict, for it is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify." 1 Greenl. Evid., §§ 374, 375. In the words of Lord Mansfield, spoken in *Lee v. Gansel*, Cowp., 3: "A conviction upon a charge of perjury is not sufficient unless followed by a judgment. I know of no case in which a conviction alone has been an objection; because, upon

a motion in arrest of judgment, it may be quashed." The cases are numerous to the same effect, as well as the concurring authors in works upon the law of evidence. *Rex v. Crosby*, 2 Salk., 658; 2 Inst., 419; *Walker v. Kearney*, 2 Str., 1148; 1 Stark. Ev., 95. Under the statute of New York, which forfeits the dower of the widow who has been convicted of adultery in a divorce proceeding, it is held that there must be a judgment to render the bar effectual. *Schiffer v. Pruden*, 64 N. Y., 47; *Pitts v. Pitts*, 52 id., 593. In *Gallagher v. State*, 10 Tex. App., 469 (decided in 1881), the indictment was for illegal voting, prosecuted against one who had been found guilty of burglary, and sentenced in the verdict to confinement in the penitentiary; and an exception was taken, on a motion to quash, to the want of an averment that judgment had been entered. The court refused the motion, saying that "the word 'convicted,' used by the pleader, has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused." In *State v. Jones*, 82 N. C., 685, Ashe, J., speaking for the court, and discussing the question whether the constitutional political incapacity should, in a case where this results, be made a part of the judgment of the court, says: "This should not be the judgment. The courts have no such power. They can only render such judgments as the law annexes to the crime and empowers them to pronounce. For the crime of larceny the law has prescribed the punishment which the courts, by their judgments, may impose to be imprisonment in lieu of corporal punishment. This is the only judgment they can pronounce; the only punishment they can impose. In rendering their judgments they cannot look to consequences. They have nothing to do with the disqualifications and penalties which, under the constitution, may result from them." This language conveys a very distinct intimation that the disabilities are consequent upon, though no part of, the judgment itself. In *State v. Alexander*, the chief justice (Pearson) dissented, in an opinion which has been sustained by the supreme court of Illinois, in *Faunce v. People*, 51 Ill., 311, in construing a section of the Criminal Code of that state, which declares that "each and any person convicted" of any of the crimes previously mentioned, and of which larceny is one, shall be deemed infamous

in a sense that he has been convicted by the jury, but not until the judgment is rendered is he convicted by the law. The court says: "An examination of the adjudged cases in the various states of the Union where substantially the same laws are in force will show that it is not the commission of the crime, nor the verdict of guilty, nor the punishment, nor the infamous nature of the punishment, but the final judgment of the court, that renders the culprit incompetent."

But, without going outside the limits of the state, I find an adjudication in *State v. Valentine*, 7 Ired. (N. C.), 225, directly in point. In this case, an accomplice in the murder with which the prisoner was charged had been convicted, but not sentenced, and was examined as a witness against him, after objection (or rather his deposition, taken immediately between verdict and judgment, was used in evidence), and he was found guilty. Nash, J., afterwards chief justice, in disposing of the exception to the receiving the deposition in evidence, thus speaks: "His guilt, to reach that result, must be legally ascertained by a conviction, and that followed by a judgment. . . . This can only be done by the record, and that must show both a conviction and judgment; otherwise, it is incomplete—not a full record of the case. The judgment may have been arrested, and the conviction thereby rendered a nullity, as if it never had an existence."

To authorize the loss of personal privileges as a witness or voter, there must be administered the appropriate punishment due to crime imputed and ascertained by a jury finding, or confessed, and the cause must come to an end by final judgment disposing of it. Such must be understood to be the meaning of the term "conviction," upon which is dependent the incurring of such disabilities. Until this is done, and the cause fully disposed of, there has been no condemnation of the law, nor follow those further penal consequences to the personal *status* of the criminal, and this from that benignant rule adopted in the construction of penal statutes of doubtful import, which interprets them favorably towards the accused. The language of the constitution itself enforces the rule of construction in the present case, since, not stopping at the words "conviction or confession in open court," it proceeds and requires the person to be also "adjudged guilty," and

this plainly implies the concurring action of the judge to give it full legal effect. In the indictment it is alleged that the judgment consequent upon the verdict has been suspended; that is, put off, to be hereafter pronounced, if deemed proper. When, if ever, moved hereafter, it is exposed to an order to arrest founded upon any substantial defect in the indictment itself, and if arrested the force of the verdict is destroyed, and in legal contemplation there has been no conviction of crime, and can be no punishment inflicted to which the disability can attach. Moreover, while the prosecution remains in an unfinished state, no appeal is admissible to correct any errors in law that may have been committed on the trial, and which would render it invalid.

There is another anomalous feature developed, if the rendition of the verdict suffices to pronounce this personal infirmity in the elector. The judge deems the conduct of the accused such, or for some other consideration, as not to require the present vindication of the violated law, and forbears to proceed; and yet the severe and heavier punishment of disfranchisement cannot be arrested while the verdict remains, neither by the court nor through intervening executive clemency. If sufficient grounds were found for staying the hands of justice, as must be inferred, from forbearing to render judgment, must it have been intended that the heavier blow should fall upon the offender in the loss of citizenship, recoverable only in an action to be provided by legislation? In either aspect of the case, I concur in the ruling of the court that the indictment be quashed.

NOTE.— *What constitutes.*— Bishop defines perjury as the "wilful giving under oath in a judicial proceeding or course of justice of false testimony material to the issue or point of inquiry." 2 Bishop, 980. It will be observed that five things must combine to make the offense: 1. The oath must be false. 2. It must be wilful. 3. Upon a matter material to the inquiry. 4. Before a tribunal having jurisdiction of the subject-matter. 5. In a proceeding provided for by law. If there be any reasonable construction of the language used or of the document sworn to consistent with truth, the prisoner must be discharged. Thus in a prosecution for perjury in California, the only evidence offered at the trial as to what the defendant did swear to in connection with a bail bond was an affidavit which reads as follows: "State of California, City and County of San Francisco — ss. J. A. Bartman, being duly sworn, deposes and says that he is a resident of the city and county of San Francisco, state of California, and a freeholder in said state of Califor-

nia, and that he is worth the sum of $300, exclusive of property exempt from execution, and over and above all debts and liabilities. Five lots in block 210, Alameda county. John A. Bartman." And the court held that the words, "five lots in block 210, Alameda county," by themselves asserted nothing. They did not constitute a complete sentence, and they had no grammatical or logical connection with the rest of the affidavit. The mere surmise that the defendant, or the person who drew the affidavit, intended to have it understood that he owned said lots, is not sufficient. The language used must sustain that construction, and this clearly does not. *People v. Bartman*, 81 Cal., 200. That the false oath must be clear and unambiguous, see, also, *Reg. v. Atkinson*, 17 Up. Can. (C. P.), 295. The general intent to mislead must be supported by proof at the trial. *People v. Willey*, 2 Parker Cr. R., 19. That the oath is wilful and corrupt must be supported by proof at the trial. *Green v. State*, 41 Ala., 419. And perjury may be committed by a witness, though he be incompetent. *Chamberlain v. People*, 23 N. Y., 85.

Where the false testimony alleged to have been given is inserted in detail in the indictment, and it clearly appears that the testimony alleged to be false was immaterial to the issue of the case in which it was given, and had no tendency whatever to affect or influence the judgment of the court or jury, the indictment is fatally defective. *State v. Smith*, 40 Kan., 631. Unless the statute provides the exact form of oath, any form is sufficient. "The oath may be administered on the book, or with uplifted hand, or, in any mode peculiar to the religious belief of the person sworn, or in any form binding on his conscience. 1 Greenl. Evid., § 371. The underlying principle evidently is, that whenever the attention of the person who comes up to swear is called to the fact that the statement is not a mere asseveration, but must be sworn to, and, in recognition of this, he is asked to do some corporal act, and does it, this is a statement under oath. And this, without kissing any book, or raising his hand, or doing any religious act. Compare *United States v. Baer*, 18 Blatchf. (U. S.), 493. In the case at bar the commissioner, after reducing to writing the verbal statement of the defendant, read it over to him, with the preface and conclusion, both stating that it was sworn to. He then said to defendant: 'If you swear to the truth of this statement, put your mark.' Defendant put his mark. This was an oath." *People v. Mallard*, 40 Fed. R., 151. One may be guilty where he swears that he "thought" or "believed" a fact, whereas in truth and in fact he thought and believed otherwise, and had no probable grounds for such "belief" (*State v. Knox*, Phill. (N. C.), 312); where he swears falsely and corruptly regarding a fact of which he has no knowledge (*People v. McKinney*, 3 Parker Cr. R., 510); to swear corruptly or falsely that he is ignorant of a certain fact (*Wilson v. Nations*, 5 Yerg., 211), or which he did not know at the time to be true. *State v. Gates*, 17 N. H., 373. The evidence of one witness is not sufficient to convict of perjury. *United States v. Wood*, 14 Peters, 430. It must be something more than sufficient to counterbalance the oath of the prisoner. *State v. Heed*, 57 Mo., 252.

Where the prisoner had contradicted a former statement, he cannot be convicted without showing which statement was false. *Schwartz v. Com.*, 27 Gratt., 1025. The false oath must be wilful; so that if one swear untruly, either by inadvertence or through mistake, he is not guilty. *Com. v. Cornish*,

6 Binn., 249; *Anonymous*, 1 Wash. C. C., 84; *United States v. Passmore*, 4 Dall., 372; *United States v. Stanley*, 6 McLean, 409. Intoxication may be proved to negative a specific intent. *Real v. People*, 42 N. Y., 270.

"The matter assigned as perjury must be material to the issue on the trial of which the defendant was sworn. 'But it is not necessary that the particular fact sworn to should be immediately material to the issue. . . . The true test is whether the statement could have properly influenced the tribunal. If it tends to do so . . . it is material. The degree of materiality is of no importance; and if be material as to a single fact it is sufficient.' Wilson, Crim. St., § 306. In *Washington v. State*, 22 Tex. App., 26, it is said: "It seems to be well settled that perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of a witness." Citing 2 Bish. Crim. Law, §§ 1032–1038; 3 Greenl. Ev., § 195; 2 Whart. Crim. Law, § 1278. 'A witness' answers on his own cross-examination are material, and may be assigned as perjury, however discursive they may be, if they go to his credit.' Id., 1279. The rule of the common law in regard to perjury is thus stated by Archbold: 'Every question in cross-examination which goes to the witness' credit is material for this purpose.' Archb. Crim. Pl. & Pr., 817 (Eng. Ed.). The same rule was declared by the twelve judges in *Reg. v. Gibbons*, 9 Cox, Crim. Cas., 105. In *United States v. Landsberg*, 23 Fed. Rep., 585, it was held that where a party accused of crime testified on cross-examination, as a witness in his own behalf, that he had never been in prison, when the fact was that he had been, such false answer was material matter, and indictable for perjury. In that case it is said: 'In *Reg. v. Lavey*, 3 Car. & K., 26, the accused, when a witness, had falsely sworn that she had never been tried in the central criminal court, and had never been in custody at the Thames police station. On her trial for perjury these statements were ruled to be material matter, and the conviction was sustained. In *Com. v. Bonner*, 97 Mass., 587, a witness had been asked "if he had been in the house of correction for any crime." Objection to the question on the ground that the record was the best evidence was waived, and the case turned upon the materiality of the question. The matter was held to be material. The present case is stronger, for here no objection whatever was interposed to the inquiry respecting the imprisonment of the accused. Having made no objection to the inquiry, and gained all the advantages to be secured by his false statement, it may perhaps be that it does not lie in his mouth now to say that his statement was not material. See *Reg. v. Gibbons, supra; Reg. v. Mullany*, Leigh & C., 593.'" *Williams v. The State*, 28 Tex. App., 301.

And its materality must be clearly proven. So where one was accused of falsely denying in the action of ejectment the execution of a deed, it was held that deeds sufficient to establish a chain of title to the property in question must be introduced to sustain a conviction. The court says: "No deeds whatever were introduced for the purpose of showing that the alleged deed from Young to Judson and others was material, nor was any other evidence except that of the witness Young introduced on that subject. We do not regard this evidence, which was all introduced against the defendant's objection, as sufficient to establish the fact that the deed concerning which the defendant testified was material. In 2 Starkie, Ev., 1142, in speaking upon

this subject, the author lays down the following rule: If the assignment be in evidence in the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. This rule is quoted with approval by 2 Russ. Crimes, 662. Here the alleged deed was claimed to be a link in French's chain of title. If it was, it would be material evidence. It was, therefore, necessary for the people to show what the chain of title was, in order to establish that the alleged deed was material. This they undertook to do by the witness Young, but we do not think it was competent to prove a chain of title by parol. Resort should have been had to the deeds, or enough of them, at least, to show that the alleged deed from Young to Judson and others was material. We do not think, as has been suggested, that the action of ejectment should be tried over again in ascertaining the guilt or innocence of the defendant; but enough of the deeds read in evidence in the trial should have been produced to show that the deed in question was material." *Young v. The People*, 134 Ill. 37 (24 N. E. Rep., 1170).

To swear falsely to a material point in an affidavit for the continuance of a cause is perjury. *State v. Jackson*, 7 Blackf. (Ind.), 49; *State v. Flagg*, 27 Ind., 24; *State v. Shupe*, 16 Iowa, 36. Swearing falsely to a collateral matter, with intent to prop the testimony on some other point; but such collateral matter must be material to the issue. *Studdard v. Linville*, 3 Hawks N. C.), 474. A bankrupt who submits the facts in regard to his property fairly to the advice of his counsel, and, acting under the advice thus given, withholds certain items from his schedule, is not guilty of perjury; the fraudulent intent being wanting. *United States v. Connecticut*, 3 McLean, 573; S. P., *United States v. Dickey*, 1 Morr. (Iowa), 412. An oath administered by the clerk of a court, not required by law or by order of court, is extrajudicial, and, if false, lays no foundation for an indictment for perjury. *United States v. Babcock*, 4 McLean, 113. Compare *Pegram v. Styron*, 1 Bailey (S. C.), 595; *Van Steenbergh v. Kortz*, 10 Johns. (N. Y.), 167.

Where one states the facts truly, and then signs a deposition on the assurance of a lawyer that it was substantially what he stated, there is no perjury. *United States v. Stanley*, 6 McLean, 409; *Jesse v. State*, 20 Ga., 156. A promissory oath cannot be the subject of an indictment for perjury. *United States v. Glover*, 4 Cranch, C. Ct., 190. In the case of a parol submission to arbitrators, not made a rule of court, an oath administered to a witness by a justice of the peace is not a judicial oath; and its falsity, therefore, is not perjury. *Mahon v. Berry*, 5 Mo., 21. An indictment for perjury cannot be maintained upon an answer in chancery, unless the bill called for an answer under oath. *Silver v. State*, 17 Ohio, 365. Perjury cannot be committed in swearing to an account in order to prepare it for a set-off, on a trial before a justice of the peace. *Waggoner v. Richmond*, Wright (Ohio), 173. Perjury cannot be assigned, on the affidavit of an applicant for naturalization, as to his residence in a state previous to the application. *State v. Helle*, 2 Hill (S. C.), 290. An oath made on application to a money lender for a loan, not administered pursuant to, nor required nor authorized by, any law, cannot be made the basis for a charge of perjury. *State v. McCarthy*, 41 Minn., 59. Where one accused of two murders has fled, and, having been

extradited for one of them, is indicted, and, without objection, tried for the other before a court which has jurisdiction of the subject-matter, false testimony therein is perjury. *Cordway v. State*, 25 Tex. App., 405. Where a justice of the peace has jurisdiction of the subject-matter of an information, false swearing in the case is perjury, though the complaint on which the information is based was not sworn to. *Anderson v. State*, 24 Tex. App., 705. False swearing in a prosecution for burglary before a justice of the peace in a county parish of Louisiana is not perjury, because such justice has no jurisdiction to conduct such examination, and a charge of subornation of perjury cannot be based upon it. *State v. Wimberly*, 40 La. Ann., 460. Perjury may be committed in testifying that one accused of drunkenness was not drunk at the time charged. Such testimony is not necessarily a mere matter of opinion to one witnessing the actions of a drunken man, and perjury may committed in giving an opinion under oath. *Commonwealth v. Edison* (Ky.), 9 S. W. Rep., 161. Where an oath required to be administered by a collector of the customs is falsely taken before a deputy of the collector, acting under the provisions of, and in the cases required by, the act of March 2, 1799, it may be sufficient ground for an indictment for perjury. *United States v. Barton*, Gilp., 439. Perjury by a witness, under the statutes (regulating the fishing bounty), may be either by swearing to a fact which he knows is not true, or to his knowledge of a fact when he has no such knowledge. *United States v. Atkins*, Sprague, 558. The swearing must be before a tribunal having legal authority to inquire into the cause or matter investigated. *Pankey v. People*, 2 Ill. (1 Scam.), 80; *Montgomery v. State*, 10 Ohio, 220; *State v. Lavalley*, 9 Mo., 824. Perjury at common law is the "taking of a wilful false oath by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely in a matter material to the point in issue, whether he believed or not." *Commonwealth v. Powell*, 2 Metc. (Ky.), 10; *Cothran v. State*, 39 Miss., 541. Falsely denying a fact on the direct examination is not the less perjury because the witness confesses to it on the cross-examination. *Martin v. Miller*, 4 Mo., 47. The testimony of an incompetent witness may be material, and if so, it may be the occasion of perjury. *Chamberlain v. People*, 23 N. Y., 85. So held in a case where in a previous divorce suit the husband had testified to non-intercourse, and where the wife had borne a child. *Id.; Montgomery v. State*, 10 Ohio, 220. A witness who takes an oath without objecting to the manner in which it is offered, and swears falsely, is guilty of perjury. *State v. Whisenhurst*, 2 Hawks (N. C.), 458.

McCord v. State.

(83 Ga., 521.)

PERJURY: *Evidence — Want of motive — Prior consistent statements — Presumptions.*

1. On a trial for perjury, where the evidence in behalf of the state tends to show that the accused testified under the motive of pecuniary interest created by bribery, he has the right to reply to such evidence by proving that before there was opportunity for offering him a bribe, and within about one hour after the occurrence touching which he testified, he related the facts and circumstances (these being now recited) substantially in accordance with his account of them as subsequently given by him on oath as a witness, his testimony, as then given, being the alleged perjury.
2. Whether the time when the accused was first known as a witness is of any weight in his behalf is a question for the jury, under all the circumstances of the case. Such a fact may have weight for or against him where there is an imputation of bribery.
3. It is not admissible to prove in general terms that the account given by the accused out of court before he testified was the same as that to which he testified; the witness judging of the coincidence, and not detailing the account heard by him to the jury, so as to enable them to judge of it for themselves.
4. Evidence that the person in whose behalf the accused testified when the alleged perjury was committed was insolvent, or of limited means, is not admissible to repel the imputation of bribery.
5. The assignment of perjury embracing several particulars, it was not prejudicial to the accused for the court to stress one of them, as being the main, material matter, in charging the jury.
6. Knowledge by a witness that his testimony is false is tested, like intention generally, by a sound mind and discretion, and by all the circumstances; soundness of mind, where nothing to the contrary appears, being assumed.
7. It is not improper for the judge to inform the jury that he charges them on the prisoner's statement because the law obliges him to do so. The charge touching the statement, and the right and duty of the jury in dealing with it, was substantially correct.
8. The instructions of the court to the jury were not argumentative, but some of them were confused, and several of them, as set out in the transcript, inaccurately expressed; due in part, no doubt, to careless clerical work in preparing the transcript.
9. A request to charge which embraces a statement that a material fact is not material, or that it makes no difference, should be denied.

Error from superior court, Fulton county; R. H. Clark, judge.

The grounds for a new trial referred to in the opinion are as follows: "(3) The court charged: 'Usually, in ordinary cases, where a man is charged with perjury, with having sworn falsely, the fact of his seeing the crime is considered admitted, but that, having seen it, he swore falsely as to what he saw. There is a difference as to this part of the question here, in that it is claimed he never saw it at all, and, never having seen it, must consequently have sworn falsely. So that you will keep up this distinction all the way through your deliberations, between what he is charged with swearing, and the evidence as to whether he was in the alley or not.' Error for the reasons set forth in the preceding ground; also, because misleading, and containing expressions of opinion as to what had been proved, and of the guilt of defendant. (4) The court charged: 'You will observe that the main fact charged as having been sworn to falsely — the leading fact, the fact around which all the other facts revolve — is as to whether Gresham, in that encounter with Eddleman, held in his hand a knife. Now, first settle that matter in your minds, as to whether you believe from the evidence that Gresham held in his hand a knife. That is not all. It is material, not only that Gresham should have held in his hand a knife, in order to have matter that is material to the issue, but that he was advancing upon Eddleman with that knife. The language in the bill of indictment is that the defendant swore that Eddleman was backing towards the back door. Therefore, if you should believe that he was not backing towards that back door, and that Gresham was not advancing, which is the same thing, why, then you must consider whether you believe that to be false or not; and that, after backing within eight feet of the door, he shot said Gresham, who was within two or three feet of him; that Eddleman backed from Gresham; that Gresham was advancing; and that, when the shot was fired, Gresham was within two or three feet of Eddleman. Thus, gentlemen of the jury, there is the knife, which plays such a conspicuous part in that issue, and which is the main element in that case of Eddleman's defense, and the principle element of falsehood that is charged to have been committed in this case.' Error — *First*, because confused and misleading; *second*, because minutely argumentative, in setting forth

the state's side of the case, without correspondent mention of defendant's side, and nowhere in the entire charge is defendant's side of the case mentioned or dwelt upon; *third*, because the court singles out particular parts of the assignments of perjury, and lays great stress thereon, in distinction to other parts, to the detriment of defendant." "(8) The court charged: 'In other words, I wish you to understand, if you believe from the evidence that the defendant made known at a particular time afterwards, or that it became known, that he was a witness in that case, that that is nothing, and, as evidence, is not to be weighed in his favor, because, unless that was sustained by some other facts in the case, it is one and the same thing. It is what the defendant himself says in support of his oath. You must be satisfied from the evidence that, no matter when that fact took place; no matter when or where,—he knew that he was a witness, and that he swore falsely at that time. And, under the rules of law I have given you in charge, under the facts put before you in this case as to the point of time when this defendant ascertained, or where it was ascertained, that he was a witness, that is not to be weighed in his behalf, and is to be tested by what occurred on the trial of the case.' Error — *First*, because, under the case as contended for by the state, alleging bribery and conspiracy, the particular time when McCord was first known as a witness in the Eddleman case, or had witnessed the fatal rencounter, was a most important circumstance, which should have gone to the jury, and been duly considered by them in passing on the question of conspiracy, or bribery, or good faith of defendant; *second*, because painfully argumentative against the defendant. (9) The court charged: 'This does not prohibit you from looking into all the circumstances that tend to the looking into the truth or falsity of that statement that was given in evidence upon this trial; and if you should believe from the evidence all of the facts in this case, that the evidence of this defendant in the trial of Eddleman was a contrivance that was gotten up subsequently to the transaction, and was in specific terms manufactured evidence; and if, in the progress of your investigations, you find it necessary to resort to all the surrounding circumstances in the case, the time, and the amount of the evidence, and the men who testi-

fied, and still, after having by these means thrown upon it all light that the evidence affords, you may pursue your investigations, and see whether this was or not such a contrivance or arrangement, and throw all the light possible upon it.' Error, because argumentative, reiteration of the state's theory, and containing an intimation as to what the court believed had been proved. (10) The court charged: 'I have charged you that it matters not — it is not necessary for the establishment of perjury — if you believe that the defendant was in the alley at all. That, however, like the other matters that I have called your attention to, is an important factor in the case. You have a right to investigate the matter, and see whether the evidence is sufficient to convince your minds, beyond a reasonable doubt, that this defendant was not in the alley. If you should believe that he was not in the alley,— believe it beyond a reasonable doubt,— and find, besides, that what he swore to was not the truth, it will be your duty to find the defendant guilty; not but that he might have been in the alley, and yet sworn falsely to the facts — might have sworn falsely as to the facts.' Error, for the reason set forth in the assignment of error in the second ground; wrongfully singling out one part of the assignments of perjury in distinction to the others, and giving undue prominence thereto. (11) The court, after correctly charging the law as to defendant's statement, added the following: 'That is your right, and, under the law, I am bound to give it to you in charge. In reference to the statement, the statement consists, or should consist, of facts that are pertinent to the defense, and therefore you are to choose between those facts which go to the defense of the defendant and those facts in evidence, which you may believe to be facts, that you believe go to the conviction of the prisoner; and between the two your judgment is supreme. The statement is not evidence, but it only becomes available if the jury shall choose to give it effect.' Error — *First*, because it detracts from the force and worth of a prisoner's statement allowed by law, showing that the opinion of the court was that the prisoner's statement was worth but little, but that he was compelled by law to refer to it; and *second*, it was misleading, relating to an hypothesis not supported by the statement, nothing therein appearing that could

'go to the conviction of the prisoner,' and the jury were thereby probably led to suppose that their memory was imperfect, and that of the judge superior and more reliable, as to what the prisoner stated, and that he must have made statements which might tend to his conviction. (12) The court charged: 'Now, there is a principle that applies here, a principle of law, and that is that every man who is charged with the commission of a crime shall be endowed with that amount of human reason, and that amount of knowledge, as will make him responsible for his conduct, whatever it may be; and whoever is charged with a crime who has responsible reason, and, having that, has passed the age of fourteen years, is considered by the law to be in that condition, and amenable; but if he desires or shows or claims that he is not, then it is his duty to remove that presumption of the law by proof showing the contrary. Therefore, in the absence of that proof, a man stands responsible for what he has done as a rational man,— that he is responsible for his conduct, and has to be considered as such, and treated as such. Therefore, it is necessary for you to consider, when you come to consider the facts as to whether this defendant, if he swore falsely, if you must believe that, that he did so knowingly.' Erroneous and misleading, because there was no pretense that defendant was not perfectly sane and rational, and had attained to years of discretion; and this charge makes defendant's sanity and the falsity of his evidence absolutely conclusive of the existence of perjury." "(16) The court refused to charge thus: (*a*) 'You are instructed that it makes no difference, in point of fact, whether Mr. Gresham really had a knife or not. The real question for you to decide is whether or not the defendant in this case wilfully, knowingly and absolutely swore falsely when he testified that Mr. Gresham did have a knife. If the defendant believed that he had a knife, although he may have been mistaken, and although Mr. Gresham may not have had the knife, you would not be authorized to find the defendant guilty.' Error, because, under the evidence, the jury may reasonably have concluded that, though Gresham may not have had a knife in his hand, yet defendant may really in good faith have so believed, and testified under such belief. (*b*) 'It is proper for the court to instruct you, in view of the

evidence in this case, that, whatever opinion you may entertain on the question of guilt or innocence of Mr. Eddleman, it should have no weight or influence on your minds in determining the guilt or innocence of this defendant.' Error, because it was shown that this case and Eddleman's were closely allied and intermingled, and that high excitement and prejudice against Eddleman existed; making the warning in the charge requested a proper and necessary one,— such charges, or their substance, not being mentioned or referred to in the general charge."

Gartrell & Ladson and *Arnold & Arnold*, for plaintiff in error.

C. D. Hill, solicitor-general, by *Harrison & Peeples*, for the state.

BLECKLEY, C. J. McCord was found guilty of perjury, and moved for a new trial, which was refused. The imputed perjury was committed by him, if at all, when testifying as a witness, in behalf of Eddleman, on Eddleman's trial for the murder of Gresham. The alleged false matter testified to was, substantially, that he (McCord) was in a certain alley, and saw a large man (Gresham) striking with a knife at Eddleman, Eddleman backing, and Gresham advancing; and that the former shot the latter when they were only a few feet apart. The homicide took place in May, and Eddleman was tried in October following. On the trial of McCord, the state, after proving that he had testified as alleged, and after adducing evidence tending to show that his testimony was false, proved by one Owens that he overheard a conversation, in July or August, between McCord and Heflin, in which the former said to the latter that if he got up and swore that Gresham had a knife, he would have to have better security than Hildebrand was, to which Heflin replied that he was all right; "just go ahead, and it would be all right;" and that McCord said: "Suppose anybody says that nobody was in the alley?" to which Heflin answered that everything was in confusion, and nobody could tell who was in the alley.

1. The plain tendency of this evidence was to show, either that measures were in progress at that time to bribe McCord

as a witness in behalf of Eddleman, or that some agreement in the nature of bribery had already taken place. To meet this evidence McCord offered the testimony of Langley, to the effect that in about an hour after the homicide he (McCord) communicated to Langley the fact that he was in the alley, saw the rencounter, and detailed the circumstances to Langley, substantially in accordance with his testimony as delivered upon the trial of Eddleman. This testimony the court rejected. It appears from other evidence in the case that as soon as the homicide was committed Eddleman was taken into custody and carried to prison. There is no suggestion that any intercourse whatever took place between him and McCord prior to the conversation of the latter with Langley, nor does it appear that there was any special relation between Eddleman and McCord calculated to induce the latter to volunteer as a false witness in his behalf. The earliest intercourse indicated anywhere in the record as taking place between McCord and Hildebrand, who, it seems, acted as agent for Eddleman in preparing or procuring evidence for use on his trial, was one week, or about one week, after the homicide. This time is fixed from McCord's statement made to the jury on his trial. The evidence on the subject which came from Langley tends to make the period longer, to wit, two or three weeks after the homicide, Langley testifying that in about that length of time Hildebrand inquired of him, by describing McCord, what his name was and where he could be found, which information Langley gave him. Under these circumstances the question is whether the court erred in refusing to allow the evidence of Owens in behalf of the state, tending to show that McCord testified under the influence of a bribe to be answered by the testimony of Langley, tending to show that he gave the same account of the homicide within about an hour after it occurred as that which he detailed on the trial of Eddleman. The solution of this question will be materially aided by inquiring whether the proposed evidence would have been admissible in behalf of Eddleman on his trial had the like attack for bribery been then made by the state upon his witness, McCord, the person now accused of perjury. Formerly in England previous consonant statements by a witness were considered admissible in evidence to sup-

port the testimony given by him at the trial the same as previous inconsistent statements to impeach him. Gilb. Ev., 150; McNal. Ev., 378; *Lutterell v. Reynell*, 1 Mod., 282. This broad rule, however, was found to be radically unsound, and, from the time of the case in 3 Doug., 242 (*King v. Parker*), has generally been considered as exploded. A remnant of the rule still holds its footing in the law, which remnant may be expressed as we find it in 1 Thomp. Trials, § 574: "Where the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist." "So, in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account before its effect and operation could be foreseen." Id., § 576. The doctrine, in one or both of these forms, is recognized by many authorities, among them the following: 1 Phil. Ev., 308; 1 Starkie, Ev., 221, 222; Rosc. Crim. Ev., 185; 1 Greenl. Ev., § 469; 2 Tayl. Ev., § 1476; *Craig v. Craig*, 5 Rawle, 91; *Robb v. Hackley*, 23 Wend., 50; *State v. Vincent*, 24 Iowa, 570; *People v. Doyell*, 48 Cal., 85. Doubtless there are cases in which the doctrine has been applied as well as recognized; but we have not felt called upon to make an exhaustive search for such cases, as we consider its inherent soundness, together with its recognition by the standard text-writers, as sufficient. We can entertain no doubt that, had Owens testified on the trial of Eddleman as he did on that of McCord, the fact that McCord told Langley that he witnessed the homicide, and that the circumstances were as he detailed them to Langley, would have been admissible in evidence for the purpose of repelling, or in some degree weakening, the imputation of bribery cast upon McCord by the Owens evidence. As was said by Reade, J., in *State v. Parish*, 79 N. C., 610: "The fact that supporting a witness who testifies does incidentally support the facts to which he testifies does not alter the case. That is incidental. He is supported, not by putting a prop under him, but by removing a burden from him, if any has been put upon him. How far proving consistent statements will do that must depend upon the circumstances of the case. It may amount to much or

very little." Does it follow, because this evidence would have been admissible on Eddleman's trial in answer to a charge of bribery, that it was admissible on McCord's trial in answer to the like charge? We think it does. If Eddleman would have been entitled to remove a burden from his witness by showing previous consistent statements made directly after the occurrence to which they related, McCord should be allowed to cast off or lighten the same burden by the same means. Any evidence which would tend to show in behalf of Eddleman that McCord did not testify as he did under an interest motive would have the same tendency in behalf of McCord himself; and so we think the court erred in excluding this evidence, the same being admissible, not for the purpose of showing directly that his testimony on the trial of Eddleman was true, but for the purpose of showing that he did not have the motive of bribery to induce him to invent it, as might be inferred from the testimony of Owens were it left wholly unanswered.

2. On a trial for perjury it may be a material fact in favor of or against the accused as to when and how he first became known as a witness in the case; and the evidence on the subject of the materiality of such fact, in the light of all the circumstances, would be a question for the jury, and it would be improper for the court to charge that they could not consider it as weighing anything in behalf of the defendant, especially if no like injunction was imposed against weighing it in behalf of the state. We consider the charge, as set out in the eighth ground of the motion for a new trial, as objectionable, for, if the topic was one to instruct the jury upon at all, as the evidence then stood, the jury should not have been excluded from considering it in the defendant's favor, and at the same time left free to consider it, as well as all other facts, against him.

3. The exclusion of the evidence of Judge Dorsey, one of the counsel for Eddleman, to the effect that in an interview of the counsel with McCord, which took place in June preceding the trial of Eddleman, McCord's statement, made then, coincided with what he testified on the trial, was not error; for the reason that the question to Dorsey expressly excluded any disclosure as to what McCord did say, but simply referred to Dorsey the decision of coincidence between what was said then and what was testified to by McCord upon Eddleman's

trial. If this coincidence was a matter for decision at all, the reference should have been to the jury, and not to the witness. Whether McCord's statement to the counsel on that occasion, if detailed in full, would be admissible evidence under the rule announced in the first head of this opinion, we need not now consider, as no such question is made in the record.

4. Evidence that Eddleman had not paid in full the fees of his counsel, and that his means were limited, or that he was insolvent, was not admissible to repel the imputation of bribery which Owens' testimony tended to cast upon McCord. Unless it could be known how much it would take to bribe McCord, whether the means of Eddleman for that purpose would be sufficient or not could have no relevancy. Moreover, the aid of friends might have supplied the means in whole or in part.

5. It was not prejudicial to the accused for the court to single out the main element in the assignment of perjury, and stress that as the material matter in the assignment. This was to narrow the basis for a conviction, and not to widen it. It was therefore favorable to the accused, instead of being prejudicial.

6. There was no evidence of want of sanity by the accused, and consequently the charge complained of in the twelfth ground of the motion on that subject seems to us misleading. If meant to intimate that knowledge by McCord of the falsity of his testimony on the trial of Eddleman would have to be negatived, if at all, by proof that he was of unsound mind, the charge would be grossly erroneous; for soundness of mind relates to capacity for knowledge, not directly to knowledge itself. One may have full capacity to know a fact, and still be mistaken as to the existence of the fact. The jury, in considering whether the alleged perjury was knowingly committed, would not be restricted to the capacity of McCord for acquiring knowledge, but should take into consideration all the circumstances tending to show either that he was or was not mistaken. Code, § 4293. Insanity is not the sole test of mistake, and we do not suppose that the court intended to announce it as such; but the charge set out in the ground referred to seems to us susceptible of that construction. We have read it in connection with the whole charge of the court and do not find it cleared up anywhere in the context. How-

ever, if McCord's testimony on the trial of Eddleman was false, there is scarcely a glimpse in the evidence of any reason for thinking he did not know it was false; so this part of the charge was probably harmless.

7. The charge in the eleventh ground of the motion touching the prisoner's statement is correct in substance. There is no reason why the judge should not inform the jury that he is bound by law to instruct them on that subject. The duty is virtually imposed by statute, and it is well enough for the jury to know that it is a statutory right of the prisoner to have it performed. Code, § 4637. Instead of its being less impressive, it ought to be more so on that account.

8. Several parts of the charge are complained of as confused and argumentative. None of them are argumentative, but some are more or less confused. We find inaccuracies of expression in those parts set out in the third, fourth, ninth, tenth and twelfth grounds of the motion for a new trial. Some of these inaccuracies may be due to erroneous copying by the clerk in making up the transcript. It is evident that the clerical work in preparing the transcript was carelessly and very imperfectly done.

9. The request to charge set out in the sixteenth ground of the motion was rightly refused; for it did make a difference, in point of fact, whether Gresham really had a knife or not, and for other reasons which need not be specified. The court erred in not granting a new trial. Judgment reversed.

NOTE.— *Presumptions.*— The case of *Kinnebrew v. The State*, 80 Ga., 232, was a prosecution of an employer for an illegal sale of intoxicating liquors made by his clerk. During the trial in the court below the judge instructed the jury as to certain presumptions of law, and upon appeal the supreme court gave the following very able analysis of the origin and office of the law concerning presumptions: "The judge cannot pilot the jury in their passage by inference from fact to fact, but he can point out the line of transit which the law authorizes them to follow if they think the facts in evidence sustain them in taking that route. Presumptions of law are conclusions and inferences which the law draws from given facts. Presumptions of fact are exclusively questions for the jury, to be decided by the ordinary test of human experience. Code, § 3752. This plain distinction only needs to be understood, and applied with due discrimination, to reduce to the minimum all just complaint of encroaching on the province of the jury, in the matter of drawing inferences. Doubtless, all presumptions of law not originating in statutes were once presumptions of fact, and grad-

ually developed into presumptions of law by a process of evolution; and most probably many inferences and conclusions destined to become presumptions of law in the future are now in the formative stage, passing and repassing through the jury-box. Before any presumption, not manufactured by the legislature, can mount to the bench, it has to serve for a long season on the jury, and be trained for judicial administration. But there is, touching most inferences of fact, a question of law for the court as well as one of logic for the jury, for in some instances the law, though it will not itself draw a given conclusion from given premises, will allow the jury to draw it if they are convinced from the evidence that it ought to be drawn; but in other instances it will neither draw the conclusion nor suffer the jury to draw it. Now, the judge may, if he can, always distinguish these two classes of instances one from the other, and tell the jury to which class the case in hand belongs. To instruct them that they are legally authorized to infer one thing from another, or from certain others, but that they are to decide for themselves both whether the given premises are true, and whether the inference can and ought in fact to be made, is only to say that the law permits them to reason in the manner indicated if they determine that the evidence and the ordinary test of human experience warrant them in so doing. It is but to tell them that the law will be satisfied if they are, and that they will not have done a vain thing. No doubt there is danger of intimating an opinion, or of leading the jury to think that an opinion is intimated, though the purpose be only to discriminate between legal and logical sufficiency; and this danger is not lessened, but rather increased, by the fact that in most instances the one kind of sufficiency exists wherever the other does. But danger is no interdict on duty, and a charge is not erroneous for pointing out that the jury are authorized to infer one thus and so from another thus and so, provided they believe from the evidence that the first thus and so is established, and provided they further believe that the second thus and so is a reasonable and proper inference to be drawn from the first. And the equivalent of this is all that was done in the present case, if the whole of the charge be taken together; and that it must be so taken has been ruled in some dozen of cases to be found by looking through the indexes to our reports under the head 'Charge of the Court.' Striking examples may be seen in *Hanvey v. State*, 68 Ga., 615, and *Moon v. State*, id., 697, where the context was invoked for explanation; the part of the charge excepted to being, in substance, that if *a* is used to cause *b*, and is likely to cause 'when used in the manner the proof shows it was used, the law presumes' *c*. It was held that this, properly construed, was no intimation as to what was proved — no invasion of the prerogative of the jury. And see *Everett v. State*, 62 Ga., 72.

"On the general question as to when an opinion is intimated and when not, I have analyzed numerous illustrative cases, and will now give the result. If facts *a*, *b*, *c* be proved (they were mere evidentiary, not constitutive facts), 'you are authorized to find the defendant guilty,' if, etc., 'the law presumes the defendant guilty; but this presumption may, like all others, be rebutted. Whether the facts proved raise this presumption, or whether, if raised, such presumption has been rebutted, is for you to decide from the testimony.' This charge had a qualified approval by the court, which said:

'The court used a strong expression when he said that 'if the above facts be proven by the testimony, the *law* presumes the defendant guilty;' it would have been better put in another way: that the law would authorize the jury to presume the defendant guilty.' *Ivey v. State*, 23 Ga., 579, 582. 'If you believe the evidence of [certain named witnesses] you ought to find for the plaintiff.' Disapproved, *Jarrett v. Arnold*, 30 Ga., 324. If you believe from the evidence facts *a* and *b*, 'that would be a strong circumstance to show' fact *c*. Disapproved, *Phillips v. Williams*, 39 Ga., 602; *Stephenson v. State*, 40 Ga., 292. 'It is my opinion you can infer' fact *a* from fact *b* 'inasmuch as' fact *c* was. Disapproved, *Grant v. State*, 45 Ga., 477. If facts *a* and *b* existed, 'it will be presumed that' fact *c* existed, 'if nothing appears to the contrary; but this presumption may be rebutted by any sufficient facts or circumstances, such as' *d*. Disapproved, *Mitchell v. Mayor, etc.*, 49 Ga., 19. If fact *a* appeared before, it appears now, etc. Disapproved, *Deupree v. Deupree*, id., 326. That fact *a* 'is of but little consequence because of' fact *b*. Disapproved, *Wannack v. Mayor, etc.*, 53 Ga., 165. If fact *a* be true, *b* cannot be recovered, and in this case *b* cannot be recovered. Disapproved, *Dye v. Denham*, 54 Ga., 229. Facts *a*, *b*, c, being enumerated, 'it was not a slight, but a strong, circumstance from which they could infer that' fact *d* existed. Disapproved, *Warmock v. State*, 56 Ga., 503. That evidence *a* 'would be the strongest attainable,' unless evidence *b* could be procured. Disapproved, *Davant v. Carlton*, 57 Ga., 491. 'If that was the evidence, what more deliberation can a man have?' 'These are facts from which a deliberate intention may be inferred.' Disapproved, *Keener v. State*, 18 Ga., 194. When an act is threatened, and immediately done as threatened, the presumption is that it was done by the person who made the threat, and it is incumbent on him to show that he did not do it. Disapproved, *Fulton v. State*, id., 226. If you believe facts *a*, *b*, 'that is a circumstance from which you may conclude' fact *c*. Disapproved, *Hayden v. Neal*, 62 Ga., 367. 'I am of the opinion' that such a thing has not occurred. Disapproved, *Jones v. State*, 63 Ga., 458. 'We don't know' fact *a* or *b* or *c* or *d*; 'it was' *e*. Disapproved, *Headman v. State*, id., 465, 466. If facts *a*, *b*, *c* (all the essential facts) be true, 'he is guilty.' Approved, *Kitchens v. State*, 41 Ga., 217. And see *Hill v. State*, 63 Ga., 578; *Holifield v. White*, 52 Ga., 567; *Williams v. McMichael*, 64 Ga., 445; *Nixon v. State*, 75 Ga., 862. 'It seems to me that if it be shown by the evidence that' facts *a*, *b*, *c* were true, 'the law will presume' fact *d*. Approved, *Hagar v. State*, 71 Ga., 164. If facts *a*, *b* were true, 'these were circumstances from which they (the jury) might infer' fact *c*. Approved, *Johnson v. Dooly*, 72 Ga., 298, 299."

UNITED STATES v. CHASE.

(135 U. S., 255.)

POSTOFFICE: *Depositing obscene letter in the mails.*

Certificate of division in opinion from the circuit court of the United States for the district of Massachusetts.

No. 241. Argued March 28, 31, 1890. Decided April 28, 1890.

1. The knowingly depositing an obscene letter in the mails, inclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, is not an offense within the act of July 12, 1876 (19 Stat., 90, ch. 186).
2. A sealed and addressed letter is not a "writing" within the meaning of that act.
3. A certified question: "Does the indictment charge the defendant with any offense?" is too general to be made the subject of a certificate of division.

The case is stated in the opinion.

Mr. Assistant Attorney-General Maury, for plaintiff.
Mr. Warren O. Kyle, for defendant.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an indictment under the act of congress of July 12, 1876, chapter 186, found and returned in the district court, and remitted, pursuant to section 1037 of the Revised Statutes, to the court below, charging that on the 24th day of January, 1886, at North Attleborough, in the district of Massachusetts, "Leslie G. Chase did unlawfully and knowingly deposit and cause to be deposited in the mails of the said United States, then and there for mailing and delivery, a certain obscene, lewd and lascivious letter, which said letter was then and there non-mailable matter, as declared by section one of an act of congress approved on the twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-six, and which said letter is and then and there was so grossly obscene, lewd and lascivious that the same would be offensive to the court here and is unfit and improper to appear upon the records thereof, wherefore the jurors aforesaid do not set forth the same in this indictment, which said letter was then and there inclosed in a certain paper wrapper,

which said wrapper was then and there addressed and directed as follows, that is to say: 'Watchweer Print, Providence, R. I.,' against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided."

After a plea of guilty had been entered and before sentence, a motion in arrest of judgment was made on the following grounds:

"1. The indictment does not set forth the contents of the letter which is alleged to be obscene, lewd, lascivious and non-mailable, nor does it describe said letter or any part thereof, nor does it in any way identify said letter.

"2. The indictment does not allege that the defendant knew the contents of said letter at the time of the alleged deposit thereof in the mails of the United States.

"3. The indictment does not allege that the defendant deposited said letter in the mails of the United States for the purpose of circulating and disposing of, or of aiding in the circulation or disposition of, anything declared to be non-mailable matter by any law in the United States.

"4. The indictment does not allege that the defendant deposited or caused to be deposited, for mailing or delivery, anything declared to be non-mailable matter by section one (1) of an act of congress approved on the 12th day of July, A. D. 1876, or by any law of the United States.

"The indictment does not charge the defendant with any offense."

At the hearing in the circuit court upon the motion in arrest of judgment, the following questions arose, upon which the judges by whom the court was held were divided in opinion, viz.:

"'First. Is the knowingly depositing in the mails of an obscene letter, inclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, an offense within the act of July 12, 1876, chapter 186?

"'Second. Does this indictment allege that the defendant deposited or caused to be deposited, for mailing or delivering, anything declared to be non-mailable matter by that act or by any law of the United States?

"'Third. Does this indictment charge the defendant with any offense?'

"Thereupon, at the request of the counsel for the United States, it is ordered that these questions be stated as aforesaid and be certified under the seal of this court to the supreme court of the United States at its next session."

Objection is taken to the consideration of the questions presented by this certificate of division, for several reasons, none of which are deemed sufficient to preclude our taking jurisdiction of the case; and we shall, therefore, proceed to consider the questions certified in the order they are arranged in this certificate.

Section 1 of the act of July 12, 1876 (19 Stat., 90), upon which this indictment is founded, is as follows:

"V. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any postoffice nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same, shall be guilty of a misdemeanor, and shall, for each and every offense, be fined not less than $100 nor more than $5,000, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The contention on the part of the United States is that the term "writing," as used in this statute, is comprehensive enough to include, and does include, the term "letter" as used in the indictment; and it is insisted, therefore, that the offense charged is that of unlawfully and knowingly depositing in the mails of the United States an obscene, lewd and lascivious "writing," etc.

We do not concur in this construction of the statute. The word "writing," when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms "letter" and "writing" equivalent expressions. When in ordinary intercourse men speak of mailing a "letter" or receiving by mail a "letter," they do not say, mail a "writing" or receive by mail a "writing." In the law the term "writing" is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds and notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. And in the many discussions to which this statute has given rise, these instruments are referred to as "the writing" or "some writing." But in its most frequent and most familiar sense the term "writing" is applied to books, pamphlets, and the literary and scientific productions of authors. As for, instance, in that clause in the United States constitution which provides that congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In the statute under consideration, the word "writing" is used as one of a group or class of words,— book, pamphlet, paper, picture, print,— each of which is ordinarily and *prima facie* understood to be a publication; and the enumeration concludes with the general phrase "or other publication," which applies to all the articles enumerated, and marks each with the common quality indicated.

It must, therefore, according to a well defined rule of construction, be a published writing which is contemplated by

the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written.

We do not think it a reasonable construction of the statute to say that the vast mass of postal matter known as "letters" was intended by congress to be expressed in a term so general and vague as the word "writing," when it would have been just as easy, and also in strict accordance with all its other postal laws and regulations, to say "letters" when letters were meant; and the very fact that the word "letters" is not specially mentioned among the enumerated articles in this clause, is itself conclusive that congress intended to exclude private letters from its operations.

Upon this point Judge Hammond, in his opinion in *United States v. Huggett*, 40 Fed. Rep., 636, 641, makes the following apt and, to our minds, conclusive remarks: "I have taken the trouble to examine with care the legislation concerning our postal affairs, and do not find a single instance where congress has ever used any other word to include 'letters' than that word itself, except such expressions as 'the mail,' 'mailing matter,' 'bag or mail of letters,' etc. . . . Whenever the legislation in hand requires specific classification or enumeration, I find no word ever substituted for 'letters' to express that which is commonly known as letters in relation to the postal service. We have 'letter' and newspaper envelopes, 'letter correspondence,' 'registered letters,' 'unclaimed letters,' 'dead letters,' request letters,' 'non-delivered letters,' 'all letters and other mail matter,' 'foreign letters,' letters or packets,' 'letter postage,' 'letter mail,' 'letter and other mail matter,' and such like, almost innumerably; and these I have taken quite at random from the Revised Statutes. Can it be possible that congress, then, wishing to include 'letters' in any particular and accurate enumeration, shall drop that word so imbedded in our postal laws and that of our ancestors beyond the sea, and adopt some unfamiliar, inferior, and in every sense ambiguous term to express the idea?"

A further argument in support of the view we have asserted is found in the fact that the statute, after it has declared by enumeration, in the clause under consideration, what articles shall be non-mailable, adds a separate and distinct clause de-

claring that "every letter upon the envelope of which . . . indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed . . . shall not be conveyed in the mails." And the person knowingly or wilfully depositing the same in the mails "shall be deemed guilty of a misdemeanor," etc. This distinctly additional clause, specifically designating and describing the particular class of letters which shall be non-mailable, clearly limits the inhibitions of the statute to that class of letters alone, whose indecent matter is exposed on the envelope. It is an old and familiar rule that "where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." *Pretty v. Solly*, 26 Beavan, 610, per Romilly, M. R.; *State v. Com'rs of Railroad Taxation*, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560.

The decisions of the circuit court upon the question presented to us by this certificate have been conflicting. Those sustaining indictments in cases similar to this, hold that the term "writing" comprehends "letters," and insist that even if the general phrase "other publication" is allowed to apply to the word, the sending or mailing of a letter by one person to another is a sufficient publication to bring a letter within the statute, as is held to be the case in an action of slander and libel.

The reply to this is, that the statute prohibits the conveyance by mail of matter which is a publication before it is mailed, and not such as becomes a publication by reason of its being mailed.

Another argument on which indictments of this character have been sustained by some of the circuit courts is that a reasonable construction must be given the statute, and, it being evident that congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the

thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress. *United States v. Sheldon*, 2 Wheat., 119; *United States v. Wiltberger*, 5 Wheat., 76, 95; *United States v. Morris*, 14 Pet., 464, 475; *United States v. Hartwell*, 6 Wall., 385; *United States v. Reese*, 92 U. S., 214.

But we cannot concede that the policy of the statute was so sweeping as the argument assumes. We think that its purpose was to purge the mails of obscene and indecent matter as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination. *Ex parte Jackson*, 96 U. S., 727. This object seems to have been accomplished by forbidding the use of the mails of books, pamphlets, pictures, papers, writings and prints, and other publications of an indecent nature, and also to private letters and postal cards whereon the indecent matter is exposed to the inspection of others than the person to whom the letter is written.

Ashurst, J., said in *Jones v. Smart*, 1 T. R., 61: "It is safer to adopt what the legislature have actually said than to suppose what they meant to say." In the *Queensborough Cases*, 1 Bligh, 497, Lord Redesdale said: "The proper mode of disposing of difficulties arising from a liberal construction is by an act of parliament, and not by the decision of the court." Congress seems to have acted upon this idea; and if further arguments were needed in support of our view, it will be found, we think, in the fact that in an amendment to this statute passed September 26, 1888 (25 Stat., 496, ch. 1039), for the first time in the history of the postal service, the

word letter was included in the list of articles made non-mailable by reason of their obscene, lewd, lascivious or otherwise improper character. If letters were embraced in the statute on which this indictment was founded, why did congress consider it necessary to insert the specific word to designate them in 1888? It must be that that body did not put the construction on the proper statute claimed in behalf of the United States, else we have it doing a useless and vain act. But as the amendment of 1888 is not involved in this case, no opinion is expressed as to whether the term "letter," as used therein, can, under a proper construction of that statute, be held to include a strictly private and sealed letter. With reference to the argument that the word writing occurs, in the legislation on this subject, as an amendment, we have only to remark that the entire history of that legislation, so far from forming a basis for a different construction of this act, confirms it. The questions are therefore answered in the negative.

SULLIVAN v. THE STATE.

(67 Miss., 346.)

PRIZE-FIGHTING: *Indictment.*

1. As it is doubtful whether, to constitute a "prize-fight," there must be fighting in public, and as the act of Mississippi of March 7, 1882, making it "unlawful for any person to engage in prize-fighting in this state," was intended to prohibit prize-fighting which is public in character, and tends to disturb the peace, is not sufficient to indict under this statute by the use of statutory words only, but the facts which, if proved, would show the defendant to be guilty of the statutory offense must be charged.
2. The indictment must charge that the persons fought together, and against each other, in order to constitute the offense of "engaging" in the fight, and an indictment which charges that S. did unlawfully engage in a prize-fight with K., "to wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in said ring, beat, strike and bruise said" K., is defective, as the *videlicet* excludes the conclusion that K. fought.

Appeal from circuit court, Marion county; S. H. Terral, judge.

Calhoon & Green, for the appellant.

T. M. Miller, attorney-general, for the state.

COOPER, J. The appellant has been convicted of the offense of prize-fighting, in violation of an act entitled "An act to prevent prize-fighting in this state, and for other purposes," approved March 7, 1882. The first section of the act declares that "it shall be unlawful for any persons to engage in prize-fighting in this state, and any persons engaging in such prize-fighting shall be deemed guilty of a misdemeanor," etc. The indictment contains two counts — the first for a violation of the above statute, and the second for an assault and battery. Appellant was acquitted under the second count, and convicted under the first. The defendant pleaded in abatement to the indictment, to which pleas demurrers were sustained; and, after conviction, he moved in arrest of judgment, and for a new trial; and, both motions being denied, he prosecutes this appeal.

So much of the indictment as is brought into review is as follows:

"The state of Mississippi, county of Marion. In the circuit court for the second judicial district of Marion county, at the special August term, 1889. The grand jurors of the state of Mississippi, upon their oaths, present that John L. Sullivan, in the second judicial district of Marion county, Mississippi, on the 8th day of July, A. D. 1889, by and in pursuance of a previous appointment and arrangement made to meet and engage in a prize-fight with another person, to wit, with Jake Kilrain, did then and there, for a large sum of money, the exact amount of which is to the grand jurors aforesaid unknown, did then and there, to wit, on the 8th day of July, 1889, in the second judicial district of Marion county, Mississippi, unlawfully engage in a prize-fight with the said Jake Kilrain, to wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in the said ring, beat, strike and bruise the said Jake Kilrain, against the peace and dignity of the state of Mississippi.

"JAS. H. NEVILLE, Dist. Atty."

This count is fatally defective as one charging the appellant with the offense of prize-fighting. The statute neither defines the offense of prize-fighting, nor declares what act done shall be a violation of its provisions. The specific offense was unknown to the common law, the participants being only punish-

able for an affray, riot, or assault and battery, according to the circumstances. In indictments for purely statutory offenses, it is sometimes sufficient to charge the offense by using only the words of the statute. This may be done whether the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent its application to any other acts than those made unlawful. Our statute against retailing (Code, § 1097) is an apt illustration of statutes of this character. It declares that "it shall not be lawful for any person to sell any vinous or spirituous liquor in a less quantity than one gallon, without having first obtained a license in the manner directed by this act." Here the nature and character of the prohibited act is clearly set out, and there is an exclusion of its application as to the only class of persons — licensed dealers — who may sell in the quantity named without guilt. But where the act prohibited does not clearly appear from the language employed, or where, under certain circumstances, one may lawfully do the thing forbidden by the literal meaning of the words of the statute, it is not sufficient to indict by the use only of the statutory words. Under such circumstances, the indictment must charge, in apt language, the unlawful act that the defendant may be advised of the nature and character of the offense with which he is charged, and that he may, by demurrer, take the opinion of the court whether the facts charged constitute an offense.

In *Jesse v. State*, 28 Miss., 100, the defendant had been indicted under a statute which provided that "if any slave be guilty of burning any dwelling-house, store, cotton-house, gin or out-house, barn or stable," etc. The indictment was in the words of the statute, and it was held insufficient, for the reason that the statute was intended to punish a malicious burning only.

A statute declared that, "if any clerk of any court, or public officer, or any other person, shall wittingly make any false entry, or erase any word or letter, or change any record belonging to any court or public office, whether in his keeping or not, he shall on conviction," etc. Code 1880, § 2703. It was held that the purpose of the act was to prevent such change, erasure or false entry, to the end that some one might be thereby benefited or injured, as were intended or calculated

to damnify some person, or benefit the person making it, and that an indictment which failed to aver such fact was fatally defective. *Harrington v. State*, 58 Miss., 490. The facts developed on the trial of that case disclosed that the defendant, a clerk of the treasurer, erased the number of a warrant that had been erroneously entered on the treasurer's books, and substituted the true number. These cases were decided on the ground that a person might, under circumstances, lawfully do the things forbidden in the most comprehensive manner by the mere letter of the statute. "A verdict [of a jury] does nothing more than verify the facts charged, and, if these do not show the party guilty, he cannot be considered as having violated the statute." Shaw, C. J., in *Commonwealth v. Odlin*, 23 Pick. (Mass.), 275.

Where, therefore, the language of the statute is broader than its purpose, and the indictment is in the words of the statute, it cannot be told whether the jury intend to find the defendant guilty of the act forbidden by the statute, or of those only within its literal but not its true construction. It is therefore necessary for the pleader to depart from the statute, and indict in words aptly charging an offense, in all cases in which the words of the statute do not in legal intendment import a particular offense certainly committed by any one who has violated its literal language.

The statute under consideration declares, in general terms, that it shall be "unlawful for any person to engage in prize-fighting in this state." What is a "prize-fight" is not declared, but must be discovered by the courts from the known meaning of the terms used, and the evil intended to be provided against. The meaning of "to fight," according to Webster, is "to strike or contend for victory in battle or in single combat; to attempt to defeat, subdue or destroy an enemy either by blows or weapons." Worcester gives practically the same definition. "Prize" is defined by Worcester to be "a reward gained by contest or competition," and by Webster as "that which is obtained against the competition of others; anything carried off as the result or award of a contest." Worcester defines "prize-fighter" as "one who fights or boxes publicly for a reward," and "prize-fighting" as "the act or the practice of fighting for a prize." Webster defines "prize-

fighter" as "one who fights publicly for a reward," and "prize-fighting" as "fighting, especially boxing in public, for a reward or wager." He defines "prize-fight" to be "a contest in which the combatants fight for a reward or wager." Worcester gives no definition of this word. It thus appears that, while these two lexicographers define a "prize-fighter" to be one who fights publicly for a reward, Worcester defines "prize-fighting" as the act of fighting for a prize, while Webster defines it as a fighting in public for a reward or wager, and prize-fight to be a contest in which the combatants fight for a reward or wager. According to the lexicographers, it would seem to be left doubtful whether, to constitute a prize-fight, there must be a fighting in public. We think, however, that the evil sought to be protected against by the statute is the debasing and brutalizing practice of fighting in public places, or places to which the public or some part of it is admitted as spectators. The act was not passed in tenderness to those who participate in such contests, nor to afford them protection by discouraging the practice. We must either construe the act as prohibiting all contests, whether public or private, where a prize or wager is determined by blows, or as intended to apply only where others than the contestants are admitted spectators.

The second section of the act declares that, if death result from the fight, the party causing it shall be guilty of murder, or, if mayhem results, the punishment for that crime shall be inflicted. By the third section the aiders and abettors of such "prize-fighting" are declared guilty of a misdemeanor. These sections add strength to the conclusion which would properly be drawn from the first only, that the prize-fighting intended to be prohibited is that which is public in character and tends to disturb the peace and quiet of the community in which it occurs, and to debase not only the participants, but others who are admitted as spectators. A private contest between individuals, whether amateurs or professional fighters or boxers, though it be for a prize or wager, would not be in violation of the particular statute under consideration, though the participants might be guilty of assault and battery or of gaming. A fight or contest under such circumstances would be a fight, because a contest determinable by blows, and a prize-fight be-

cause a prize or wager would be awarded to the victor; but it would not be a prize-fight within the meaning of the statute which prohibits such fights only as are offenses against public peace and order. Since, therefore, the appellant might fight for a prize under such circumstances as would not be violative of the statute, it is not sufficient to indict by the use of the statutory words only, but the facts which, if proved, show him to be guilty of the statutory offense must be charged.

The indictment is defective for another reason. The offense can only exist where two persons engage in the unlawful act. The parties are severally guilty, but the guilt of each springs from the joint unlawful act. One man cannot commit the offense. The indictment in this case does not follow the usual form by charging that Sullivan and Kilrain fought together and against each other. It avers that Sullivan, "in pursuance of a previous appointment and arrangement made to meet and engage in a prize-fight with Jake Kilrain for a large sum of money, did unlawfully engage in a prize-fight with the said Jake Kilrain, to wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in said ring, beat, strike and bruise the said Kilrain, against the peace and dignity of the state of Mississippi." The clause preceding the *videlicet*, that Sullivan "unlawfully did engage in a prize-fight with the said Jake Kilrain," is the only portion of the indictment by which even an indirect charge is made that Kilrain did anything in the fight; and the pleader excludes the conclusion that he did fight by setting out, under the *videlicet*, how Sullivan so engaged in a prize-fight, viz., by going into a prize-ring, and then and there beating Jake Kilrain. The common office of a *videlicet* is to state time, place or manner which are not of the essence of the matter in issue, and thereby to relieve the party of the duty of proving the allegation strictly as made; but it may be, and is frequently, used as particularizing the more general antecedent matter. "A *videlicet*," says Lord Hobart, "is a kind of interpreter. Her natural and proper use is to particularize that that is before general." It may work a restriction when the former words are not express and special, but so indifferent as they may receive such restriction without apparent injury, though these

former words, by construction of law, would have had a larger sense if the *videlicet* had not been. *Stukeley v. Butler*, Hob., 172; *Dakin's Case*, 3 Saund., 290, note *a*. "If a party, in pleading, use a generic term, comprising, therefore, many species or particulars, and afterwards use an averment defining which particular or species of the number he insists on, he is tied up to that particular one. [The reason may be, because he leads his adversary to suppose he only means to rely on that, who therefore confines his proof accordingly.]" *Harris v. Mantle*, 3 T. R., 307; *King v. Perrott*, 2 Mau. & Sel., 379; Com. Dig., tit. "Pleader," ch. 22. "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. If expressions are used which leave it in doubt whether all of several facts, or some only, are charged against him, subsequent averments must be used defining and tying up this generality." Com. Dig., tit. "Pleader," ch. 22.

In *Mallett v. Stevenson*, 26 Conn., 428, a warrant had issued commanding the officer to seize "certain intoxicating liquors, to wit, several casks of French brandy, containing twenty-five gallons, more or less, several casks of gin, containing twenty-five gallons, more or less, and several casks of intoxicating wines, containing twenty-five gallons, more or less." The officer seized some French brandy, and also a quantity of rum, cider, brandy and pale brandy. It was held that the warrant did not justify the seizure of the latter articles. The court said: "'Intoxicating liquors' is the name of a genus, of which brandy, gin, etc., are species; and, although we agree with the judge who tried the cause that the particular species of liquor, when the species is unknown, need not be stated in the complaint or warrant, yet the objection in this case is, not that all the liquors seized were not designated by their specific names, but that the generic name, 'intoxicating liquors,' was by the *videlicet* restricted to the species particularly described under it, so that no intoxicating liquors besides those designated by their specific names were complained of or proceeded against under any name, general or specific."

In *Harris v. Mantle*, 3 T. R., 307, breach of covenant was assigned "that the defendant had not used a farm in an hus-

bandlike manner, but, on the contrary, has committed waste." *Held*, that plaintiff could not give in evidence defendant's unhusbandlike use, if it did not amount to waste.

Where the matter stated under the *videlicet* is immaterial, it may be rejected as surplusage. But, where the precise time is the very point and gist of the cause, there the time alleged by the *videlicet* is conclusive and traversable, and it shall be intended to be the true time, and no other, and, if impossible or repugnant to the premises, will vitiate the plea; if true, will support the defense. Blackstone, in argument in *Bishop of Lincoln v. Wolferstan*, 1 W. Bl., 495. "And the distinction seems equally to apply to every other matter which comes under the *videlicet*." Note to *Dakin's Case*, 3 Saund., 290; 1 Bish. Cr. Pro., § 406.

If the averment of the indictment had been that Sullivan and Kilrain "fought together and against each other," the allegation under the *videlicet* might be referred to Sullivan's action in such fight. But, as we have said, the antecedent clause only states that Sullivan fought with Kilrain, and the *videlicet* explains and particularizes the whole of the previous averment, by showing how he "fought with him." So read, the indictment is as though the pleader had said that Sullivan engaged in a prize-fight with Kilrain by going into a prize-ring, and there beating and bruising him. This avers the several act of Sullivan to constitute a prize-fight; and, in the nature of things, that cannot be. As we have said, the parties in a prize-fight are severally guilty, but the guilt of each must arise from the joint act of two.

The present indictment illustrates the wisdom of the advice given by Mr. Bishop, "to have nothing to do with the *videlicet*, unless in exceptional circumstances."

The demurrer to the pleas in abatement should have been extended to the indictment, and the first count of the indictment quashed.

The judgment is reversed, the first count of the indictment quashed, and the appellant held to answer at the next term of the circuit court of Marion county such indictment as may be preferred against him.

NOTE.— *Nature of offense.*— Persons who agree to enter into a pugilistic encounter may be bound over to keep the peace and also held for conspir-

acy. It will not avail them to pretend that the contest was to be for scientific "points" only when the evidence shows a real fight was intended. *Com. v. Sullivan and McCaffery*, 16 W. N. C., 14 (Phila.). But a conviction under a statute prohibiting prize-fighting is unwarranted where no prize was to be given the winner and the contest was simply for "points." *People v. Floss*, 7 N. Y. S., 504.

Reynolds v. State.

(27 Neb., 90.)

Rape: *Necessity of caution from the court — Consent given after assault.*

1. In a prosecution for rape there was a conflict in the testimony as to the resistance of the prosecutrix, and also as to the resort to force by the accused. The latter asked an instruction in substance cautioning the jury against prejudice which was liable to be aroused against the accused because of the heinous nature of the charge, and to call their attention to the difficulty of defending against the accusation; and that if the carnal knowledge while she had the power to resist was with the voluntary consent of the woman, no matter how tardily given or how much force had previously been employed, it was no rape. *Held*, the instructions asked should have been given.
2. Objections were predicated on certain testimony of an expert, but it appeared from the record that the testimony objected to had been first drawn out on cross-examination by the attorney for the prisoner. *Held*, that the objections could not be considered.

Error from district court of Saunders county; Marshall, judge.

Hamilton & Trevitt, for plaintiff in error.
The Attorney-General, for the state.

Maxwell, J. An information was filed against the plaintiff in error in the district court of Saunders county, charging him with the crime of rape, and on the trial he was found guilty, and sentenced to imprisonment in the penitentiary for four years. A large number of errors are assigned in this court, most of which it is unnecessary to notice. The evidence of the prosecuting witness was received through the aid of an interpreter, and, while it may be true in its principal features, the examination was conducted in such a manner as practically to put words in the witness' mouth. No objection seems to have

been made to this mode of conducting the examination, and it is not ground of error; but as there must be a new trial, and it is evident that the witness has a considerable knowledge of the English language, an effort should be made to take her testimony without the intervention of an interpreter, and as far as possible require her to narrate the facts.

The plaintiff in error asked the court to give the following instruction, which was refused: "(1) The charge made against the defendant is in its nature a most heinous one, and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty, growing out of the nature of the usual circumstances of the crime, in defending against the accusation of rape. So you, the jury, must carefully consider all the evidence in the case, and the law given you by the court in making up your verdict. You must find on the part of the woman not merely a passive policy or equivocal submission to the defendant; such resistance will not do. Voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape." In *Conners v. State*, 47 Wis., 523, Judge Lyon, in delivering the opinion of the court, said of an instruction substantially like the one asked in this case: "The charge given by the learned circuit judge to the jury contains a correct statement of the law of the case, as far as it goes, but it does not contain the substance of the rejected instructions. It fails to caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime charged in the information, or to call their attention to the difficulty, growing out of the nature and usual incidents of the crime, of defending against an accusation of rape. It did not press upon their attention the principle or rule that voluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. The jury were not expressly told that if the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been em-

ployed, it is no rape. And, lastly, the jury were not instructed that proof of the good reputation of the accused as a peaceable and law-abiding citizen (and such proof was given on the trial) was entitled to some weight in his favor, especially if there were circumstances proved on the trial upon which a doubt of his guilt might be predicated. The proposed instructions are not very accurately drawn, but they aim to state the above propositions, all of which are well-established rules of law." This, we think, is a correct view of the law. The fact that the charge itself will frequently raise a clamor among ignorant and easily biased persons has been recognized by fair-minded judges and law-writers from the time of Chief Justice Hale, at least, until the present time. Even that eminent and impartial judge seems to have given but little thought to the care required in trying this class of cases until a case came before him where three witnesses, including the prosecutrix, swore positively to the commission of the act, which, upon inspection of the accused, it appeared that he could not have committed. Other cases are also mentioned. He says: "I only mention these instances that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance." 1 Hale, P. C., 633 (Ed. 1778). In *Oleson v. State*, 11 Neb., 330, it was held that where the prosecutrix was conscious, and had possession of her natural, mental and physical powers, and was not terrified by threats, or in such a position that resistance would be useless, it must appear that she resisted to the extent of her ability. In *Mathews v. State*, 19 Neb., 330, the authorities of this this and other states were reviewed, and the doctrine of *Oleson v. State* affirmed. The case of *State v. Burgdorf*, 53 Mo., 65, resembles in some of its features that under consideration, and it was held that a "passive policy — a mere half-way case — will not do." To the same effect are *People v. Abbott*, 19 Wend., 194; *Whittaker v. State*, 50 Wis., 518; *Moran v. People*, 25 Mich., 356; *Whitney v. State*, 35 Ind., 506; *People v. Brown*, 47 Cal., 447; *Taylor v. State*, 50 Ga., 79. The case should be so submitted to the jury as to enable it to consider all the evidence, and determine therefrom the question of the guilt or innocence of the accused.

Objection is made to certain questions asked Dr. Mansfelde as an expert. It is sufficient to say that the questions objected to were in the first instance asked by the attorneys for the plaintiff in error, and therefore they cannot predicate error thereon. As there must be a new trial, we will not discuss the testimony in the case. The judgment of the district court is reversed, and the cause remanded for a new trial. The other judges concur.

NOTE.— *Nature of offense.*— As Lord Hale says, the charge of rape "is easily made, hard to be proved and still harder to be defended against by one ever so innocent." The atrocity of the crime sends the testimony of the accused to the jury tinged with some of its own blackness, and sympathy for the supposed victim very often gives to her evidence an undue weight. So the courts and sometimes the legislatures have taken precautions concerning the proof necessary to convict in this class of cases, and have required greater circumspection to be exercised than in any other. Thus, if the prosecutrix does not complain of the outrage within a short time after its commission, it is a circumstance which may be considered for the defendant. On the other hand, if complaint were at once made it may be considered as a circumstance tending to show his guilt. 2 Roscoe's Crim. Ev., 1122. Even that she appeared with disheveled hair, frightened appearance, red face and swollen eyes, and testimony of her crying shortly after the occurrence, is competent; but not that two days after she attempted suicide. *People v. Batterson*, 2 N. Y. S., 375. But if this complaint be not made promptly the delay calls for explanation before the courts will receive it. *State v. Niles*, 47 Vt., 82; *People v. Gage*, 62 Mich., 271. In some states, as in Iowa, the law requires that a prosecutrix shall be corroborated by other testimony connecting the defendant with the commission of the offense. But this provision of the statute is confined to the crime in question and is not applicable to an assault with intent to commit rape. *State v. Hatfield*, 75 Iowa, 592. It may also be shown that the general reputation of the prosecutrix for chastity is bad. *Woods v. People*, 55 N. Y., 515; *State v. Murray*, 63 N. C., 31; *McQuirk v. State*, 84 Ala., 435. So previous acts of intercourse with the defendant may be shown. *People v. Glover*, 71 Mich., 303. And also the former relations existing between the parties. *Hall v. The People*, 47 Mich., 630; *S. C.*, 3 Greenl., 214; *State v. McCaffrey*, 63 Iowa, 479. It may be shown, too, that the defendant has committed this crime on the same person at other times. *State v. Parrish*, 104 N. C., 679. It has even been held that the declaration by a female that she had had sexual intercourse with a certain man, and would have it again, notwithstanding what other people might say, made to a witness who had seen the conduct and actions of the woman and man a short time before he committed, as alleged, a rape on her, are admissible in evidence in a prosecution for the alleged offense, though made subsequent to the time of the commission thereof. *State v. Cook*, 65 Iowa, 560. But her statements as to intercourse with others are inadmissible. *State v. McLean*, 71 Mich., 309. So, also, it is

permissible to show that she was in the habit of receiving men at her dwelling for promiscuous intercourse. *Woods v. People*, 55 N. Y., 515.

Consent.— The mere fact that a woman is weak-minded does not disable her from consenting to the act; for a woman with a less degree of intelligence than is requisite to make a contract may consent to carnal intercourse, so that the act will not be rape. And the consent given may be implied as well as express, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her free will to the commission of the act. *McQuirk v. The State, supra.*

"Wherever there is a carnal connection, and no consent in fact, fraudulently obtained or otherwise, there is evidently, in the wrongful act itself, all the force which the law demands as an element of the crime. In the ordinary case, when the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent. And it has been held that, though she objects verbally, if she makes no outcry and no resistance, she by her conduct consents and the carnal act is no rape in the man; and the jury must be satisfied that she resisted the man to the extent of her ability; that the resistance must be up to the point of being overpowered by actual force, or of inability, from loss of strength, longer to resist; or that resistance is dangerous or absolutely useless; or there must be dread or fear of death; that the will of the woman must oppose the act, and that any inclination favoring it is fatal to the prosecution.

"While, on the other hand, it has been held that, in this age, to compel a frail woman or girl of fourteen to abandon her reason and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched, yet not to preserve her virtue, on pain of being otherwise deemed a prostitute instead of the victim of an outrage, is asking too much of virtue and giving too much to vice. The law requires that the unlawful carnal knowledge shall be against her will. She must resist, and her resistance must not be a mere pretense, but must be in good faith. She must not consent. If she consent before the act it will not be rape. But as to this consent, we may observe that it must be a consent not controlled and dominated by fear.

"If the girl is very young and of a mind not enlightened on the question, this consideration will lead the court to demand less clear opposition than in the case of an older and more intelligent female, or even lead to a conviction where there was no apparent opposition. A consent induced by fear of bodily harm or personal violence is no consent; and though a man lay no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dare not resist, he is guilty of rape by having the unlawful intercourse." *Baily v. The Commonwealth*, 82 Va., 107; *S. C.*, 3 Am. St. R., 87. See, also, cases cited in each volume of this series and the notes thereto.

STATE v. CUNNINGHAM.

(100 Mo., 382.)

RAPE: *Consent — Weak mind — Capacity for consent — Jurors.*

1. The evidence showed that the prosecutrix, while mentally weak, was not insane, but was able to attend to her household duties. About dark defendant entered her house, dragged her out, despite her resistance and protests, placed her in a wagon, which was driven by another man, lay down with her, and covered her and himself up with a tarpaulin. After driving for some time, they stopped at a saloon about two hours, prosecutrix remaining in the wagon in a state of apparent unconsciousness. Defendant then had intercourse with her. She appeared during all the time to be dazed, and was in an advanced state of pregnancy. After delivery she became insane, and hence unable to testify. *Held* that, though it did not appear that she resisted or that force was used when intercourse was effected, the evidence showed want of her consent; as resistance and force are only facts bearing on the question of consent, and, in case of mental weakness, less evidence of want of consent is necessary than where the female is of sound mind.
2. A juror stated on his *voir dire* that he did not know the defendant or the prosecutrix, but remembered reading of the case when it occurred, and thought it a hard case, and could not say that he had no opinion in the case, but that his opinion would not prejudice him as a juror. On cross-examination he said that the newspaper report produced an opinion in his mind, which could be only removed by evidence, and that the defendant would have to prove his innocence. On re-examination he said that if the newspaper report were shown to be true he would retain his opinion, but that if the facts were shown to be different he would arrive at a different conclusion. If sworn as a juror, he would be governed only by the evidence, and would pay no attention to what he had read; that his attention would be drawn from the newspaper account, and that he could give defendant a fair trial. *Held*, construing his whole examination together, he was qualified. It being a question of fact, all doubts should be resolved favorably to the finding of the trial court, and as it did not clearly appear that the juror had such an opinion as to bias his mind, the decision favorable to his competency should be sustained.

SHERWOOD, J., dissenting.

Error to St. Louis criminal court; James C. Normile, judge.

Thomas Cunningham was indicted for, and tried and convicted of, rape, and sentenced to confinement in the penitentiary for fifteen years. He brings error.

C. P. & J. D. Johnson and *Silver & Brown*, for plaintiff in error.

John M. Wood, attorney-general, and *J. G. Lodge*, for the state.

BLACK, J. The defendant was convicted of rape, committed upon the person of Mrs. Gutting. Objections were made to several jurors for cause; and, as the ruling of the trial court upon the qualification of Mr. Worsey presents the strongest case in favor of defendant's objections, the examination of the other jurors need not be set out. This juror, upon his examination by the state, testified: "I do not know the defendant, nor do I know Mr. or Mrs. Gutting. I remember of reading of the case in the newspaper shortly after the affair occurred. I thought it was a pretty hard case. I can't say but I have an opinion about the case. It would not prejudice me in the trial." *By counsel for defendant:* "*Question.* You did form some opinion at the time of the occurrence, did you, when you read it in the newspaper? *Answer.* Well, I thought it was a kind of a hard case, of course. *Q.* And you formed an opinion that it was a hard case? *A.* At that time; yes, sir. *Q.* Well, you have nothing to change the opinion, have you? *A.* Never thought of it since. *Q.* You have got that opinion yet? *A.* Well, I have got that opinion yet, as I read it in the paper: if evidence is proved to the contrary, I can give a just verdict. *Q.* In other words, if you went on the jury you would have to have evidence to change that opinion you have formed? *A.* Yes, sir. *Q.* If you were to take your seat now, you would have a bias or prejudice in your mind? *A.* Yes, sir. *Q.* A bias and prejudice that would require evidence to remove? *A.* Yes, sir. *Q.* In other words, the defendant would have to prove that he was innocent? *A.* Yes, sir." He states on re-examination by the state, what he means is that if the newspaper report is shown to be true then he would retain the opinion he had formed; but, if the evidence showed another state of facts, he would arrive at a different conclusion. *By the court:* "*Question.* Have you any prejudice in the case that would prevent you from giving him a fair trial? *Answer.* Nothing to prevent me from giving him a fair trial. *Q.* Then would or would you not pay any attention to what you read in the paper? *A.* No, sir. If I am employed as a juror, it would take my attention from the paper. If I am sitting as a juror, I judge by what is put forth. *Q.* In the court-room? *A.* Yes, sir." In answer to other questions, he says he could and would be guided by the

evidence advanced on the trial. The examination of this juror is lengthy, but the foregoing presents the essential parts of it.

The statute provides that a juror may be sworn, though he has formed an opinion, if it be founded on rumor and newspaper reports, and be such as not to prejudice or bias his mind. The rule repeatedly asserted under the statute is, in substance, this: A juror who states on his examination that he has formed and expressed an opinion as to the guilt or innocence of the accused, and that opinion has been formed from rumor or newspaper reports, and that it would require evidence to remove the opinion, is not an incompetent juror; provided it shall appear to the satisfaction of the court that such opinion will readily yield to the evidence in the case, and that the juror will determine the issues upon the evidence adduced in court, free from bias. *State v. Walton*, 74 Mo., 271, and cases cited; *State v. Bryant*, 93 Mo., 302. This rule, so often asserted by this court, is in accord with that where it is said: "The true doctrine is that if the juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial, so as to be convinced according to the law and the testimony, he is not incompetent." 2 Grah. & W., New Trials, 378. Now, the opinion of the juror in this case was based upon what he had read in the paper over a year before the trial, since which time he had not thought of the matter. There is but one question left, and that is whether it appears the opinion thus formed is such as not to bias his mind in the trial of the case. Does it appear that the opinion is one which will readily yield to the evidence? This question, it may be observed, in the first place, is to be tried by the trial court as a question of fact; and the finding of the trial court ought not to be disturbed, unless it is clearly against the evidence. All doubts should be resolved in favor of the finding of the trial court. *McCarthy v. Railroad Co.*, 92 Mo., 536. Moreover, the question as to the qualification of the juror must be determined, not from a few catch-words drawn from him by a series of questions, but from his whole examination, including his demeanor while on the witness-stand. When he says he would have a prejudice and bias which it would take evidence

to remove, and the defendant would have to prove his innocence, he is evidently speaking of the case on the supposition that the circumstances as stated in the newspaper report should turn out to be true. His attention is called to the newspaper account, his opinion thereon, and then the direct and leading questions are asked which bring out the statements. When he is given an opportunity to make a full explanation, it appears he has no bias at all. He understood it to be his duty to disregard the newspaper reports, and this he says he could and would do. His notions of the case were nothing more than such as any one would form from reading a newspaper report, and it is but common information that such reports have little or no influence upon a fair-minded man when he is called upon to determine the fact in the light of evidence given under oath. If such a juror is to be rejected, it must be because he is an intelligent, honest, fair-minded man, and not because he has any opinion which would in the least sway his mind from an impartial consideration of the evidence.

2. Mrs. Gutting resided on an out-street in the city of St. Louis, with her husband and two children. She had been subject to aberrations of the mind for four or five years, and for two years prior to the occasion in question she had, according to the testimony of her husband, spells two or three times a week, when she imagined the persons who came to the house came there to steal or carry off their property. In other respects she appeared to be well, and at all times attended to her household duties, taking care of the children. On the 7th December, 1886, she prepared breakfast for her husband as usual, and he left for his work. Cunningham, the defendant, was a street-vendor of produce, and in that capacity had been at the house on several occasions. About 6 o'clock in the evening of the day last mentioned he and Maher went to the house with a two-horse wagon, having high sideboards, but no cover. According to the evidence of Maher, who was jointly indicted with defendant, he went to the house to sell some butter, but did not go in. Defendant then left the wagon, and went into the house, and closed the door after him, and in a few minutes came out, dragging Mrs. Gutting by the arms. She had no covering on her head, and only a pair of stockings on her feet. In the struggle they fell down at the yard fence, when defend-

ant raised her up, took her to the wagon, placed her feet on the hub, and then threw her over into the wagon. The defendant got in, and threw a tarpaulin over her and himself, and told Maher to drive on, which he did. She appeared to be dazed, and said: "What have I done? What is this for?" Another witness, who was fifty yards distant, says he saw the wagon in the road at the house, and heard the woman say: "I won't." That it was dark, and he heard and saw nothing more. Maher drove about a half mile, and stopped at a saloon, at what is called the "Half-Way House." He says he went into the saloon, leaving defendant and Mrs. Gutting under the tarpaulin, and that defendant came into the saloon in ten or fifteen minutes. They remained at the saloon about two hours, drinking with five or six other peddlers. Other evidence is that these peddlers, at the invitation of defendant, went to the wagon, one after another, and returned with straw on their clothes. One witness says the woman was lying down in the wagon, motionless, and apparently in a state of unconsciousness. This shameful conduct over, Maher and defendant drove west, about two miles, and the evidence of Maher is to the effect that on this drive defendant had intercourse with her. She said on this drive three or four times she wanted to go home. Maher drove back, but not to the house, and she found her way home. Defendant was then in a drunken stupor. Mrs. Gutting was alone when carried away by these men. She was then in the ninth month of pregnancy, and in twelve days gave birth to a child, since which time she has been wholly insane. Her husband says she came home about half-past 12, in a bewildered state of mind. She gave a broken account of what had happened, and did not know that any great wrong had been done. She was still without covering on her head and feet, though the weather was cold. On each arm there were from six to ten black marks, having the appearance of finger-marks. Defendant, testifying in his own behalf, says he drank beer with Mrs. Gutting on a former occasion when he stopped at the house; that on the evening in question she wanted beer, and got into the wagon of her own accord to go to the Mount Pleasant House for that purpose, but they stopped at the Half-Way House. He says she was a good woman, and he had no intercourse with her,

with or without force, and that he made no improper proposals to her.

The objection made that it does not appear that force was used by the defendant, or that there was resistance on the part of the woman, cannot be sustained. The state must, of course, show force used on the part of the defendant, and that the woman did not consent. These questions of fact are interwoven, and the one is somewhat dependent upon the other. Whether the woman did or did not consent to the act is, in most cases, to be inferred from the surrounding circumstances; and hence resistance or want of resistance becomes an important element in the evidence. So the resistance to be expected depends much upon the physical and mental strength of the woman. The distinction between the facts to be proved and the evidence adduced in proof of them should be kept in mind. The importance of resistance is simply to show two elements in the crime,— carnal knowledge by force by one of the parties, and non-consent thereto by the other. *State v. Shields*, 45 Conn., 264. According to *Com. v. McDonald*, 110 Mass., 405, the act must have been done without the woman's consent, and there must have been sufficient force used by the accused to enable him to accomplish his purpose, and when these facts are made to appear sufficient force has been shown. The case of *People v. Crosswell*, 13 Mich., 427, holds, and only holds, that when a man had connection with a woman of mature years, of good size and strength, who was in a state of *dementia*, not idiotic, but approaching to it, and no fraud or force was used, it was not rape. The evidence in the present case tends to show that Mrs. Gutting, though not insane, was of a weak mind. She was dragged from her house, and forced into the wagon, and carried off. It tends to show that she did resist until thrown into the wagon. There is abundant evidence of force, and that she did not consent to the outrage.

But, conceding all this, it is next urged that the crime was not committed when the force was used, and that the subsequent conduct of the woman furnishes conclusive evidence of acquiescence on her part. It is doubtless true, as a proposition of law, that if consent is given after the assault, and before the act is completed by penetration, it will not be

rape. But a consent induced by fear of personal violence is no consent. 2 Bish. Crim. Law (7th ed.), § 1125. Submission from fear, or because the mind of the woman is overcome by fright, is no consent. *McQuirk v. State*, 84 Ala., 335. Though the witness Maher says Mrs. Gutting, during the drive to the saloon, made no outcry or resistance that he saw or heard, yet he says she and the defendant were covered up from his view, and that she, to use his language, appeared to be dazed when thrown into the wagon. Other evidence tends to show that while in the wagon at the saloon she was unconscious, and after leaving that place she wanted to go home. All this evidence tends to show that she was overpowered by the first brutal assault; and, if that be the fact, then her subsequent conduct falls far short of showing consent. On the contrary, the evidence, as a whole, tends to show that she did not consent, and whether she did or not was a question for the jury to determine. Nor do we agree to the proposition advanced by counsel for the defendant that there is no evidence of rape, except upon the theory that Mrs. Gutting was so insane as to be incapable of giving her consent. She was, beyond all doubt, a woman of a weak and a disordered mind, but she had the mental capacity to attend to her household duties at all times, cared for her small children, and visited acquaintances with her husband. The mere fact that a woman is weak-minded does not disable her from consenting to the act. *McQuirk v. State, supra.* "A woman with less intellect than is required to make a contract may so consent to a carnal connection that it will not be rape in the man." 2 Bish. Crim. Law (6th ed.), § 1121. So long as the woman is capable of consenting, and does consent, the act is not rape, and this is true though the man may know that she is of weak intellect. All the evidence tends to show that Mrs. Gutting did have, when first assaulted, the strength of mind to consent or dissent, and there was no error in placing the case before the jury on that theory. Had this not been done, it is quite clear the defendant would be demanding a reversal on that account.

At the close of the evidence the court inquired if there were any instructions that either side specially craved, and counsel on both sides made a negative reply. Thereupon the

court, it is conceded, gave such instructions as are usually given in cases of rape. But it is now urged that the court erred because it did not, of its own motion, submit the question of the sanity of Mrs. Gutting to the jury, and in not instructing the jury that if she was insane the defendant could not be convicted, unless it also appeared that he knew she was incapable of giving her consent. Our statute provides that "every person who shall be convicted of rape, . . . by forcibly ravishing any woman of the age of twelve years or upwards, shall be punished," etc. R. S. 1879, sec. 1253. "Rape" is generally defined to be the carnal knowledge of a woman by force and against her will. This and like definitions are compiled from the English statutes, and some text-writers hold that it is erroneous, in that the words "without her consent" shall be used instead of "against her will." 2 Bish. Crim. Law (7th ed.), §§ 1114, 1115. Wharton says: "The term 'against her will' was used in the old statutes convertibly with 'without her consent,' and it may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent, although no positive resistance of the will can be shown." 1 Whart. Crim. Law (9th ed.), § 556. Carnal knowledge of a woman by force and without her consent is rape. *Commonwealth v. Burke*, 105 Mass., 377; *Reg. v. Fletcher*, 8 Cox, Crim. Cas., 131; *Queen v. Ryan*, 2 Cox, Crim. Cas., 115; *Reg. v. Jones*, 4 Law T. (N. S.), 154. "From this," says Wharton, "it follows that carnal knowledge with a woman incapable, from mental disorder (whether that disease be idiocy or mania), of giving consent, is rape." 1 Whart. Crim. Law (9th ed.), § 560. To constitute rape, the act must be intended to be done with force, and without the woman's consent; and, if done with these intentional elements, it can make no difference that the woman was insane, and that the accused did not know she was incapable of giving her consent. Unless this is so, an insane woman or an idiot is at a great disadvantage in the hands of a ravisher. But if the man does not know that the woman is *non compos*, and from her conduct is led to believe he has her consent, we do not see how the act can be rape. But in this case there is no evidence tending to show that the accused had intercourse with Mrs. Gutting upon the mistaken belief that he had her

consent. His evidence is a denial that he had intercourse with her at all, or made any proposal to her to that end. The state's evidence, if worthy of belief, shows that this woman was forcibly and intentionally ravished. No such defense as that now suggested was thought of on trial, or the defendant's able counsel would have suggested it to the court. There is no evidence upon which to base it. Indeed, under the authorities before cited, it might well be said that there is no evidence tending to show that the woman was incapable of giving her consent when first assaulted. The judgment is therefore affirmed.

RAY, C. J., absent. SHERWOOD, J., dissents. The other judges concur.

BROWN v. THE STATE.

(27 Tex. App., 330.)

RAPE: *Assault to ravish — Instructions as to intent to use force.*

Penal Code of Texas, article 529, having defined "force," for the purpose of a prosecution for rape, where the use of force is relied on for a conviction, as such as may reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case, an assault with intent to commit rape by force can only be committed where there was an intent to use the amount of force indicated by such statute, and in a prosecution for such an assault the failure of the court to so charge is error.

WILLSON, J., dissenting.

Appeal from the district court of Galveston county.

W. L. Wilson, for the appellant.
Assistant Attorney-General Davidson, for the state.

HURT, J. This conviction was for an assault with intent to rape. As presented by the facts, an issue in the case was the intention of the appellant. Did he intend to have carnal knowledge of Katie Ford by force or with her consent? The indictment alleges that the assault to rape was by force, threats and fraud. Threats and fraud are eliminated from

the case, because there was no proof of either. The state's case, then, is an assault with intent to rape by force, and to warrant conviction the evidence must show force, and this force must be of a certain character, viz.: "Such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case." Penal Code, art. 529. This article constitutes a part of the definition of "rape" or "assault to rape," when force is relied on for conviction. Make this provision a component part of article 528 of the Penal Code, and we would have this definition of "rape:" "Rape" is the carnal knowledge of a woman, without her consent, obtained by such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and the other circumstances of the case. An assault with intent to commit rape is constituted by an assault, or an assault and battery, with intent to have carnal knowledge of the female by the use of such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. To be guilty of this offense the accused must have intended to accomplish his purpose by the use of this character of force. This proposition is absolutely correct, for, if his intention falls short of this, it would be impossible for him to be guilty of an assault with intent to rape, because we have seen (threats and fraud not being in the case), that, to constitute rape, such force must be actually used. Therefore the conclusion is inevitable that, to be guilty of an assault with intent to rape, the accused must have intended to use such force, it being impossible for him to intend to rape without intending to do that which constitutes rape. These propositions are self-evident, demonstrating their inherent infallibility.

The authorities are harmonious on this question. Says Mr. Bishop: "An attempt is committed only when there is a specific intent to do a particular criminal thing, which intent imparts a special culpability to the act performed towards the doing. It cannot be founded on mere general malevolence. When we say a man attempted to do a thing, we mean that he intended to do specifically it, and proceeded a certain way

in the doing. The intent in the mind covers the thing in full; the act covers it only in part." 1 Bish. Cr. L., § 729. In section 731 the same author says: "The offender's purpose must be to commit an entire substantive crime; as, if the alleged offense is an assault with intent to commit rape, he must, to be guilty, have meant to use force, should it be necessary to overcome the woman's will." And again, in section 745, Mr. Bishop says: "'There must,' in the words of Cockburn, C. J., 'be an attempt which, if successful, constitutes the full offense.'" There can be no doubt of the soundness of this doctrine. We have seen that in law a man does not intend to commit a particular offense, if the act he intends would not, when fully performed, constitute such offense. The conclusion from all the authorities is, that nothing short of the specific intent to commit the substantive offense will answer. And in rape, and in assault with intent to commit rape, the party cannot be said to intend to commit the substantive offense unless he uses or intends to use all such force as is necessary to overcome all resistance, and unless the jury are so charged, the charge will fail to inform them as to what is requisite to constitute the substantive crime.

In rape, under the circumstances, all resistance must be overcome. In assault to rape, the accused must intend to overcome all resistance. And in passing upon the question as to whether the accused, in either rape or assault with intent to rape, did, in rape, or intend to use, in assault to rape, such force, relative strength of the parties, and all other circumstances must be looked into. In the substantive offense — rape — such force must be used. In the intended offense, such force must have been intended; and, if such force was intended, it will matter not that the accused did not have the ability to overcome resistance in fact. The assault with intent by force — that force defined in article 529 of the Penal Code — to have carnal knowledge of the woman is the test, and if these exist and concur the offense is complete. Just what facts and circumstances are sufficient to show an intention to resort to such force can never be enumerated — each case must depend upon its own circumstances.

The court below failed to define "force." This should have been done, because article 529 is a part of the definition of

"rape," and for this reason enters into and constitutes one of the elements of assault with intent to rape. The judgment is reversed, and the cause remanded.

WILLSON, J. (*dissenting*). I do not assent to the proposition that, in a prosecution for assault with intent to commit rape, it is essential for the court to charge that the force intended to be used must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case. Such character of force is necessary to constitute rape by force, and in a prosecution for that offense it is essential that the court should so instruct the jury. Penal Code, art. 529; *Jenkins v. State*, 1 Tex. App., 346; *Jones v. State*, 10 id., 552. I do not think that article 529 of the Penal Code, defining the force necessary to constitute rape, applies, or was intended to apply, to an assault with intent to commit rape. Our code provides that "an assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit such other offense, as of maiming, murder, rape or robbery." Penal Code, art. 506. This seems to be the view entertained by this court in *Carroll's Case*, 24 Tex. App., 366. According to my understanding of the statute, if a man assaults a woman with the specific intention to have carnal connection with her by force, against her will, he commits the offense of assault with intent to rape. The assault is the use or attempted use of force, and the intent requisite to constitute the crime is not an intent to use the force contemplated in article 529, *supra*, or any specific character of force, but is an intent to forcibly, and against the will of the woman, have carnal connection with her. The force intended to be used by the assaulting party may not be such as might reasonably be supposed would be sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case; yet if there was an assault, and the assaulting party intended to ravish the woman, or at least to make the attempt to do so, taking the chances of being able to accomplisb his design, I think he would be guilty of an assault with intent to rape. To illustrate: A man

meets a woman in daylight in a city, on a public street, in the presence of hundreds of people. He is a small, delicate man; she is a large, athletic woman. He assaults her, and attempts to throw her down, and the evidence conclusively shows that his intent is to have carnal knowledge of her without her consent. He could not reasonably suppose that he could overcome her resistance, or that the people present would allow him to accomplish his design, yet he may unreasonably believe that perchance he can succeed, and may make the effort under such unreasonable belief, willing to take the chances of the venture. Would he be guilty of an assault with intent to rape? I think he would, but under the opinion of the majority of the court, as I understand it, he would not be guilty of that offense.

It is with deference and hesitation that I dissent from the opinion of the court, which opinion, I concede, is supported by authority. My dissent is founded upon articles 503 and 506 of our Penal Code, and with reference to which article 529, in my opinion, has no connection or application. I think the charge of the court in this case was unobjectionable, and that the conviction should not be set aside upon the ground of the insufficiency of said charge.

STATE v. DOWELL.

(106 N. C., 722.)

RAPE: *Assault — Responsibility of one coerced into crime.*

1. A husband who, by threats of death, constrains another to attempt to ravish his wife, is guilty of an assault with intent to commit rape.
2. On an indictment against a husband for assault with intent to ravish, it cannot be objected that there was no criminal intent where it appears that he, by threats, compelled another to attempt to ravish his wife.

MERRIMON, C. J., dissenting.

Appeal from superior court, Rowan county; Shipp, judge.

Indictment for an assault with intent to commit rape.

The Attorney-General, for the state.

SHEPHERD, J. Ordinarily, precedent is grateful to the judicial mind, as something approved and steadfast, on which it may rest with confidence; but sometimes cases arise of such exceptional enormity that, for the fair name of humanity, the judge would hope to find no counterpart in criminal annals. We incline to believe that the case under consideration is one of such bad eminence. Unmatched in iniquity, as it appears to be, it is hoped, however, that the application of a few elementary principles will harmonize the conclusion to which we have arrived, not only with our moral conceptions of what should be the law, but also with its strict, formal administration.

The facts are abhorrently simple. The white husband of a white wife, under menace of death to both parties in case of refusal, and supporting his threat by a loaded gun held over the parties, constrains a colored man to undertake, and his wife to submit to, an attempted sexual connection. The details of this shocking transaction are so disgusting that we will not stain the pages of our reports with their particular recital. Suffice it to say that, under the coercion of the defendant, Lowery, the colored man, did actually make the attempt. Indeed, he did everything necessary to constitute the crime of rape except actual penetration. Fortunately the fright and excitement rendered him incapable of consummating the outrage, which, as we understand the case, he would otherwise have perpetrated; and, alike fortunately, at perhaps the critical moment, the gun discharged itself in the hands of the unnatural husband, and the enforced assailant was enabled to effect his escape.

Under the laws of this state the offense of an assault with intent to commit rape, although subject to very severe punishment, is technically a misdemeanor; and, there being no degrees in this class of crimes, it must follow that, if the defendant is guilty at all, he must be guilty as a principal. The defendant strangely insists that he is not guilty because he is the husband of the prosecutrix; and he relies as a defense upon the marital relation, the duties and obligations of which he has, by all the laws of God and man, so brutally violated. In our opinion, in respect to this offense, he stands upon the same footing as a stranger, and his guilt is to be determined

in that light alone. The person of every one is, as a rule, jealously guarded by the law from any involuntary contact, however slight, on the part of another. The exceptions, as in the case of a parent, or one *in loco parentis*, moderately chastising a child (*State v. Harris*, 63 N. C., 1), or a school-master a pupil (*State v. Pendergrass*, 2 Dev. & B., 365; and *Boyd v. State*, 88 Ala., 169), are strict and rare. It was at one time held in our state that the relation of husband and wife gave the former immunity to the extent that the courts would not go behind the domestic curtain, and scrutinize too nicely every family disturbance, even though amounting to an assault. *State v. Rhodes*, Phil. (N. C.), 453. But since *State v. Oliver*, 70 N. C., 60, and subsequent cases, we have refused "the blanket of the dark" to these outrages on female weakness and defenselessness. So it is now settled that, technically, a husband cannot commit even a slight assault upon his wife, and that her person is as sacred from his violence as from that of any other person. It is true that he may enforce sexual connection; and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of rape. But it is too plain for argument that this privilege is a personal one, only. Hence if, as in *Lord Audley's Case*, 3 How. St. Tr., 401, the husband aids and abets another to ravish his wife, he may be convicted as if he were a stranger. The principle is thus tersely expressed by Sir Matthew Hale: "For, though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another." Hale, P. C., 629; 2 Bish. Crim. Law, 1135; *Lord Audley's Case*, 3 How. St. Tr., 401.

It thus appearing, we think beyond all question, that the defendant in this indictment is to be regarded as a stranger, we will further consider the case in that aspect alone. It is contended that, as Lowery acted under coercion, and was for that reason excusable, there was no intent to commit rape, and therefore the defendant cannot be convicted. It will be observed that the intent of Lowery to commit the offense is not determined alone by the presumption that every one is presumed to intend the natural consequences of his act; but he testifies that he did actually attempt to have sexual connection. Here, then, we have a specific actual intent to commit the foul deed; and can it be that he who constrains the

will of another to commit such a crime is to be permitted to shield himself upon the ground that there was an entire absence of criminal intent? If this be true, then one who coerces another to shoot down a third person in cold blood is not guilty of murder, because there was no intent for which the person doing the shooting is criminally responsible. The law in such a case couples the act of the instrument with the felonious intent of the instigator, and in this way he is held guilty of murder; and this is true, also, where the instrument is under the age of seven, and conclusively presumed to be incapable of having any criminal intent. So, too, if one is indicted under our statute for shooting at a railroad train with intent to injure it, and it appears that he coerced another to do the shooting, can it with reason be said that he is not guilty because his instrument did not have an intent to inflict any injury? These and other examples which we could cite from our reports well illustrate the principle upon which our case depends; and especially is this so when, as we have said, the specific intent is expressly shown by the testimony. We are clearly of the opinion that the unlawful act committed in pursuance of the combined intents of the defendant and his enforced instrument are amply sufficient to sustain the conviction.

While placing our decision upon this ground, we are not prepared to say that, under the circumstances, Lowery would have been excusable had he completed the offense. We leave this as an open question, remarking, however, that the *tabula in naufragio* of Lord Bacon has been well-nigh submerged by judicial and critical casuists. See Whart. Hom., §§ 560, 561, and notes to second edition; *United States v. Holmes*, 1 Wall., 1. See, also, Coleridge, C. J., in the case of *The Mignionette*, decided in 1884. But mark the diversity: There the displaced struggler for life was, by clinging to the plank, insufficient for two, as much attacking his companion in shipwreck, as if he were firing at him with a pistol. In our case the victim is entirely innocent,—in no way threatening by her act or deed any harm to the attempted ravisher. In this view of the case, let us briefly refer to the authorities. In Broom, Leg. Max., 17, 18, it is said: "In accordance with the principle, *necessitas inducit privilegium*, the law excuses the

commission of an act *prima facie* criminal if such act be done involuntarily, and under circumstances which show that the individual doing it was not really a free agent. Thus, if A. by force take the hand of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but B. is excused, though if merely a moral force is used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., this is no legal excuse." For this is cited 1 Hale, P. C., 434, which seems to be entirely in point. East, in his Pleas of the Crown (vol. 1, p. 294), undertakes to argue that, "if the commission of treason may be extenuated by the fear of present death, . . . there seems no reason why this offense (homicide, or any of the other capital offenses, of course) may not also be mitigated upon the like consideration of human infirmity." 1 Bish. Crim. Law, 348. To this, however, an answer is found in 4 Bl. Comm., 30, where he says: "In time of war or rebellion, a man may be justified in doing many treasonable acts, by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. This, however, seems only, or at least principally, to hold as to positive crimes, so created by the laws of society, and which, therefore, society may excuse, but not as to natural offenses, so declared by the law of God. . . . And, therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent." If this be so, and the crime of rape is considered so heinous as to be punishable in the same way as murder, it would seem that "human infirmity" ought not to be tolerated by our laws to the extent of excusing one for the violation of female virtue on the plea of danger to himself, however great or imminent. For the reasons first stated, we think that the ruling of his honor was correct, and that there is no error.

MERRIMON, C. J. (*dissenting*). The horrible and detestable purpose of the defendant in doing the acts which constitute the criminal offense committed by him against his wife cannot warrant what I deem a misapplication of well-established principles of criminal law. In the nature of the marriage re-

lation, the husband himself cannot ravish his wife; nor, for like reasons, can he, in a legal sense, assault her with the intent to commit a rape upon her. He can only commit the offense of rape, or that of assault with intent to commit a rape, against his wife, by procuring, aiding, abetting or encouraging another to commit these offenses. His offense in such case depends, necessarily, upon the perpetration of the principal offense by another party. In this case the negro named did not commit a rape upon the wife of the defendant, nor did he assault her with such intent. There was a total absence of such intent on his part. Then, in the nature of the matter, how can the defendant be chargeable with the particular offense charged against him in the indictment? As the negro committed no assault with intent to commit a rape, so the defendant did not. It is said, shall the defendant go quit? Has he committed no offense? Most unquestionably he shall not go quit. He has committed an offense,—a very serious one. He is chargeable with an assault upon his wife with a deadly weapon, and with the intent to kill, and a like assault upon the negro. It is said the punishment of the offense last mentioned is not adequate. It may be very severe. But it may be said as well that the punishment for the offense as charged is not adequate. This, however, is no argument; not the slightest reason pertinent here. The courts have nothing to do with the punishment of offenders, further than to impose the same in the cases, and as required and allowed by law. I will not pursue the subject further.

NOTE.—A husband may be guilty of rape upon his wife by aiding another in the commission of the offense. *People v. Chapman*, 7 Am. Cr. R., 568. So by aiding another in the commission of the crime against another woman a woman may be guilty. *State v. Jones*, 83 N. C., 605; *S. C.*, 35 Am. Rep., 586. A boy under fourteen years in like manner may be guilty. *State v. Williams*, 14 Ohio, 222; *S. C.*, 45 Am. Dec., 356.

SANDERSON v. COMMONWEALTH.

(11 Ky. L. R., 341.)

RECEIVING STOLEN GOODS FROM A PARTNER.

1. A count in an indictment for larceny, which charges that defendant was an accessory before the fact,—that is, that he procured certain others to commit the larceny for his benefit,—is not prejudicial to defendant, as such charge is embraced in a count for larceny.
2. In Kentucky a count for receiving stolen goods may be joined with a count for larceny.
3. Where one partner, without his copartner's knowledge, receives stolen goods, knowing them to be stolen, and his copartner, afterwards learning of the theft, takes charge of the stolen goods, both are guilty of receiving stolen goods.
4. An instruction that if the person who stole the property placed it in defendant's house for him, and defendant knowing it to be stolen, and placed there for him, took control of it to fraudulently deprive the owner of his property, this was in law a felonious receiving of the property, is correct.
5. Where it appears that defendant paid a witness for the commonwealth to leave the county, and also paid half of a sum afterwards demanded by the witness in a letter to defendant's partner, who was also concerned in receiving the stolen property, the letter is admissible to show why the money was advanced.

Appeal from circuit court, Graves county; C. L. Randle, judge.

W. J. Sanderson, jointly with another, was indicted for grand larceny. He was convicted, and appeals.

D. G. Park and *Jas. Campbell*, for appellant.
P. W. Hardin, attorney-general, for the commonwealth.

PRYOR, J. The accused, Sanderson, and one Brisendine were indicted in the Graves circuit court for grand larceny, the charge being a felonious taking of one hogshead of tobacco, the property of Matthews & Son. There was a demurrer to the indictment as a whole, and also a demurrer to each count in the indictment, and the demurrers were overruled. It is not necessary to allude to the demurrer filed to the entire pleading, as it is in the usual form for grand larceny, and the defense was properly required to plead to it. It is insisted that the second count was defective, because it charged that

the accused was, as is alleged, an accessory before the fact; that is, that he advised and procured two others named in the indictment to commit the larceny complained of. While this count may be defective, it was evidently intended by the pleader to present the case where the parties actually taking the property were advised and procured to take it for the benefit of the accused and his partner, and if they did commit the larceny, and deliver the property to the accused under such an arrangement, accused was as much guilty of larceny as the parties who took it from the warehouse. The first count for grand larceny embraced the charge in the second count, if the facts alleged have been established, and the failure to sustain the demurrer to the second count in no wise prejudiced the accused. It was in fact a statement only of how the larceny was committed. The third count in the indictment is for receiving stolen property knowing it to have been stolen, and was properly held good on demurrer. It may be joined with an indictment for larceny, as is expressly provided by the code. The testimony in this case conduces to show that Wilkerson and England took the hogshead of tobacco at the procurement of Brisendine, the partner of Sanderson. That the two were partners in handling this product, and the tobacco of Matthews found its way into their possession, is a fact clearly established. Counsel for Sanderson maintains that, as the proof shows Brisendine received the stolen property, the fact that Sanderson, who was his partner, afterwards took charge of it, knowing it to have been stolen, does not constitute guilt on the part of Sanderson. We cannot concur in such a conclusion. These men were partners, and, assuming that Sanderson had no knowledge of the original taking by Wilkerson and England, but that his partner, Brisendine, received the property from them knowing it to have been stolen, and Sanderson, with a full knowledge of that fact, assumed control of the stolen property with a view of depriving the owner of its use, it is plain that both would be guilty of receiving the stolen goods, and a conviction must necessarily follow.

The argument of counsel is that, as the indictment alleges a joint reception of the stolen goods, and the proof showing the tobacco to have been first received by Brisendine and then

by Sanderson, it is such a variance between the charge and the testimony as defeats the prosecution. While one partner cannot commit a crime for which his partner, who is innocent, can be held criminally responsible, we cannot well see why one partner may not be guilty of receiving stolen goods where his copartner has first received them with a guilty knowledge, and then they are controlled and used by both with the guilty design and purpose on the part of both to deprive the owner of his property. Nor do we think the fact of their being partners determines the legal question; for, if not partners, the use and appropriation of the goods by Sanderson with a knowledge that Brisendine had purchased them knowing them to have been stolen, and the fact of the theft, also known to Sanderson, would have made the latter guilty under the third count.

While there may not be sufficient testimony in the record to convict Sanderson of the larceny, the evidence in relation to his guilty knowledge after the tobacco was delivered to his partner is very conclusive, and the instructions on that branch of the case are unobjectionable. Instruction No. 3, of which counsel complain, was properly given. By that instruction the jury was told that if Wilkerson and England committed the larceny, and placed the tobacco in the house of the defendant and Brisendine for them, and the defendant, knowing it to be stolen property, and placed there for them, did take control of it to fraudulently deprive the owner of his property, in law this was a felonious receiving of the tobacco, etc.

We think, on the facts of this case, it was proper that the jury should have been enlightened as to what constituted guilty knowledge, and by this instruction the jury had to believe that the tobacco was stolen and placed in the warehouse of defendant for them, and the defendant, knowing it was stolen and placed there for them (the partners), took charge of it for the purpose of depriving the owner of his property. It was as favorable to defendant as it should have been, and afforded the jury every opportunity to acquit the accused if they disbelieved the testimony of the witnesses for the prosecution. While the defendant protests his innocence, it is shown that he paid the commonwealth's witness to leave the county, and contributed means after he left in order to keep him from

testifying. The letters of the witness to Brisendine showed the demand of the witness for more money, a part of which was furnished by the defendant, and, being connected with the removal of the witness, the letters to Brisendine were competent to show the action and conduct of both partners with reference to the pending prosecution. They had paid the witness $50 to leave, and when gone the witness demanded more money in this letter to Brisendine, and the accused gave one-half of the amount demanded, and the letter was permitted to be read to show why the money was advanced.

The statements made by Sanderson before the grand jury were competent; at least we see no reason for excluding them. They had reference to these transactions, and in his statement was no confession of guilt. There are other exceptions taken to testimony that could not have prejudiced the accused.

The instructions asked by the defense were properly rejected, because they were all based on the idea that, if Brisendine received the stolen goods without the knowledge of Sanderson, the latter is not guilty if he afterwards appropriated them with a like guilty knowledge, and further, when the charge is made against two, one may be convicted, but both cannot, unless the receiving was joint. This seems to have been the common-law rule as laid down by Wharton and Bishop. This rule, however, was changed by the English statute, and as said in the Crown Cases, in the case of *Queen v. Reardon*, L. R., 1 Cr. Cas., 31, for the purpose of removing certain technical objections that at the time prevailed.

We think it absurd to hold that on a joint indictment against A. and B. for receiving stolen property, upon proof that A. received the goods with a guilty knowledge, and then let B. have them with the same guilty knowledge, only one can be convicted.

We are not disposed to follow such a technical rule; and here the purchasing of Matthews' tobacco from the thief by Brisendine with a full knowledge of the theft, and its appropriation and use by Sanderson and Brisendine jointly, with the fraudulent purpose of depriving Matthews of his property, both knowing it was stolen, makes the offense complete; and, being found in the joint possession of the parties, this court will not inquire whether the one received the property in the

first instance without the guilty knowledge of the other. They are both equally guilty. *Queen v. Reardon*, L. R., 1 Cr. Cas., 32. Judgment affirmed.

NOTE.— *What constitutes.*—One who, knowing or having good reason to believe that goods are stolen, retains them for a single moment, or permits their concealment in his house, either for the purpose of appropriating them for his own use or for the purpose of obtaining a reward, may be convicted of receiving stolen goods. *Leonardo v. Territory*, 1 N. Mex., 291. He can be prosecuted either in the county where the goods were stolen or where they were received. *State v. Ward*, 49 Conn., 429. To prove guilty knowledge, it may be shown that the prisoner had before received stolen goods from the same person. *Id.* Nor is it necessary even that they be from the same person or of a similar character. *Id.* Under Penal General Statutes, page 503, section 15, with regard to receiving and concealing stolen "goods or articles," it was *held* that a horse was within that phrase. *Id.* Concealing would include any acts tending to render the discovery of the property difficult, such as clipping the horse, and in other ways seeking to prevent identification. *Id.* One who receives stolen goods, not from the thief but from the receiver, must have received them under circumstances connecting him with the theft in order that he may be convicted of receiving. *Foster v. State*, 106 Ind., 272. If the goods are charged in the indictment to have been stolen by an unknown person, he must be in some manner identified or singled out and the grand jury must have tried to ascertain his name. *Id.* If a person knows that property is stolen and sees it hid by another and refuses to give information to officers searching for it, his conduct, unexplained, makes him guilty of receiving and aiding in concealing stolen property. *State v. St. Clair*, 17 Iowa, 149; S. P., *State v. Turner*, 19 id., 144. Receiving stolen goods with intent to obtain a reward from the owner by delivering them up is within the statute against receiving stolen goods. *People v. Wiley*, 3 Hill (N. Y.), 194; *State v. Pardee*, 37 Ohio St., 63. A person allowed a trunk of stolen goods to be sent on board a vessel in which he had taken his passage as a part of his luggage, and it was *held* a reception of the goods sufficient to justify his conviction under the statute against receiving stolen goods. *State v. Scovel*, 1 Mill. (S. C.), Const., 274. It is sufficient if the receiver have control over the goods; manual possession is not necessary. *State v. Turner*, 19 Iowa, 144. In a prosecution for receiving personalty, knowing it to have been stolen, for the purpose of showing that the property was stolen before defendant was found in possession of it, an indictment charging one H. with the theft of the property, and a judgment of conviction of said person for such theft, are admissible. *Cooper v. State* (Tex.), 13 S. W. Rep., 1011. If the property has been embezzled it is sufficient. *Reg. v. Frampton*, Dears. & B., 585. Upon the trial of an indictment for receiving stolen goods with knowledge, the court charged "that the possession of stolen goods immediately after the larceny, if under peculiar and suspicious circumstances, where there is evidence tending to show that some other person or persons stole the property, such possession, not being satisfactorily explained, would warrant" a conviction. *Held*, no error. *Goldstein v. People*, 82 N. Y., 231.

Under Penal Code of New York, section 29, providing that "a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal;" one who induces another to procure chattels on forged orders is a principal in the larceny of the chattels, and on receiving them cannot be convicted of criminally receiving stolen goods. *People v. Brien*, 6 N. Y. S., 198; 53 Hun, 496; 7 N. Y. Crim. R., 166. In such case it is error to charge that if defendant employed the other person to steal the property, and the latter received it, he was acting as defendant's agent. *Id.* The presumption of guilt arising from the recent possession of stolen property applies as well to one charged with unlawfully receiving it as to one charged with the original taking. *People v. Weldon*, 111 N. Y., 569. Evidence that defendant had received other stolen goods than those described in the indictment about the same time, and stolen from the same person, is admissible as tending to show guilty knowledge, though it does not appear that defendants knew that the other goods were stolen. *State v. Jacobs*, 30 S. C., 131. That a party received stolen goods under circumstances which will induce a man of ordinary observation to believe they had been stolen, and also concealed them, is evidence sufficient to show guilty knowledge. *Collins v. State*, 33 Ala., 434. Actual reception, not mere possession, of stolen property, is necessary to the offense; the statute of limitations runs from the time of reception. *Jones v. State*, 14 Ind., 346.

One may be convicted of receiving money on evidence of his previous poverty and subsequent possession of such money, although the money is not identified. *Jenkins v. State*, 62 Wis., 49. And one who receives stolen goods may be convicted, although he also assisted in the theft. *Id.* To constitute the crime of receiving, it is sufficient if it be shown that the goods were received by defendant's agent or servant, or at his instigation deposited at some place directed by him, he knowing that they were stolen. *State v. Stroud*, 95 N. C., 626. One on trial for receiving stolen goods may show by his own testimony the circumstances under which he received them, and the conversation which then took place. *State v. Bethel*, 97 N. C., 459. An indictment for receiving stolen property need not allege the facts going to constitute the original theft. *Brothers v. State*, 22 Tex. App., 447; *People v. Goldberg*, 39 Mich., 545.

CLEMENTS ET AL. v. STATE.

(84 Ga., 660.)

ROBBERY: *What constitutes.*

While B. was in his smoke-house, about fifteen paces from his house, defendant came up and said that if B. put his head out he would "shoot it off." While B. was thus detained co-defendant entered the house and

carried off valuables belonging to B., who did not know for what purpose he was being detained until defendants had left. *Held* a sufficient taking in the presence of B. to constitute robbery.

Error from superior court, Coffee county; Atkinson, judge.

S. W. Hitch and *J. H. Lumpkin*, for plaintiffs in error.
W. G. Brantley and *D. H. Rountree*, for the state.

SIMMONS, J. 1. William and Charles Clements were indicted, tried and convicted of robbery. They made a motion for a new trial upon several grounds, which was overruled by the court, and they excepted. The evidence as to the robbery was in substance as follows: Between 7 and 8 o'clock on the evening of January 19, 1888, Bird went into his smoke-house to weigh out rations for his hands. While he was in there a man ran up and said that the first one who put his head out he would shoot it off; said they were after a murderer that had killed four men in Dooly county, and were told he was there. Bird asked what was his name, and the man said he did not know, but the sheriff did, and that the place was surrounded. Bird looked through the crack, the room being built of logs, and the man was standing with his face towards Bird, who could not tell anything about him, only he was a stout man, and he stood in a shooting position. After a little while the man disappeared,—"kinder backed off,"—and Bird waited until he thought it was time for a man to come from anywhere around in fifty or sixty yards, and he did not come; and Bird said: "I am going out, if you do shoot;" and went out. When he got to the back door he met his wife coming in from the kitchen, and she asked him if he knew his chest was gone, and he told her, "No." Before that man came up a gun was fired off. The chest was right under the bed, which stood at the front door of Bird's dwelling-house. There was a piazza running along by the front door, and the chest had been taken out by that door. The smoke-house was "sorter back" of that house. The bed was from one and a half to two feet from the front piazza. The chest could have been seen under the bedstead. It was under the bed when Bird went to the smoke-house. It contained before it was broken open several hundred dollars in currency, and deeds and papers.

He was alarmed or dazed by the statement made while he was in the smoke-house by the man on the outside, who was standing within eight feet with his gun in a shooting position, so he could not put his head out. The smoke-house was about fifteen steps from the dwelling-house. Nobody said anything to him about taking his money, and nobody took anything from his person. The chest was not very heavy. It was about eighteen inches long and about fourteen inches high. It was generally known that he kept his valuables in that chest. There was other evidence tending to show that the plaintiffs in error were the guilty parties, but it is unnecessary to detail it here, as the main question is whether, under the facts above set out, the offense was robbery.

Under the above stated facts the court charged the jury as complained of in the third and fourth grounds of the motion for a new trial, which is alleged by the plaintiffs in error to be erroneous. These grounds are as follows: "(3) Because the court erred in the following charge to the jury: 'In order to convict these defendants, it must appear that the goods alleged to have been taken were taken from the person of the owner. By this you are not to understand that the goods must have been in the hands of or attached to the person of the owner. All his property, so far as cases of this character are concerned, is, in contemplation of law, upon the person of the owner which is at the time of taking in the immediate presence of the owner, or is so near at hand or stored in such position that at the time of taking it is under the immediate personal protection of the owner. If the goods are in that condition, then they are, within the contemplation of law, upon the person of the owner.' (4) Because the court gave the following charge: 'That goods stored in the dwelling-house are deemed to be upon the person of the owner, in contemplation of law, so far as cases of this character are concerned, when the owner thereof is either personally therein,—that is, in his dwelling-house, or in any house so nearly adjacent thereto as that the whole is under his immediate personal dominion and control. If you shall find from this evidence that in the county of Coffee, upon the day named in the indictment, the goods alleged to have been stolen were the property of Wiley Bird; that they were of some value; that they

were stored in the dwelling-house of the owner; that the owner thereof was present therein, or in a house so nearly adjacent thereto as that the same was under his immediate protection, dominion and control; that the defendants, acting in concert, intending by violence or intimidation to take and carry away the goods described in the indictment, and by threats of violence putting him in fear, within the meaning of that term as the court has defined it to you, and by this means overcame his will; and that, while under the influence of such fears, the other entered the dwelling-house of the owner and took and carried away the goods described with the intent to steal the same,— then it would be your duty to convict them even though it should appear that at the exact moment of taking the owner had no knowledge that his goods were being taken or of the purpose of the defendants in their putting him in fear.'"

We do not think that the court erred in giving the charges complained of under the facts of this case. It is not necessary in a case of robbery to prove that that the property was actually taken from the person of the owner, but it is sufficient if it is taken in his presence. *Crews v. State*, 3 Cold., 350; *State v. Jenkins*, 36 Mo., 372; 2 Russ. Crimes, 106, 107; 2 Rose. Crim. Ev., 935, 936. In the present case, Bird, the prosecutor, was in his smoke-house within fifteen steps of the dwelling-house which contained the chest. All the property in this dwelling-house, in contemplation of law, was in his immediate possession and control. He was found by the defendants in this smoke-house, and was prevented by threats and intimidation from leaving the smoke-house and going into his dwelling-house. He was kept in the smoke-house a sufficient length of time to enable some of the defendants to enter the dwelling-house and take the chest therefrom. Suppose the defendants had found Bird on the front steps of his piazza, and had carried him by force to this smoke-house and locked him therein, and had then gone back to his house and stolen his chest. Could it be said that the taking was not in his presence? Suppose they had found him in his dining-room, and, locking him therein, had gone to the front room and taken the chest. Would not that have been in his presence? Suppose the owner of cattle is out in the pasture with them, when a man comes

up and points a pistol at him, telling him to stay where he is. At the same time confederates of the aggressor drive the cattle off from another part of the field. Would not that be a taking in the presence of the owner? See 2 East, P. C., 707. In the case of *State v. Calhoun*, lately decided by the supreme court of Iowa, the accused went into the dwelling-house of a lady, and into the room where she was, and by violence and intimidation, throwing her down and tying her, extorted information as to where her valuables were. Being told that they were in another room, he left her tied and went into the other room, where he got her money and watch. This was held to be a taking in the presence of the owner notwithstanding it occurred in a different part of the house from that in which the owner was tied. 72 Iowa, 432. Bishop, in his work on Criminal Law (vol. 2, §§ 1177, 1178), says: "The meaning of this legal phrase is not that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection, that will suffice. Within this doctrine the person may be deemed to protect all things belonging to the individual within a distance, not easily defined, over which the influence of the personal presence extends." In the case of *Merriman v. Hundred of Chippenham*, 2 East, P. C., 709, it was held that where a wagoner was forcibly stopped in the highway by a man under fraudulent pretense that his goods were unlawfully carried for want of a permit, and while they were going to a magistrate to obtain the permit the man's confederates took away the goods, this was sufficient proof of a taking to constitute robbery. See, also, same case quoted in 3 Greenl. Ev., § 228. So we think that where the prosecutor was within fifteen steps of the property stolen, and was kept away by threats and intimidation by one of the defendants while the other stole the chest, the taking was in the presence of the prosecutor.

2. The verdict was found by the jury upon the proper count in the indictment and the evidence authorized the finding.

Judgment affirmed.

NOTE.—*What constitutes.*—Robbery is the theft of property from the presence or from the person of the owner, accompanied by putting in fear or with force. *U. S. v. Palmer*, 3 Wheat., 610; 2 Bishop, Crim. L., 1108. The person robbed need not be the owner of the property taken; it is sufficient

if he have the right to the possession. *Brooks v. The People*, 49 N. Y., 436. And it is not necessary that he be in the actual manual possession of the property, or in its visible presence. Thus, where the defendant bound a person and extorted by threats the knowledge of the whereabouts of certain property, and then went into a room some distance apart, found the property and departed with it, he was held to be guilty, and the court, in discussing the question, says: "It is insisted that the third, fourth and fifth instructions are erroneous, in that they hold the crime of robbery may be committed by taking goods not upon the person or in the immediate presence of the individual robbed; the thought of counsel being that though 'with force or violence, or by putting in fear,' the goods were obtained by the accused from the possession and custody of the prosecuting witness, yet the crime is not robbery for the reason that the goods taken were found by defendant in a room of the house other than the one in which the violence was used towards the witness for the purpose of extorting from her information of the place where the money and valuables in her possession could be found. The statute defining robbery, which is correctly quoted in the second instruction given to the jury, contemplates the taking of property 'from the person' of another. Counsel interpret this language to mean that the property, in order to constitute the crime, must be upon or in some way attached to the person of the individual robbed, or in his immediate presence. The preposition 'from' does not convey the idea of contact or propinquity of the person and property. It does not imply that the property is in the presence of the person. The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it. If it be away from the owner, yet under his control, in another room of the house, as in this case, it is nevertheless in his personal possession; and, if he is deprived thereof, it may well be said it is taken from his person. Goods are called personal property in the law and presumed to accompany the person. If taken from the owner, this relation of owner and property is surrendered, and the goods are separated from the person. In the case before us, defendant, by violence, bound the prosecuting witness, and thereby put her in fear. By this violence he extorted from her information of the place where she kept her money and watch in another room of the house. Leaving her bound, he went into that room and took the property. We are clearly of the opinion that it was taken from her person in the sense of the words as used in the statute. In support of this conclusion, see the following authorities, and cases cited therein: 2 Bish. Crim. Law, § 975; Whart. Crim. Law, § 1696." *State v. Calhoun*, 72 Iowa, 252. So, where one assaulted throws his property into a bush to save it, and the thief takes it after the owner is gone, it is robbery. *United States v Jones*, 3 Wash. C. C., 209. The crime of robbery includes larceny, and one put upon trial for robbery may be convicted of larceny. *People v. Jones*, 53 Cal., 58.

STATE v. REEVES.

(97 Mo., 668.)

SEDUCTION: *Instruction — Sufficiency of evidence — Indictment — Motion to quash.*

1. INSTRUCTION — SUFFICIENCY OF EVIDENCE.— Under Revised Statutes of Missouri, sections 1259, 1912, making it a felony to "seduce and debauch" an unmarried female of good repute under promise of marriage, and providing that, unless the evidence of the woman as to such promise is "corroborated to the same extent required of the principal witness in perjury," it is error, on a trial for such an offense, to instruct that, as to the promise of marriage, there must be evidence to corroborate that of the woman, which may be supplied from the circumstances of the case, as the degree of proof required by the statute is ignored by such an instruction.
2. SAME.— The instruction is also faulty for failing to designate the circumstances which would supply the necessary corroboration, and for the omission to define "corroboration."
3. SAME — OMITTING ELEMENT OF THE CRIME.— In such case, an instruction that, if the defendant promised the prosecutrix, an unmarried female of good repute, to marry her, on the faith of which she allowed him to have sexual intercourse with her, the defendant should be convicted, is erroneous, for omitting the element of seduction from the essentials of the crime.
4. SAME.— An instruction that, if defendant had carnal intercourse with the prosecutrix, and that she submitted to him without promise of marriage, he should be found not guilty, should be given at the instance of defendant, there being evidence tending to establish that state of facts.
5. EVIDENCE — COMPETENCY.— There being conflicting evidence as to the material facts in the case, and no prosecution having been instituted until more than a year after the birth of the child alleged to be the result of the connection between the prosecutrix and defendant, during which time the latter married, it is error to refuse to allow the prosecutrix to be asked, on cross-examination, if the idea of prosecuting him did not first present itself to her after his marriage, as that fact might tend to throw light on the *animus* of the prosecutrix.
6. FELONY.— Under said section 1259, making said offense punishable either by confinement in the penitentiary or by fine and imprisonment in the county jail, and section 1676, defining a "felony" as any offense liable to be punished by confinement in the penitentiary or death, such offense is a felony and not within the statute of limitations.
7. INDICTMENT — MOTION TO QUASH.— A motion to quash an indictment may be entered pending a plea of not guilty, and will not affect a withdrawal of the plea.

BLACK, J., dissenting.

Appeal from circuit court, Callaway county; G. H. Burckhartt, judge.

Indictment against William M. Reeves for seducing and debauching Zerelda Hall, an unmarried female. On the trial, in November, 1888, the prosecutrix testified that she was unmarried, and seventeen years old; that she became acquainted with defendant in July or August, 1886, and that he came to see her about that time. Defendant told prosecutrix that he would marry her if she would allow him to have carnal intercourse with her, which she did, being persuaded by his promise, and by love and sympathy. At the time of the trial the child which resulted from that intercourse was fifteen months old. The first intercourse occurred in December, 1886, in Callaway county. She stated that he kept renewing his promise of marriage, and therefore she never instituted criminal proceedings until a few days before the trial. No one prompted her to complain but her father. She could not say how often she had intercourse with him; whether as often as twelve times or not, but probably as many as six times, but never before he promised to marry her.

L. B. Hall, father of the prosecutrix, testified that she was seventeen years old August 21, 1888; that he knew defendant, who began coming to his house in 1886 to see prosecutrix. He asked witness' consent to allow her to marry him in August, 1888, which he gave. Defendant went to see her two or three times a week. Other men came to the house of witness about the same time, but not many. Witness mentioned eleven men who sometimes visited at his house, some of whom came to see prosecutrix, and stated that the prosecutrix stayed at the house of defendant's mother about a week.

Ida Hall, a sister of prosecutrix, stated that she was fifteen years old, and that defendant, prior to December, 1886, came to visit prosecutrix very often, and in August, 1888, she heard him ask her father to give his written consent to his marriage with prosecutrix. Witness heard defendant ask prosecutrix to marry him in the presence of her father and mother, to which prosecutrix answered that she would think about it. A number of witnesses testified to the good reputation of the prosecutrix, and one stated that defendant acknowledged that he was the father of her child.

Defendant was himself a witness in his own behalf, and stated that he became acquainted with prosecutrix in June, 1886, and commenced to go to see her, going quite frequently. He first had connection with her in the latter part of July, 1886, in the yard, at the house of a Mr. Jones, where they remained from about 8 or 9 o'clock at night until 1 in the morning, and from that time had intercourse with her frequently. There was no promise of marriage made. He simply asked her for it, and she said he could get it. The second time she refused to yield at first, but he insisted, and she consented. Witness could not tell the number of times he had connection with her, there were so many. He also mentioned the names of four other young men that took liberties with her. Witness never told her that he loved her, to induce her to have intercourse, but did tell her that she was good-looking, to which she replied that he was a good-looking fellow. Her way of lying around on him first induced him to make the proposal.

There was other evidence, but it was of little consequence, some tending to show bad character of the prosecutrix, and some in rebuttal.

The jury found defendant guilty, and fixed his punishment at three years in the penitentiary. A motion to set aside the verdict was overruled, and judgment entered thereon. Defendant appeals.

Revised Statutes of Missouri, section 1676, defines "felony" to be any crime for which the offender is liable, on conviction, to be punished with death or confinement in the penitentiary.

B. G. Boone, attorney-general, for the state.
Crews & Thurmond and *I. W. Boulware*, for appellant.

SHERWOOD, J. Indicted for the seducing and debauching, under the promise of marriage, Zerelda Hall, the defendant, put upon his trial, was found guilty, his punishment assessed at three years in the penitentiary, judgment and sentence accordingly, and he appeals to this court. For the reversal of the judgment numerous grounds are assigned, which are to be passed upon in this opinion.

1. The motion to quash the indictment, though filed with

the consent of the court, and after a plea of not guilty entered, but not withdrawn, did not have the effect of withdrawing that plea. A motion to quash is in the nature of a demurrer. It certainly occupies no higher plane; and at common law a defendant in a prosecution for a felony might, at one and the same time, enter his plea of not guilty to the indictment, and his demurrer to the sufficiency thereof, and, upon the indictment being held sufficient in law, he would be triable on his pending plea of not guilty, just as if no demurrer had been interposed. And the like was true of a plea in bar or in abatement interposed at the same time with a plea of not guilty. 1 Chit. Crim. Law, 435, 440; 2 Hawk. P. C., ch. 23, § 1281; id., ch. 3, § 6, and cases cited. But, though this was true in cases of felonies, the rule did not cover misdemeanors. *Id.* This explains the view taken in *State v. Copeland*, 2 Swan, 626, and *Hill v. State*, 2 Yerg., 248, where the offenses charged were only misdemeanors. These considerations rule the point raised against the defendant, and an eminent text-writer regards the doctrine here announced as the better one; holding, as he does, that a motion to quash is in order at any time down to the rendition of the verdict, and this without any withdrawal of pleas. 1 Bish. Crim. Proc., § 762.

2. The crime charged in the indictment was, under the provisions of section 1259, Revised Statutes, a felony, because punishable by imprisonment in the penitentiary; and the fact that it might be punished by a lighter punishment does not rob it of its felonious attributes. This is well settled. R. S., § 1676; *Johnston v. State*, 7 Mo., 183; *Ingram v. State*, id., 293; *State v. Green*, 66 Mo., 632. For these reasons the statute of limitations (sec. 1705, R. S.), invoked by defendant, does not apply here, and the prosecution was begun in time.

3. By our statute it is made a crime for any person, "under promise of marriage," to "seduce and debauch any unmarried female of good repute," etc. Section 1259, Revised Statutes, and section 1912, id., provide that, in trials for that crime, the evidence of the woman, "as to such promise, must be corroborated to the same extent required of the principal witness in perjury." Sec. 1912. The statutes of no other state have such stringent provisions in regard to the *quantum* of evidence neces-

sary to convict of the crime of seduction. Thus it will readily be seen that decisions of other states, authorizing convictions for that offense, possess but little worth in determining how to apply such a rigid statute as ours. Resort must therefore be had to decisions and authorities respecting the crime of perjury, and no corroboration falling short of that necessary to prove that offense will suffice in prosecutions like the present one; for so the law is written. And, though the strictness of the rule requiring two witnesses in order to convict of perjury has long since been relaxed, yet it is now uniformly held that the evidence offered in corroboration of the accusing witness must at least be strongly corroborative of such witness, and something more than sufficient to overcome the oath of the prisoner, and the legal presumption of his innocence. Parker, C. J., in *Queen v. Muscot*, 10 Mod., 192, quaintly and tersely expresses the rule by saying: "Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant." See, also, *State v. Heed*, 57 Mo., 252; 1 Greenl. Ev. (14th ed.), § 256, and cases cited; 2 Whart. Crim. Law, § 1319, and cases cited.

Wharton, speaking of the offense of perjury, says: "The preponderance of contradictory proof must go to some one particular false statement." Whart. Crim. Ev., § 387, and cases cited.

In Iowa, the statute respecting the criminal offense of seduction declares that "the defendant cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense."

In Minnesota, the language of the statute is: "But no conviction shall be had under the provisions of this section on the testimony of the female seduced, unsupported by other evidence."

The statute of New York is like that of Minnesota, and under that statute it has been ruled in the last-mentioned state that the prosecutrix may be supported by "proof of circumstances which usually attend an engagement of marriage." *Armstrong v. People*, 70 N. Y., 38.

Similar rulings have been made in the other states, the statutes of which have been quoted; but it is too plain for argument that to give such a construction to our own statute on the subject would be contrary to its letter, and at war with its obvious meaning. And in respect to its meaning, it must be presumed to mean just what it says. R. S., § 3126.

These remarks are prefatory to the consideration of the second instruction given at the instance of the state, as follows: "The jury are instructed that they may find the fact of seduction upon the uncorroborated testimony of the prosecuting witness, but, as to the promise of marriage, there must be evidence corroborating the prosecuting witness; but this may be supplied by circumstances proven in evidence." This instruction entirely ignores the plain statutory language, that "the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury."

It is also faulty in other particulars; it does not designate the circumstances which would supply the necessary support to the story of the prosecutrix, nor does it define what "corroborating" means.

In *State v. Chyo Chiagk*, 92 Mo., 385, an instruction which told the jury that, as to "matters material to the issue," the testimony of an accomplice must be corroborated, was held erroneous in that it failed to tell them what those words meant. A similar ruling was made in *State v. Forsythe*, 89 Mo., 667, where an instruction used the words, "in a lawful manner," but failed to define their meaning. The instruction, in consequence of its failure in these particulars, shed no light on the subject before the jury.

4. The theory of the defendant was that there was illicit intercourse, but no promise of marriage, and his testimony supported that theory. He had the right, therefore, to have that theory presented to the jury. This was done in the fourth instruction which he asked, declaring that, "if the jury believe from the testimony that defendant, in the year 1886, had carnal intercourse with Zerelda Hall, and that she willingly submitted to defendant, without any promise from defendant to marry her, the verdict of the jury should be for the defendant."

5. The language of the statute upon which the indictment in this case was found, as before stated, is this: "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc. R. S., § 1259. Though in common parlance the crime made punishable by the foregoing statute is simply termed "seduction," yet each of the words "seduced" and "debauch" has its appropriate meaning, and this, under the familiar rule which presumes that the legislature, in drafting a statute, employ no superfluous words, or words without a purpose.

There are two steps necessary to be taken in order to consummate the crime under discussion: *First*, the female must be "seduced," — that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing; her affections must be gained, her mind and thoughts polluted; and *second*, in order to complete the offense, she must be "debauched," — that is, she must be carnally known, — before the guilty agent becomes amenable to human laws. Thus, it will be seen that a female may be "seduced" without being "debauched" or "debauched" without being "seduced."

If Joseph Andrews had yielded to the salacious solicitations of Lady Booby, as she lay naked in her bed, he would have been guilty of debauching her person, but certainly not of corrupting her mind. A similar view of the proper construction to be given to a statute substantially identical with our own was taken in Pennsylvania, and cited with approval in *State v. Patterson*, 88 Mo., 88.

These remarks are made in order to the consideration of the fifth instruction given at the instance of the state, as follows: "(5) If the jury believe beyond a reasonable doubt that the defendant, at the county of Callaway, Mo., and within three years of the finding of the indictment, promised Zerelda Hall to marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise, and she was at the time under the age of twenty-one years, and unmarried, and of good repute, they will find defendant guilty, and assess his punishment at not less than two nor more than five years' imprisonment in the penitentiary, or by a fine of not exceeding one thousand dollars, and by imprisonment in the county jail not exceeding one year."

The view of that instruction consists in not requiring the female in question to be "seduced," — to be drawn aside from the path of virtue; but simply that if, without any such arts and wiles as are calculated to operate upon a virtuous female, and to lead her astray, the defendant made to the prosecutrix a plain business offer that he would "marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise," that then he was guilty. No one can with any degree of plausibility contend that a virtuous female could be seduced without any of those arts, wiles and blandishments so necessary to win the hearts of the weaker sex. To say that such an one was seduced by simply a blunt offer of wedlock *in futuro*, in exchange for sexual favors *in præsenti*, is an announcement that smacks too much of bargain and barter, and not enough of betrayal. "This is hire, or salary, not seduction." Any construction of the statute which would sanction the fifth instruction aforesaid would strike from that statute the word "seduce," and render any one guilty of a felony who should, under promise of marriage, "debauch" any unmarried female.

6. There were many circumstances connected with the trial of this cause which rendered the testimony of the prosecuting witness open to very jealous observation. The trial occurred on the 26th of November, 1888, the indictment having been found but two days previously, and the complaint was made about that time. According to her testimony, the first congress between defendant and herself occurred in December, 1886 (but what time in that month she does not state), and the result of their illicit interviews was a child fifteen months old at the date of the trial. This would prove the child to have been born on the 25th of August, 1887; but the usual period of gestation, two hundred and seventy-six to two hundred and eighty days, would, according to the books, throw the date of conception into November, 1886. 2 Whart. & S. Med. Jur., §§ 41–55. But she would not designate what time in December the first amorous encounter took place. If on the 15th day of December, this would give but two hundred and fifty-four days between conception and birth, even if conception took place *eo instanti*. If on the 1st day of December, but

two hundred and sixty-nine days; and there is no pretense that the child was not fully mature when born.

Granting, however, that she was in error as to the time when the initiatory step was taken,— when the proceedings *in limine* were had, — still it taxes credulity to a great extent to believe that she would continue to believe that the defendant intended to marry her over a year after her child was born, and therefore kept silent upon the subject of the supposed wrong done her. The foregoing remarks are only made in order to show the caution with which this cause should have been tried, considering the peculiar circumstances which surrounded it, and the great length of time which intervened between the alleged criminal act done and its prosecution begun.

Full opportunity, therefore, should have been afforded to sift the witness, and to test and ascertain her *animus*, and the motives which prompted her, after so long a time had elapsed, to institute the present prosecution. For this reason she should have been required to answer the question whether the idea of prosecuting the defendant did not spring into being upon his marriage to another. It is always allowable to ask similar questions, in order for the jury to understand, and understand fully, the attitude of a witness, and especially of a prosecuting witness, towards the accused. *State v. Cooper*, 83 Mo., 693; 1 Whart. Ev., §§ 408, 545, 547, 549, 561; 1 Greenl. Ev., § 450.

Because of the errors aforesaid the judgment should be reversed, and the cause remanded.

Brace, J., concurs; Ray, C. J., and Barclay, J., in the result. Black, J., dissents.

Note.— *What constitutes.*— The supreme court of Iowa says in speaking of the seduction of a young girl: "It has often been held that to establish a charge of seduction it must be made to appear that the intercourse was accomplished by some artifice or deception. Something more than a mere appeal to the lust or passion of the woman must be shown before the law will inflict the penalty prescribed for that crime, or afford her a remedy. *Gover v. Dill*, 3 Iowa, 337; *Delvee v. Boardman*, 20 Iowa, 446; *Brown v. Kingsley*, 38 Iowa, 220; *State v. Haven*, 43 Iowa, 181; *Baird v. Boehner*, 72 Iowa, 318. It was contended that the evidence had no tendency to bring the case within this rule; that, with the most favorable construction in

plaintiff's favor of which it is fairly capable, it did not tend to show either artifice or deception, but, on the contrary, showed merely a yielding to gross solicitation. But we think that view cannot be sustained. The evidence had some tendency, we think, to show that defendant, by his caresses and flatteries, first acquired an influence over her by means of which he afterwards accomplished his purpose. It may be that the virtue of a pure woman of mature years would have been alarmed by his first appoaches. Plaintiff, however, was but a child in years. She had the passions of a woman, but lacked the judgment and discretion which come only with age and experience. If the means made use of by defendant were calculated to overcome the will of a person of her years and experience, and were intended to create in her mind an affection for him, and they actually did have that effect, and if under that influence she yielded her person to him, this amounted to an 'artifice' within the meaning of the law. And the question as to the sufficiency of the evidence to establish that fact was for the jury." *Hawn v. Baughart*, 76 Iowa, 683. And in a Michigan case it was shown that the defendant commenced his familiarities with the prosecutrix, a girl of fifteen years of age, more than a year before the act was committed; that he frequently visited her father's house when the parents were absent, and participated in games and sports with the children; that he frequently made Annie presents, thereby gaining her friendship and confidence, and on several of these occasions he forced her into the bed-room and attempted to accomplish his criminal purpose, which finally culminated, on the occasion referred to in the information, in the accomplishment of this child's ruin. In putting in this testimony, when the girl was upon the stand, she was asked: "Had he before this made you any presents?" This was objected to as immaterial. The court says: "The testimony was properly admitted. She also gave testimony showing that force was used by the respondent on each occasion, against the like objection of counsel for respondent. We see nothing objectionable in this. The 'seducing and debauching of the unmarried female' was the crime for which the respondent was being tried. It consisted of the means used by him to induce this young girl to yield and surrender to him her chastity and her virtue; and such means always include all the acts, artifices, influences, promises, enticements and inducements calculated, under all the circumstances of the case being considered, to accomplish that object; and all testimony having any tendency to establish any of these should be admitted when offered to prove the criminal conduct. We find nothing in the testimony received going beyond this. In all such cases, the age, experience, artfulness and blandishments of the offender, and the youthfulness, innocent, guileless and confiding nature of the injured party, will always be found to enter largely into the consideration of the acts of the parties involved in the investigation; and the largest latitude consistent with safety should be allowed in taking the testimony having any tendency to develop the material facts in the case. A proper regard for the protection of female virtue and the welfare of society can never require less. The record tends to show that at first force as well as strategy was used by the respondent in bringing this child within his seducting grasp, for the purpose of exciting in her impure and carnal desires. The testimony of the girl is to the effect that while she, at all times, opposed and

resisted the respondent's lecherous approaches, she did on the last occasion, after he had got her into the bed-room at her father's house, yield to his seductive influence and persuasions; that on this occasion he promised he would buy her clothing, which he never did, but that he finally succeeded in making complete his crime. *People v. Gibbs*, 70 Mich., 425. In that case the trial court gave very clear instructions as to the constituent element of the offense, and the supreme court indorse and discuss them as follows: "Counsel for defendant asked the jury: 'If you find from this evidence that the girl, Annie Bunn, did yield then and there, viz., on the 31st of March, at the house of Bunn, through the promise of a silk dress, then I charge you that would not be seduction, for that would be no more than any lewd woman might do.' This request was substantially given by the court, and in this connection the court said: 'If you find that the complaining witness yielded simply by reason of that promise, that all that occurred was by reason of making the promise that he would buy her a dress, and that she then yielded to his embraces, this of itself would show that the inducements were not such as to induce a woman of previous chaste character; but if you find that she was of previous chaste character, and that the giving — making — a promise of a dress, or any other promise, on this or any other occasion, was simply one of the means which he had employed to overcome her reluctance to submit to this act,— to overcome her virtue,— this would and might be one of the means which the jury would have the right to consider as having been employed for the purpose of seducing this girl from the path of virtue. And in passing upon the question of whether the means employed, as charged in this case by this prosecution, were such as would be likely to induce a woman of previous chaste character to yield to the sexual embraces of another, the jury have a right to take into account the relation existing between the parties, and the age of this girl at the time. So, I don't mean to be understood as saying that the means employed and used in no given case include the making of gifts, or promise of gifts in the future are not to be considered by the jury. It will be for the jury to say whether, at the time, the woman was of chaste character, and whether arts were practiced, and whether she was lured from the path of virtue, and her reluctance to the sexual act overcome, by these means. The means used are not material if the arts and persuasions were what caused her to submit.' In defining the crime, and what is necessary to be proved to establish it under our statute as applied to the facts in this case, the court further said: 'Seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions or wiles which are calculated to have and do have that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused. . . . If, in this case, you find that the girl, Annie Bunn, was before and on the 31st day of March, 1886, of chaste character, and virtuous, and if the respondent, by arts, persuasion and wiles, induce her to depart from the path of virtue, and submit to the sexual embraces at that time, this would constitute seduction. In order to constitute the offense, it must be shown by the proofs in the cause that on this day, March 31, 1886, this girl yielded her person and her virtue by reason of some artifice, promise or inducement made by the respondent at

the time, and without which she would not have yielded. That, however, should be modified to this extent: that the artifice or inducement need not have been concurrent with the act of sexual intercourse; but if, by insidious and persistent attentions, and by the gifts of trifling articles from time to time, he built up such respect for himself, or affection for himself, as to finally and eventually overcome her virtue, and induce her to yield by these means, it would not be material that all of these purposes — all of these efforts — may not have been concurrent with the final act of sexual intercourse, or the first act of sexual intercourse which was voluntary on her part. Now, as I have said, the act of intercourse must have been voluntary eventually; and, at the time, the complaining witness must have been of a chaste character. Illicit intercourse which takes place in consequence of any reliance on a promise of compensation for a specific act is not seduction. . . . Some claim is made that, upon former occasions, the testimony of Annie Bunn had disclosed a state of facts which would be, if anything, rape as distinguished from seduction. You will comprehend, from the definition I have given you of the offense of seduction, that you must be able to say upon the evidence, beyond a reasonable doubt, that the offense was seduction rather than rape, or there can be no conviction in this case upon this charge. To constitute seduction there must have been submission; for if the offense was rape, no conviction can be had upon this record. If the complaining witness was compelled to submit by force, or if she was prevented from resisting by fear of dangerous consequences or great bodily harm,— so strong a fear as to overcome the mind so that she dare not resist,— this would be rape, and not seduction. But, to constitute rape, she must not have yielded at any stage of the act; she must have resisted, persisted in her determination and wish to resist, and must have resisted to the utmost, except as she was overcome by fear of dangerous consequences or great bodily harm. . . . If there had been a previous seduction, there could be no conviction here, because it would follow that she was not of chaste character, and the sexual act complained of as seduction was not an act which occurred prior to March 31st. By this, I mean that if there had been a seduction — an actual seduction — of this girl,— an intercourse had been kept up from time to time,— then this isolated act could not be charged as an act of seduction. If illicit intercourse once begins between two parties, it would be incumbent upon the prosecution, before they could charge a second seduction, at least to show affirmatively there had been a reformation. But it may be stated, however, in this connection, that previous acts of intercourse, or attempts at intercourse which was not completed, but which failed, or acts of intercourse which were consummated by force, or under such circumstances as constitute rape, would not tend to show that she was unchaste at the time. In other words, a woman cannot be charged with unchastity who is by force compelled to yield her virtue — her person — to another.' In the foregoing charge, we find the law applicable to this case well stated, and in accord with the previous decisions of this court. *People v. Millspaugh*, 11 Mich., 278; *People v. Brewer*, 27 Mich., 134; *People v. Clark*, 33 Mich., 113; *Lewis v. People*, 37 Mich., 518; *People v. Squires*, 49 Mich., 487; *People v. Cummons*, 56 Mich., 545; *People v. De Fore*, 64 Mich., 693. See, also, 2 Bish. Crim. Law, § 1119; Whart. Crim. Law, 762; *State v. Bierce*, 27 Conn., 319;

Dinkey v. Com., 17 Pa. St., 128; *Carpenter v. People*, 8 Barb., 603; *Com. v. McCarty*, 4 Pa. Law J., 136; *State v. Boak*, 5 Iowa, 430; *State v. Carron*, 18 Iowa, 372; *Brown v. Kingsley*, 38 Iowa, 224; *Leucker v. Steileu*, 89 Ill., 547; *Crogan v. State*, 22 Wis., 454; *Hogan v. Cregan*, 6 Rob. (N. Y.), 150; *Hart v. Walker*, 77 Ind., 334; *Delvee v. Boardman*, 20 Iowa, 446; *State v. Fitzgerald*, 63 Iowa, 268. A false promise of marriage, under our statute, is not a necessary element in the influence exerted through the wiles, artifice and deception used by the seducer in taking advantage of the guileless simplicity and confidence of a young girl, and leading her from the path of virtue, in depriving her of her chastity and accomplishing her ruin; but any other subtle device or deceptive means, involving the same moral turpitude, used by him in accomplishing the same criminal result, is all that is necessary to constitute the crime. The quality of the means used, rather than the kind, is that which characterizes the act, and brings it under the condemnation of the law."

Even where the prosecutrix swears that the defendant forced her, her statement is not conclusive upon this question. It was so held by the supreme court of Missouri, and that eminent tribunal drops into poetry while it announces the rule. "It is true the prosecutrix swore point-blank that the defendant always forced her, but that statement is to be received with many grains of allowance. This is a case where 'actions speak louder than words.' In *State v. Woolaver*, 77 Mo., 103, where a defendant was also prosecuted under section 1260, an instruction was given which told the jury to find the defendant guilty if he had carnal knowledge of the girl either with or without force, and it was held erroneous, but the judgment was notwithstanding affirmed, because the physical facts testified to by the girl herself showed beyond peradventure that the force required to constitute the sexual act rape had not been employed. In our opinion the deductions from the evidence in the case at bar must be similar to those in that one. The testimony of the girl when contrasted with her actions; her failure to make complaint, although forced 'a good many times,'—only furnishes one in the long list of instances of which that profound philosopher of human nature, Shakespeare, speaks:

> 'The wiles and guiles that women work,
> Dissembled with an outward show.'"

An instruction in a prosecution for seduction, that "it matters not what promises or arts were used by the seducer, if thereby the prosecutrix was led astray and induced to surrender her virtue and do what she would not otherwise have done, it is seduction;" and that "the fact that the prosecutrix knew the defendant was a married man, and that she allowed him to approach her with such promises, should be carefully considered by the jury in deciding upon the question of her purity of heart," was held to be proper. *State v. Groome*, 10 Iowa, 308. An unmarried woman who has been unchaste may reform and acquire a chaste character, so that her subsequent seduction will be a crime within the meaning of Iowa Rev., § 4209. *State v. Carron*, 18 Iowa, 372. What was the previous character for chastity of the prosecutrix in an indictment for seduction is a question of fact to be determined by the jury. *Id.* A man who obtains carnal intercourse with a woman solely by means of his promise of marriage, made to her at the

time, and without which she would have yielded to his desires, is guilty of the statutory crime of seduction. *People v. Millspaugh*, 11 Mich., 278. But the corroboration need not be of such force as would prove the facts independently of complainant's testimony; it need only amount to proof of those circumstances usually concomitants of the main facts, and which are sufficiently strong and pertinent to satisfy the jury of the truthfulness of witness' testimony on the principal facts. *State v. Timmons*, 4 Minn., 325. And if complainant appears to have had previous intercourse with defendant under promises of marriage, and, on finding that he was deceiving her, had, at and before the time charged, reformed from principle, she is still in the eye of the law a chaste person at the time of the act. *Id.* The New York statute provides that the testimony of the woman seduced shall not be sufficient unless supported by other evidence. *Held*, that evidence supporting only material facts is not sufficient. *Crozier v. People*, 1 Park. (N. Y.) Cr., 453. By "previous chaste character" the statute does not require chaste reputation. It means actual personal virtue, and this is to be presumed until the contrary is shown. *Id.* And "it has always been well understood that roaming at night is an evidence of want of virtue in a woman. A 'night-walker' is a name applied to one who roams at night for evil purpose. No good purpose can ordinarily take a young girl with frequency, late at night, away from her home." *State v. Clemmons*, 78 Iowa, 123. The term "character," in section 2586 of the Iowa Code, which provides that if any person seduce and debauch an unmarried woman, of previously chaste character, etc., signifies that which the person really is, in contradistinction of that which she may be reputed to be. *Andre v. State*, 5 Iowa, 389; *Boak v. State*, id., 430. In order to establish the unchaste character of an unmarried female, it is not necessary to prove that she has been guilty of sexual intercourse. *Id.*

Defendant and prosecutrix had illicit intercourse for more than a year, when defendant went away, and prosecutrix reformed and led a chaste life until after defendant's return in about a year, when, under promise of marriage, their relations were resumed. *Held*, that defendant was guilty of seduction when the first offense was committed after their former illicit relations had been broken off. *State v. Moore*, 78 Iowa, 494. The fact that a child was born is relevant to show the fact of seduction. *Hausenflouck v. Com.*, 35 Va., 702. Upon the trial of an indictment for seduction, the record of a previous conviction of defendant upon a charge against him by the complaining witness for bastardy is not admissible. *State v. Wenz*, 41 Minn., 196. Upon the trial of an indictment for seduction, the usual presumption of chastity in a woman does not apply. *State v. Wenz*, 41 Minn., 196. *Contra, People v. Kane*, 14 Abb. N. Y. Pr., 15.

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ABDUCTION.

1. ABDUCTION — WHAT CONSTITUTES.— Defendants were indicted under the Criminal Code of Illinois, section 1 which provides that whoever entices an unmarried female of chaste life from her home for the purpose of prostitution or concubinage shall be punished, etc. It was proved that the principal defendant, a dissolute and impecunious young man, induced the prosecutrix, a girl of fifteen, to elope with him by promise of marriage, but no arrangements had been made or suggested as to time and place of such marriage, and the defendant was without means to defray traveling expenses. For the avowed purpose of taking a night train, defendant took her to a neighboring city, where they slept together at an hotel, he representing her to be his wife, keeping her hid until late the next day, when, without any effort to take a train, they returned to the town where the girl lived, and, still keeping secluded, slept together that night until aroused by the approach of the girl's parents and the police, when they fled together, and were together when arrested, two or three days later. *Held*, an enticing for the purpose of concubinage, within the meaning of said statute. *Henderson et al. v. People*, 5.

2. SAME.— No length of time nor long continuance of illicit intercourse is necessary to constitute concubinage. That relation is formed when a single woman consents to unlawfully cohabit with a man generally as though the marriage relation existed between them. *Id.*

See INSTRUCTIONS.

ABORTION.

CONSPIRACY TO PROCURE ABORTION — WOMAN NOT WITH CHILD.— A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion. *The Queen v. Whitchurch*, 1.

ACCOMPLICE AND ACCESSORY.

1. ACCOMPLICE TRIED FOR MURDER ALTHOUGH PRINCIPAL CONVICTED ONLY OF MANSLAUGHTER.— One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offense, notwithstanding the principal offender had been tried previously and convicted and sentenced for manslaughter only. *Goins v. State*, 19.

2. DECLARATIONS OF CO-DEFENDANT.— On the trial of one of several defendants jointly indicted for an offense, the declarations of a co-defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, are admissible when a *prima facie* case of conspiracy has been made. *Id.*

3. CRIES OF MOB ADMISSIBLE. — On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it was formed, though made before the deceased joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made. *Id.*

4. RIGHT TO RESIST ATTACK. — Where a number of persons, in the exercise of their lawful rights, have reason to apprehend an immediate, violent and criminal assault upon them as a party from superior numbers, it is not unlawful for them to combine for their just defense. *Id.*

5. ACTS AND DECLARATIONS OF MOB ADMISSIBLE. — Where one is on trial for homicide, and is defending on the ground that the killing was done in repelling the attack of a mob, he has a right to prove, and have the jury consider, the violent, malicious and criminal acts and declarations of the mob. *Id.*

6. INDEPENDENT FIGHT. — In the absence of proof of a conspiracy, one who is present when a homicide is committed by another upon a sudden quarrel, or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act. *Id.*

See EVIDENCE, 15; INCEST, 3.

ADULTERY.

1. ADULTERY — PROOF OF MARRIAGE — MARRIAGE CERTIFICATE — STATUTES — CONSTRUCTION. — Statutes of California, 1871-72, page 380, providing for the punishment of adultery, and making a recorded certificate of marriage proof of marriage for the purpose of the act, does not exclude other proof of the marriage. *People v. Stokes*, 14.

2. EVIDENCE TO IDENTIFY PERSONS NAMED IN CERTIFICATE. — Where, in a trial of one John W. Stokes for adultery, the record of a marriage certificate introduced in evidence shows a marriage of John Stokes to *Rebecca* Gibson, the testimony of a witness that he was present when defendant was married to *Rachael* Gibson in the year when, at the place where, and by the person by whom, the record shows the marriage was performed, is admissible as tending to identify the parties named in the certificate. *Id.*

3. REAL NAMES OF PARTIES MAY BE SHOWN. — Evidence of the real names of the parties, which differ from the names in a marriage certificate, does not contradict the certificate, the minister not being required to guaranty that the persons named were married in their true names. *Id.*

4. COHABITATION. — Evidence that defendant and Rachael Gibson lived as man and wife for many years, and that she bore him children, if not admissible as proof of marriage in a trial on a charge of adultery, is admissible as tending to identify the parties named in the certificate. *Id.*

5. MARRIAGE — PRESUMPTION OF CONTINUANCE OF STATUS. — The *status* of marriage, having been proved, is presumed to continue, and the presumption can only be overcome by evidence of death or divorce. *Id.*

AFFRAY.

1. EVIDENCE. — On an indictment for an affray for fighting in a public place, the testimony of a party thereto of his apprehension of danger to himself and sons when he saw the other parties two miles away,

and of his grounds for such apprehension, is immaterial, as it does not show that he or his sons fought only in their own defense. *State v. Harrell*, 36.

2. SAME.— Evidence that the fight terminated when the other parties were wounded and fled, that the father and sons pursued them, and shouted to the wounded men "to stop, and shoot it out like men," was competent, as showing their willingness to fight and prolong the conflict. *Id.*

3. INSTRUCTIONS.— It was sufficient for the court to charge that they had the right to fight in their own defense, and in defense of each other, without going into details in respect thereto. *Id.*

ALIBI.

See EVIDENCE, 16; INSTRUCTIONS, 3.

ARREST.

1. WITHOUT WARRANT.— In cases of ordinary misdemeanors a constable cannot arrest the offender without warrant, unless he is present at the time of the offense. *Webb v. State*, 41.

2. SAME.— The fact that a warrant has issued directed to any constable of the county will not avail such officer, unless such precept be in his possession at the time the arrest be made. *Id.*

ARSON.

Under Penal Code of Texas, articles 661, 662, defining arson as the wilful burning of any building, edifice or structure inclosed with walls, and covered, a person cannot be convicted of arson for burning the materials of a crib after having torn it down. *Mulligan v. State*, 49.

ASSAULT.

One whose property has been wrongfully taken by another may thereupon retake it from him, using no more than reasonable force; and what is such force is a question of fact for the jury. *Com. v. Donahoe*, 45.

ASSAULT WITH DEADLY WEAPON.

1. ASSAULT AND BATTERY — INSTRUCTION — "DEADLY WEAPON" DEFINED. There is no error in instructing a jury, on a trial for assault with a deadly weapon, that "a deadly weapon is any weapon or instrument by which death may be produced, or would be likely to be produced, when being used in the manner in which it may appear it was used in the affray. The jury are the judges as to whether the weapon was or was not a deadly weapon." *People v. Rodrigo*, 53.

2. ASSAULT WITH DEADLY WEAPON — JUSTIFICATION — REASONABLE DOUBT. In a prosecution for assault with a deadly weapon, it is not proper to instruct the jury that they must find defendant not guilty if they entertain a reasonable doubt that he acted under a reasonable apprehension of great bodily injury. If such a state of facts existed, still the defendant would not be justified, unless the use of a deadly weapon was necessary to prevent the injury. *Id.*

3. BURDEN OF PROOF — WEAPON.— In a prosecution for assault with a deadly weapon, when the defendant sets up in defense no distinct and independent facts, but contends upon the facts and circumstances, as proved by the evidence, constituting the transaction charged as criminal, that he is not guilty, the burden of proof is on the government to satisfy the jury beyond a reasonable doubt that the assault as charged was unjustifiable, and the burden of proof does not shift throughout the case. *Id.*

ASSAULT — INDECENT ASSAULT.

1. FEMALE UNDER TEN YEARS.— Under section 245 of the Penal Code, the taking of indecent liberties with or on the person of a female child under the age of ten years, without regard to whether she consents to the same or not, constitutes an assault. *State v. West*, 381.

2. INDICTMENT.— Under an indictment for an assault with intent to carnally know and abuse the child, the defendant may be convicted of taking indecent liberties with her person, if within the allegations of the indictment. *Id.*

3. A VERDICT of "guilty of an indecent assault" sufficiently describes the offense. *Id.*

BASTARDY.

EVIDENCE OF PREVIOUS MISCONDUCT OF PROSECUTRIX.— In a bastardy proceeding, evidence that the prosecutrix, some seven or eight years before, was locked up in a room with one D. at a public house for several hours is material, where it was shown that she was several times in D.'s company, both at his home and riding with him, about the time that the alleged intercourse with defendant was had. *State v. Borie*, 87.

BIGAMY.

1. CONSTITUTIONAL LAW.—The provision in section 501, Revised Statutes of Idaho, that "no person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust or profit within this territory," is an exercise of the legislative power conferred upon territories by Revised Statutes, sections 1851, 1859, and is not open to any constitutional or legal objection. *Davis v. Beason*, 89.

2. RELIGIOUS BELIEF.— Bigamy and polygamy are crimes by the laws of the United States, by the laws of Idaho and by the laws of all civilized and christian countries; and to call their advocacy a tenet of religion is to offend the common sense of mankind. *Id.*

3. CRIME NOT SANCTIFIED UNDER GUISE OF RELIGION.— A crime is none the less so, nor less odious, because sanctified by what any particular sect may designate as religion. *Id.*

4. SAME.— It was never intended that the first article of amendment to the constitution, that "congress shall make no laws respecting the establishment of religion, or prohibiting the free exercise thereof," should be a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. *Id.*

5. SAME.— The second subdivision of section 504, Revised Statutes of Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the territory, is not open to any valid legal objection. *Id.*

6. REASONABLE BELIEF OF DEATH OF FIRST HUSBAND.— The prisoner was convicted under 24 and 25 Vict. (ch. 100, § 57), of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds

believed her husband to be dead. *Held*, by a majority of the court, that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defense to the indictment, and that the conviction was wrong. *The Queen v. Tolson*, 59.

BLACKMAIL.

1. THREATENING LETTER — PAROL EVIDENCE TO EXPLAIN. — Under Revised Statutes of Indiana, 1881, section 1926, which provides than any one who threatens to accuse, or sends a letter threatening to accuse, any person of a crime punishable by law, or of any immoral conduct which, if true, would tend to disgrace such person, or in any way to subject such person to ridicule or contempt of society, with intent to extort gain from such person, is guilty of blackmail; and when the letter containing the threats is ambiguous, the ambiguity may be explained by parol evidence. *Motsinger v. State*, 110.
2. IMMATERIAL THAT THE PERSON THREATENED IS GUILTY. — A charge that a person has solicited sexual intercourse with the wife of another is a charge of immoral conduct, which, if true, would tend to disgrace him, and subject him to the contempt of society. It is immaterial whether or not the person so accused is guilty of the matter with which he is charged. *Id.*

BODY STEALING.

1. EVIDENCE — MOTIVE. — On an indictment against P. for the disinterment of a dead body, which was to be burnt, and made to represent the carcass of Q., who was to disappear, and thus make payable the insurance on his life, the policies of insurance are admissible in evidence to prove the motive of the crime. *State v. Pugsley*, 100.
2. SAME — LAWFUL AUTHORITY. — Evidence that defendant disinterred a body secretly during the night-time, concealed it, and that there was an attempt made to burn it, warrants a refusal to grant a new trial on the ground that there was no evidence to show that the body was disinterred without lawful authority. *Id.*

Harmless error, see INSTRUCTIONS, 2.
Impeaching witness, see WITNESS, 3.

BRIBERY.

1. RIGHT OF APPEAL. — Where a denial of the right of suffrage and to hold public office is annexed to the punishment imposed on conviction of a misdemeanor, an appeal will lie to the court of appeals, though the fine imposed is insufficient to give the court jurisdiction. *Johnson v. Com.*, 113.
2. MOTION TO DISMISS. — At a trial for receiving a bribe to vote for a certain candidate for congress, the testimony for the commonwealth was that of a single witness, who testified that he loaned defendant $5, but not to influence his vote, though he did not know that he would have loaned it but for the election; and that the accused entertained the same political views as witness. *Held*, that a motion to dismiss should have been granted. *Id.*
3. INSTRUCTION. — Defendant requested an instruction that the jury must believe that the money was given accused to influence his vote, and that for such money the accused did vote as requested, and that if the money was in good faith loaned the accused was not guilty. *Held*, that it was properly refused. *Id.*
4. OFFERING BRIBE BY THIRD PERSON. — The conveyance to a juror of an offer of a third person to bribe such juror is the offering of a bribe by the person conveying the offer, and is no less an offer to bribe because the money to be paid was not to come from his pocket. *People v. Northey*, 338.

See EVIDENCE, 9.

BURDEN OF PROOF.

When it does not shift, see ASSAULT WITH DEADLY WEAPON, 3.

BURGLARY.

1. THE OFFENSE of burglary cannot be made out without clear proof of the breaking. *People v. McCord*, 117.

2. PERSUADING ANOTHER TO COMMIT.— It would be a disgrace to the law if a person who had taken active measures to persuade another to enter his premises and take his property can treat the taking as a crime. What is authorized to be done is no wrong in law to the instigator. *Id.*

3. SAME.— If a crime can be readily prevented without injuring the criminal, every wanton injury is a trespass and may become a crime. *Id.*

CARRYING CONCEALED WEAPONS.

CARRYING A PISTOL IN A COVERED BASKET on one's arm, not for the purpose of transportation only, but for convenience of use and access and to evade the law, is carrying a concealed weapon within Code of Georgia, section 4527, making it a misdemeanor to carry a pistol about the person, unless in an open manner, and fully exposed to view. *Boles v. State*, 126.

CHANGE OF VENUE.

1. PREJUDICE OF JUDGE — DUTY OF COURT.— Where a change of the place of trial of a criminal case is sought on the alleged ground of the prejudice of the presiding judge, the judge is not at liberty to avoid the embarrassment of a trial in the face of such objections by granting a change, but must rule upon the application, when fully advised, "according to the very right of it" (Code, sec. 4374); and this ruling will not be disturbed on appeal unless it is shown that he has abused his discretion, and no such showing is made in this case. *State v. Billings*, 329.

2. PREJUDICE OF PEOPLE — SHOWING AND COUNTER-SHOWING — ABUSE OF DISCRETION.— The application for a change of venue in this case, involving a charge of murder in the first degree, was supported by the affidavits of some forty or fifty persons, showing a high state of feeling among the people, and at least some prejudice against defendant, and that there was some talk of lynching him. It also appeared that many other persons applied to to make like affidavit would have done so but for prudential reasons. This showing was opposed by the affidavits of some eight hundred persons, which did not controvert the facts of excitement and prejudice, but did controvert the claim that the excitement and prejudice were so great as to prevent a fair and impartial trial. *Held*, that to have granted the change upon the showing made would have been in accord with the general practice in such cases, and that it was, under all the circumstances, an abuse of discretion for the court to deny the change. *Id.*

3. SAME.— Affidavits that deponents have heard the case frequently discussed, and do not believe that defendant can have an impartial trial in the county because the inhabitants are prejudiced against him, are insufficient for change of venue, and the action of the court in taking the motion under advisement until an effort was made to obtain a jury, and then overruling it, was harmless. *Territory v. Manton*, 521.

CONSPIRACY.

1. CONSPIRACY TO MURDER — DISCRETION OF COURT.— It is largely in the discretion of the trial court to allow the preliminary proof to the introduction of death-bed statements of deceased to be given to the court in the presence of the jury, but good practice would suggest that such proof be made in the absence of the jury, when properly insisted upon. *State v. Furney*, 131.

2. DYING DECLARATIONS.— Statements not under oath can only be admitted in evidence as dying declarations when they are made *in extremis*, and where the death of the person who made the declaration is the subject of the charge, and where the circumstances of the death are the subject of the declarations, and the person making them is in the full belief that he is about to die; and this condition of mind must be made clearly to appear. *Id.*

3. ACT MUST BE THE OUTCOME OF THE COMMON DESIGN.— Where persons combine to commit a crime, and while so engaged in such unlawful act murder is committed by one or more of the conspirators, without the knowledge or consent of the others; and the act is not the natural or probable outcome of the common design and purpose, but the independent act of one or more of the conspirators, *held*, those not participating in it are not guilty of murder. *Id.*

4. CIRCUMSTANTIAL EVIDENCE.— Where circumstantial evidence constituting a single chain is relied upon by the state for a conviction, each essential fact in the chain of circumstances must be found to be true by the jury beyond a reasonable doubt, to warrant a conviction. *Id.*

See ABORTION.

CONSTITUTIONAL LAW.

1. OFFENSE COMMITTED NEAR BOUNDARY LINE — TRIAL BY JURY — CRIMINAL JURISDICTION.— Code of Iowa, section 4160, providing that "when a public offense is committed on the boundary line between two or more counties, or within five hundred yards thereof, the jurisdiction is in either," is not in conflict with the Constitution of Iowa, article 1, section 9, which provides that "the right of trial by jury shall remain inviolate," when a statute similar to section 4160 was in force when the first constitution was adopted, and has remained so ever since. *State v. Pugsley*, 100.

2. JURY JUDGES OF LAW AND FACT.— Constitution of Maryland, article 15, section 5, declaring that the jury shall be judges as well of law as of fact in criminal cases, does not prohibit the court from instructing the jury on the law, when they unanimously request it. *Beard v. State*, 173.

Power of state to punish by disfranchisement, see BIGAMY.

Verdict of guilty does not forfeit right of elector, see PERJURY, 4; DRUNKENNESS.

CONTEMPT.

OFFENSIVE LANGUAGE TO COURT.— Where the language used in a paper filed in court plainly constitutes a contempt, the fact that the persons committing the offense "did not think nor believe, nor had they the slightest conception, that those statements were scurrilous, disrespectful, insolent or contemptuous in any particular; that nothing was further from their minds than the making of any insinuation or charge against the court, or of stating anything that would be considered contemptuous by the court,"— does not relieve them from responsibility for the language they actually used, and it is not for them, nor their counsel, to construe or state the effect of such language. *United States v. Corporation, etc.*, 138.

CONTINUANCE.

1. AFFIDAVIT — SUFFICIENCY OF.— Where defendant filed an affidavit for continuance on account of absent witnesses, not stating their names nor what he intended to prove by them, and refused on request of the court so to do, the continuance was properly refused. *White v. State*, 225.

2. ABSENT WITNESS.— An application for a continuance, on the ground that an absent witness will contradict the testimony of a witness, on a former trial, that "defendant gathered up all the papers he could get, made a bundle of them, and put them in his pocket," by testifying that the latter witness afterwards searched the premises, and burned all the papers of any value found there,— is properly denied, as the statements are consistent. *Territory v. Manton*, 521.

COUNTERFEITING.

1. APPLIES TO FOREIGN AS WELL AS DOMESTIC BANK NOTES.— Penal Code of California, section 480, providing that "every person who makes, or knowingly has in his possession," anything employed "in counterfeiting bank notes or bills, is punishable," applies to foreign as well as domestic bank notes. *People v. McDonnell*, 147.

2. INCORPORATION OF BANK.— Under Penal Code of California, section 959, subdivision 6, section 960, providing that an information is sufficient if the offense charged is set forth in such clear and distinct manner as to enable a person of common understanding to know what it is, and defendant is not prejudiced in any substantial right by the defect, an information for having possession of tools for counterfeiting notes of the "Bank of England" need not allege the incorporation of such bank. *Id.*

3. PROOF OF EXISTENCE OF BANK.— Proof that the bank is known and acting as a corporate company, and as such issues bills which come within the statute, identifies the notes set out sufficiently to show that they were "bank notes." *Id.*

4. STATE JURISDICTION OVER.— The state courts have jurisdiction of such offense, under the statute which is an exercise of the general police power of the state, though it is also punishable under a federal statute. *Id.*

5. INSTRUCTION.— A charge in substance that, to constitute the crime, a mere possession and intention to use, though without ability to use, is sufficient, is proper. *Id.*

CRUELTY TO ANIMALS.

TRESPASSING HOGS.— Under Code of Mississippi, section 2918, forbidding cruelty to animals, defendant was indicted for killing hogs trespassing on his land after he had vainly tried to drive them away. *Held* error to refuse to charge the jury that if defendant killed the hogs while they were ravaging his crop, in order to protect the crops, and not from a spirit of cruelty, they should find him not guilty. His guilt or innocence is determinable by the intent and purpose which prompted his act. *Stephens v. State*, 157.

DISORDERLY HOUSE.

1. REPUTATION OF FREQUENTERS — SPECIFIC ACTS.— Upon trial for maintaining a disorderly house by permitting lewd persons to frequent it, evidence not only of the bad reputation of the women resorting there, but of specific acts of unchastity committed by them elsewhere than on the premises in question, is admissible. *Beard v. State*, 178.

2. WHAT IS A DISORDERLY HOUSE.— A bar-room and dance-hall, with music, kept with intent to bring together and entertaining prostitutes, and men desirous of their company, if such persons habitually assemble there to drink and dance together, may be a disorderly house, though the house is quietly kept, and no conspicuous improprieties are permitted within it. *Id.*

DRUNKENNESS.

1. CONSTITUTIONALITY OF LAW.— Chapter 104, Laws 1883, punishing drunkenness in certain cases, is constitutional and valid, and the information in the present case charges an offense under it. *State v. Brown*, 165.

2. HONEST MISTAKE.— Where a person is charged with the offense of being drunk in a public place, the defendant may show, as a part of his defense, that he became intoxicated through an honest mistake of fact. *Id.*

DYING DECLARATIONS.

Statements not under oath inadmissible, see CONSPIRACY, 1, 2; MURDER, 8, 9, 10.

EMBEZZLEMENT.

1. PUBLIC OFFICERS.— Where on prosecution of a county collector for embezzlement it is shown that defendant never made a settlement, and that his books, when taken from him by the sheriff, showed a deficit, which he attempted to account for by swearing that the money was destroyed when his house was burned, the evidence is sufficient to sustain a conviction. *State v. Findley*, 191.

2. DE FACTO OFFICER.— When it is shown that defendant received the tax-books and acted as collector, it is not necessary to produce his commission. *Id.*

3. SAME.— When defendant was *de facto* collector, it is no defense that he failed to take the oath of office. *Id.*

4. EVIDENCE BY AN EXPERT of the result of his examination of defendant's books and papers, which are in evidence, is competent to show the standing of the accounts. *Id.*

5. INTENT.— It is immaterial whether defendant conceived the design of converting the money at the time he collected it or subsequently. *Id.*

6. LACK OF AUTHENTICITY OF TAX-BOOKS.— That the tax-books were not duly authenticated by the official seal of the county clerk when delivered to defendant constitutes no defense. *Id.*

7. REMARKS OF COURT.— An exception to the remarks of the court in the hearing of the jury, which does not show in what connection they were made, will not be regarded when the remarks themselves do not appear prejudicial to defendant. *Id.*

8. MISAPPROPRIATION OF FUNDS BY PARTNER.— Under the general criminal code defining embezzlement as a criminal offense, the misappropriation of partnership funds by one of the general partners, with felonious intent, does not constitute embezzlement. *State v. Reddick*, 204.

9. SAME.— Under such general statute the subject of embezzlement must be the property of another, and partnership property cannot be said, with reference to either partner, to be the property of another. *Id.*

10. SAME.— Section 4036, Compiled Laws, declares that partners are trustees for each other. Section 3195 further defines who are trustees. Section 6799 provides when a trustee is guilty of embezzlement, but these sections do not have the effect to change the rule first announced. *Id.*

11. SAME.— The partnership is the owner of the property alleged to be embezzled, and these sections do not assume to make the partners trustees for the partnership, but for each other. *Id.*

12. BY ASSIGNEE.— On trial of an information for embezzlement, it appeared that the defendant was the assignee of an insolvent debtor, and that the assignment named the order in which creditors should be paid. A firm, of which defendant was a member, was second in the list of creditors, but defendant paid the debt of his own firm first, leaving little for payment of other debts. He also received $737 from sales of milk, and only accounted for $427. *Held*, that the evidence justified the verdict of guilty, as it was for the jury to say whether defendant intended fraudulently to appropriate the property. *People v. De Lay*, 185.

13. OFFERING TO RETURN FUNDS.— In such case, under the Penal Code of California, section 513, providing that if, prior to information laid charging embezzlement, the accused restore, or offer to restore, the property alleged to have been embezzled, such fact is not ground of defense, but goes only toward mitigation of the punishment, it could not avail that defendant offered to return the balance due from him as assignee. *Id.*

14. INDEMNIFYING BOND.— Nor is it a defense that defendant has given an indemnity bond for the amount of property coming into his hands as assignee. *Id.*

EVIDENCE.

1. OTHER OFFENSES.— And evidence that defendant had been suspected of larceny from his employers; that deceased, a fellow-employee, had been active in conducting a search of defendant's house for the missing articles; and that defendant had lost his position, and had threatened to "fix" deceased,— is admissible on the question of motive, though it may also show defendant guilty of a crime other than that for which he was being tried. *State v. Palmer*, 196.

2. SAME.— And that the wire netting on defendant's cell window had been cut, and that a razor and a gun wrench were subsequently found in his possession, is admissible, as consciousness of guilt may be inferred from an attempted escape. *Id.*

3. ARSON — OTHER ATTEMPTS.— Evidence of a previous attempt to burn the same building is admissible, where there is evidence that defendant, at the time of the previous attempt, took a horse, and went to the place to which he went at the time of the fire, but by a different route, and also evidence of a motive for the crime; as such evidence sufficiently connects defendant with the attempt. *State v. Ward*, 207.

4. TRACKS.— Where the evidence tended to connect defendant with the arson, and tended to show that the one who set the fire had with him a sleigh which made certain peculiar tracks, evidence that the sleigh which defendant had on the night of the fire fitted into the tracks is admissible, without evidence that defendant was actually seen with the sleigh upon the road. *Id.*

5. SAME.— Evidence that defendant desired to marry a certain woman, and that her foster parents, the owners of the buildings burned, influenced her against him, is admissible, as tending to show that defendant committed the crime in revenge. *Id.*

6. SAME.— Testimony of the woman tending to show an admission by defendant that on the night of the attempt, and also on the night of the fire, he used the team which the evidence associated with the perpetrator of the crime, was admissible. *Id.*

7. SAME.— Certain witnesses having testified that they had seen a sleigh pass along the street on the night of the fire, and standing in front of

defendant's house, they were properly allowed to testify that they had afterwards identified the sleigh as the one let to defendant; also one present at the time of the identification was properly allowed to testify of the fact. *Id.*

8. SAME.— The size of the tracks made around the buildings on the night of the fire having been proved, it was proper to allow an overshoe to be shown by one who testified that he had sold defendant a pair of the same size and width as the one shown. *Id.*

9. BRIBERY — ADMISSIONS OF DEFENDANT — APPEAL — OBJECTIONS FOR FIRST TIME.— A written statement of the evidence given by the defendant before the grand jury, which he has admitted to be correct, is admissible in evidence against him. The objection that the evidence was not shown to have been voluntarily given, or that the admission was made while in prison, cannot be raised on appeal for the first time. *People v. Northey*, 338.

10. SAME — ACCOMPLICE — EVIDENCE.— When counsel for defendant informs the court that he is going to contend that a juror to whom a bribe was offered was an accomplice with the defendant accused of offering the bribe, it is admissible for such juror as a witness to testify upon such collateral issue, and to illustrate his conduct, that he was advised by a third person, whom he had informed of the offer, to hear all that was to be said, and to seemingly acquiesce, so as to prevent the defendant from approaching other jurors, and that he acted in pursuance of such advice. *Id.*

11. DEPOSITION — NOTES OF SHORT-HAND REPORTER NOT A.— The notes of a short-hand reporter of testimony given orally upon a trial and read to the grand jury by the reporter are not a deposition, within the meaning of the statute requiring the name of a witness, whose deposition was given to the grand jury, to be inserted at the foot of the indictment or indorsed thereon. *Id.*

12. OFFERING A BRIBE — DOCUMENTARY EVIDENCE.— On the trial of an indictment for offering a bribe to a juror who served in a civil action, the complaint, answer and minutes of the court in such action are admissible in evidence to prove the allegation of the indictment, and to show that the juror to whom the bribe was offered served as a juror on the trial of such action, and it is proper to read them to the jury. *Id.*

13. READING DOCUMENTARY EVIDENCE TO JURY.— Whatever documentary evidence is admissible may be read to the jury, without regard to the purpose for which it is offered. *Id.*

14. PHOTOGRAPH OF LOCALITY.— A photograph of the locality where the deceased was killed, taken after the trial, with persons placed where defendant and his accomplices were said to have stood, is not incompetent, as tending to influence the jury. *Shaw v. State*, 426.

15. FLIGHT OF ACCOMPLICE — EVIDENCE.— Evidence of the disappearance of other persons accused of complicity in the homicide, and that, though every effort has been made to arrest them under warrants for their arrests, they could not be found, is not admissible to rebut evidence on the part of the defendant tending to prove that the homicide was committed in self-defense. *People v. Lee Chuck*, 434.

16. ALIBI.— Evidence that another person accused of complicity with the defendant in the homicide was found apparently in a place of hiding, to avoid arrest, several hours after the homicide, is not competent to prove an *alibi* attempted to be proved by the defendant, there being nothing to show that the whereabouts of such person tended in any way to establish the presence of the defendant at the place of the killing. *Id.*

17. STATEMENTS BY WITNESS ON FORMER TRIAL.— Where a witness is interrogated with regard to statements made by him at a former trial, he

has the right, if such statements were reduced to writing, to have the writing presented to him and read. *Id.*

18. MANSLAUGHTER — ACT NOT MALUM IN SE — RES GESTÆ.— In a case of homicide the narration of the transaction given by the injured man a few minutes after the affair, and after the defendant had left, is not admissible in evidence as a part of the *res gestæ*. *Estell v. State*, 514.

19. MANSLAUGHTER — SUFFICIENCY OF EVIDENCE.— Evidence that defendant and his wife had both been drinking; that he allowed the wife to lie on the ice all night, poorly clad, near the house; that he and an employee, who lived with him, brought her to the house next day, when she died, no effort having been made to get medical aid, is sufficient to sustain a verdict of guilty of manslaughter. *Territory v. Manton*, 521.

See ACCOMPLICE AND ACCESSORY; AFFRAY; PERJURY.
Impeachment of witness, see WITNESS.

Adultery: Real names of parties which differ from names in marriage certificate may be shown. *People v. Stokes*, 14.

See FALSE PRETENSES, 5, 6, 7; BODY STEALING.
Non-experts, see INSANITY; FORNICATION.

EXTRADITION.

1. DEFECTIVE PAPERS.— One arrested and detained under extradition papers and a *capias* issued under an indictment for grand larceny, and taken into the state where the offense was committed, will not be released on *habeas corpus* for the reason that the extradition papers were defective and failed to charge a crime, except on complaint of the authorities of the state from which the prisoner was extradited. *Ex parte Barker*, 236.

2. HABEAS CORPUS — WRIT OF ERROR.— A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. *In re Cortes*, 241.

3. SAME.— If the commissioner has jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court on *habeas corpus*, either originally or by appeal. *Id.*

4. SIMILAR OFFENSE — MEANING OF THE TERM.— In section 5 of the act of August 3, 1882, chapter 378 (22 Stat., 216), the words "for similar purposes" mean "as evidence of criminality," and depositions, or other papers, or copies thereof, authenticated and certified in the manner prescribed in section 5, are not admissible in evidence on the hearing before the commissioner, on the part of the accused. *Id.*

FALSE PRETENSES.

1. WITCH DOCTOR.— Representations that defendant was a witch doctor and could kill and destroy witches; that the person to whom the representations were made was the victim of witches; and that unless he employed defendant to exorcise them they would kill him and his family, constitute no offense, being mere expressions of opinion, and not calculated to deceive a man of common understanding. *State v. Burnett*, 259.

2. SUFFICIENCY OF REPRESENTATIONS.— As a matter of pleading, the question of the sufficiency of such representations to deceive a man of common understanding is one of law for the court. *Id.*

3. COMPLAINT DEFECTIVE.— If an affidavit on which a prosecution is based is bad for any reason, it is the duty of the court to sustain a motion to quash it without reference to the particular ground assigned in the motion. *Id.*

4. INTENT—ALLEGATION OF.—Under the Criminal Code of Alabama of 1886, sections 3811, 4383, allowing the intent, in an indictment for attempting to obtain money on false pretenses, to be alleged in the alternative, "to injure or defraud," an indictment charging an "intent to defraud" alone is sufficient. *White v. State*, 225.

5. PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT.— Defendant was arrested for attempting to obtain money on false pretenses from a railroad company. It was alleged that he sought to obtain damages for two trunks which he falsely claimed had been lost by the company. *Held*, that the attorney of the defendant was properly required to testify as to his employment by defendant to demand compensation from the company. *Id.*

6. SAME.— An application by the attorney of defendant to the railroad company for compensation for the loss of the trunks and presentation of the checks for the same, under implied authority to do anything necessary for the prosecution of the demand, was within the scope of his authority, and was the act of his client. *Id.*

7. CIRCUMSTANCES TENDING TO SHOW GUILTY KNOWLEDGE.— Evidence that the wife of defendant was on the platform of the station where the trunks were delivered, and to which they were checked, and that she was traveling with her husband, and that she afterwards wore some of the dresses that were in the trunks, was properly admitted to show proper delivery and knowledge of that fact by defendant. *Id.*

8. SUFFICIENCY OF INDICTMENT.— An indictment for obtaining goods by false pretenses, which alleges that defendant falsely represented that he was the owner of certain property, and obtained the goods by giving a mortgage thereon, is sufficient, as the false representations were the direct, and not the remote, means by which defendant obtained the goods, even though they would not have been delivered to him but for the mortgage. *Com. v. Lee*, 249.

9. SUFFICIENCY OF EVIDENCE.— Where the owner of the goods testifies that he parted with them on the strength of the statements made by defendant, and also "on the statements and the mortgage," and the jury find the statements to be false, it is proper to refuse a ruling that the evidence does not support the charge of false pretenses, where the jury are instructed to acquit if the owner parted with his goods independently of the statements. *Id.*

10. INSTRUCTIONS.— The fact that the false statements were incorporated in the mortgage given as security for the goods would not free defendant from liability for making the statements, though he could not be convicted by reason of breach of covenants in the mortgage; and an instruction that "unless the jury find that some other false pretenses were made besides those to which the covenants in the mortgage relate, the defendant cannot be convicted," was properly refused. *Id.*

11. SAME.— An instruction that, if the seller had means of knowing that the property was not defendant's, the indictment could not be sustained, was properly refused, as the seller had the right to rely on defendant's statements. *Id.*

12. SAME.— An instruction that "if the jury find that the bargain in which the alleged false pretenses were made, and its object, was to secure James for a past debt and a future credit, then the defendant cannot be convicted," was properly qualified by adding: "If the defendant, at the time such representations were made, obtained any of the property . . . by reason of the alleged false pretenses, the indictment might be sustained." *Id.*

FORGERY.

1. FORGERY — WHAT CONSTITUTES OFFENSE.— A false instrument or writing, made out with criminal intent to defraud, which is good on its face, may be legally capable of effecting the fraud, even though inquiry into extrinsic facts, or matters not appearing on its face, would show it to be invalid, even if it were genuine; therefore, the forging of such an instrument or writing is an offense under the statute (secs. 120, 139, Crimes Act). *State v. Hilton*, 261.

2. LIFE INSURANCE BLANKS — PROOFS OF DEATH.— One B. had his life insured in a mutual benefit insurance company of Ohio. One of the officers of the company received a notice that B. had died in this state. Upon receiving the notice he forwarded blanks for proof of death to the address of the beneficiary in the policy of the alleged deceased, the blanks being in the forms of proofs of death in use by the company. The defendant was appointed a committee to investigate the cause of the death of B., and after a short time the proofs of death were sent by him from this state to an officer of the insurance company in Ohio. These proofs of death were false and untrue, because, in fact, B. was not dead, as alleged. The papers returned by the defendant to the company were headed: "Official Notice and Proof of Death." On the first page there appears in blank "the foregoing, and the report of the committee, together with the certificates thereunto annexed," with certain questions purporting to be answered concerning the death of the alleged deceased. The certificate of the attending physician, with the statement of an officer, under oath, that the physician is respectable, entitled to credit and engaged in active practice, the report of the council examining committee on the cause of the alleged death, and an undertaker's affidavit and a clergyman's certificate, etc. Upon receiving the proofs of the alleged death, the insurance company discovered that there was a material discrepancy in the proofs presented, and upon investigation caused the arrest of defendant for the forgery of the undertaker's affidavit and the clergyman's certificate. *Held*, that the false affidavit and certificate which the defendant executed must be treated as complete and separate instruments, and the same as though they were wholly detached from the other papers constituting the proofs of death; and being in the exact form required by the insurance company, and not being in any way invalid or defective upon their faces, are the subject of forgery, within the terms of the statute. *Id.*

3. WHAT SUBJECT OF FORGERY.— An instrument in the following form: "Mr. Goldstone Please let Bare Have the sume of $5 Dollars in Grosses and charge the same to DR F T Cook."— is not incomplete or unmeaning, without the averment of extrinsic facts, and is a subject of forgery. *Hendricks v. State*, 279.

FORGERY — UTTERING, WHAT IS.

1. FORGED RELEASE OF MORTGAGE.— The recording of a forged discharge of a mortgage constitutes the uttering of a forged instrument as an "acquittance and discharge for money," though the note secured is still outstanding, as the discharge, if genuine, would discharge the note as well as the lien. *People v. Swetland*, 283.

2. BEST EVIDENCE.— On an information for uttering a forged release of a mortgage, by recording the release, the mortgagee, by whom the instrument purported to be signed, testified that he did not sign it. The notary whose name appeared on the instrument testified that he was almost certain that he did not take the acknowledgment. The two witnesses whose names appeared, and were necessary to a valid execution of the instrument, were not sworn, nor did their names appear on the information. *Held*, that they were necessary witnesses for the people, and must be produced or their absence accounted for. *Id.*

3. EVIDENCE OF PAYMENT OF INTEREST AFTER RELEASE.— The notes secured by the mortgage were in evidence, and showed payments of interest made after the recording of the discharge. The mortgagee testified that these payments were received by him from a certain person to whom they were made, and who had the papers in his office. *Held*, that this testimony was improper unless supplemented by that of the person receiving the payments, as it might have been used as showing the falsity of the discharge. *Id.*

4. MOTIVE — MORTGAGING SAME LAND.— Testimony of a person that, about a year after the discharge was recorded, defendant mortgaged the same land to him, and furnished an abstract which was identified in evidence, and showed the former mortgage discharged, was competent, both as showing a motive for uttering the discharge and as tending to prove that she uttered it knowing it was forged. *Id.*

5. SAME.— The record of a mortgage of part of the land covered by the discharged mortgage, and executed after the filing of the discharge, was inadmissible without proof connecting it in some way with the transaction in question, as the jury might infer that an abstract similar to the one in evidence was given, or be prejudiced against defendant as having wronged the mortgagee. *Id.*

6. CORPUS DELICTI — PRACTICE.— It was not necessary under the information to prove the *corpus delicti* before proving admissions of defendant, as the *corpus delicti* depended for its existence on the acts and intent of defendant. *Id.*

FORMER JEOPARDY.

NOLLE PROSEQUI WITHOUT PRISONER'S CONSENT.— That a *nolle prosequi* was entered without the prisoner's consent after issue was joined and the jury were sworn will bar a subsequent indictment for the assault with intent to murder, where the first indictment alleged that offense, and was good and sufficient for a simple assault, even if not so for the aggravated assault charged. There can be no second jeopardy as to either grade of assault, and, as the major includes the minor, the second indictment comprehends the same simple assault of which the accused was acquitted on the first indictment. *Franklin v. State*, 291.

FORNICATION.

1. SINGLE STATE OF COMPLAINANT.— The omission to prove that the complaining witness in an indictment for fornication was a single woman is not error; the single state, being the natural state, will be presumed until testimony to the contrary is offered. *Gaunt v. State*, 297.

2. RESEMBLANCE BETWEEN BASTARD AND PUTATIVE FATHER.— Upon the trial of an indictment for fornication, where both the bastard and the putative father were viewed by the jury, the jury may consider whether there is a resemblance or not between them. In such cases, the proper instrument of proof is inspection by the jury, and not the testimony of witnesses. *Id.*

GAME LAWS.

1. GAME KILLED IN ANOTHER STATE.— Howell's Statutes of Michigan, section 2199, providing that "colin or quail" can only be killed during the months of November and December of each year, and section 2202, providing that "no person shall sell or expose for sale, or have in possession, etc., any of the kinds of species of birds protected by this act, after the expiration of eight days next succeeding the times limited and prescribed for the killing thereof," when construed together with act No. 68, Public Acts of 1887, providing that in all prosecutions for

violations of laws for the protection of game, proof of its possession at any time when, etc., shall be *prima facie* evidence of a violation of the law, do not prohibit the having in possession and exposing for sale at any time quail killed in another state and afterwards brought into this state for sale. *People v. O'Neil*, 302.

GAMING.

1. GAMING DEVICE — PLAYING-CARDS. — Ordinary playing-cards, when used for playing any game for money or property, are not a gambling device within the meaning of the Revised Statutes of 1879, section 1547, as amended by the act of March 9, 1881, prohibiting the setting up or keeping of any "table or gambling device commonly called A, B, C, faro-bank, E. O, *roulette*, equality, keno, or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property." *State v. Gilmore*, 312.

2. SAME. — The proprietor of a saloon who gives out cards and sells chips or checks to persons frequenting his dram-shop who call for the same for the purpose of playing seven-up, etc., with each other, on the tables in the bar-room, and who takes no part in the games so played by his customers, is guilty of the offense prohibited by the Revised Statutes of 1879, section 1549, and should be indicted and tried under that section. *Id.*

3. SAME. — A violation of section 294, Penal Code, which prohibits gambling with cards, etc., is a misdemeanor, and is punishable under section 13. *State v. Shaw*, 321.

4. WHAT CONSTITUTES GAMBLING. — The risking of money between two or more persons on a contest of chance of any kind, where one must be the loser and the other the gainer, is gambling. *Id.*

5. HORSE RACING. — For such purposes a horse race is a game, and betting thereon is punishable under section 296. *Id.*

6. SAME. — The "boards and lists" described in the indictment, and alleged to be kept and used by defendants, and descriptive of horse races, and the times and places of such races, are not "gambling devices" within the intent and meaning of the statute. No additional element of chance is introduced thereby, and the determination of the alleged games are not affected by their use. *Id.*

7. STUD-POKER. — The dealer of a game of stud-poker is an accomplice with those who bet money or value at such game. Both are necessary to complete the offense, each performing a separate and necessary part in the violation of the statute. *State v. Light*, 326.

See INDICTMENT, 2, 3.

GRAND JURY.

1. FREEDOM FROM BIAS — EXAMINATION. — One of the grand jurors who found an indictment for murder in the first degree against defendant was examined at length as to his freedom from bias, and the material part of his examination is set out in the opinion (which see), from which it appears that he had engaged in some talk of lynching the defendant; but held that the examination evidenced a state of mind reasonably free from any prejudice or conviction that should disqualify him, and the court did not err in allowing him to sit on the case. *State v. Billings*, 329.

2. NUMBER NECESSARY TO INDICT. — In a county where, under the present statute, the grand jury consists of five members, and a challenge is sustained as to one and his place is not filled, the remaining four may, if they all concur, find a valid indictment. *State v. Shelton*, 64 Iowa, 333, followed in principle. *Id.*

3. BIAS OF JURORS — FORMATION OF PREVIOUS OPINION. — The previous opinion which disqualifies a grand jury is one formed from mere hearsay, without the sanction of an oath. The formation of an opinion of the guilt of a party indicted by the grand jury, from his testimony under oath given before them, upon a similar charge against another person, is no disqualification. *People v. Northey*, 338.

4. SAME — SCOPE OF INQUIRY OF GRAND JURY — BIAS. — A grand jury has, within the scope of its inquiry, all public offenses committed or triable within its county; and though it takes up a charge against one person, if it appears from the testimony taken on such examination that sufficient reasons exist for putting another person on his trial, they can and should find an indictment against such person. An opinion of the guilt of such person so formed involves nothing of bias or prejudice, though the indictment against him be not directed on the same day. Nor does the calling of other witnesses, before finding such indictment, indicate bias or prejudice of the jurors. *Id.*

5. SAME — PRESENCE OF GRAND JURY IN COURT. — The fact that two of the grand jurors were in court when another person was on trial for the same offense, and heard the defendant plead his constitutional privilege as a witness, is of no significance, if it does not appear that it had any effect upon the indictment of the defendant. *Id.*

6. GRAND JURY — OBLIGATION OF SECRECY. — The rule of secrecy of the proceedings before a grand jury is intended only for the protection of the grand jurors, and the witnesses before them cannot invoke it, and the fact that a person was called, sworn and examined as a witness before the grand jury does not come within the rule of secrecy, and a grand juror may testify to such fact. *Id.*

HABEAS CORPUS.

1. TERMS OF COURT ILLEGALLY CALLED. — The terms of the supreme court of the District of Columbia are appointed by the court in general term, pursuant to 25 Statutes at Large, 749, to begin on the first Tuesdays of January, April and October. The rules of the court provide for the prolongation of a term only for the purpose of signing and settling bills of exceptions. *Held*, that one term could not be continued after the commencement of the next succeeding term, and a judgment entered in July, under the heading "January term, 1890, continued," by which a sentence pronounced at the January term, 1890, is set aside as invalid, and a new sentence pronounced, is void. *Ex parte Friday*, 351.

2. SENTENCE VOID AND VOIDABLE. — Revised Statutes of the United States, section 5541, provides that when a person convicted of an offense against the United States is sentenced to imprisonment "for a period longer than one year the sentence may be executed in a state penitentiary." *Held*, that a sentence in such case of imprisonment "for one year" in a state penitentiary is not void, but, if objectionable at all, is merely irregular, in that imprisonment in a state penitentiary for a period "not longer than one year" is imposed. *Id.*

3. SAME. — Revised Statutes of the United States, section 5541, provides that when "any person convicted of an offense against the United States is sentenced to imprisonment for a period not longer than one year" the sentence may be executed in a state penitentiary. Section 5542 provides that "in every case where any criminal conviction of any offense against the United States is sentenced to imprisonment and confinement at hard labor," the sentence may be executed in a state penitentiary. *Held*, that section 5541 applies to cases where the punishment is imprisonment only, while section 5542 applies to cases where the punishment is imprisonment at hard labor; and where a person is convicted of an offense against the United States, punishable by imprisonment at hard labor, the sentence may be executed in a state penitentiary, though it is not "for a period longer than one year." *Id.*

4. SAME.— Revised Statutes of the District of Columbia, section 1141, provides that a person convicted, among other offenses, of larceny, shall be imprisoned "in the penitentiary" for a certain period. Section 1158 provides that a person convicted of grand larceny "shall be sentenced to suffer imprisonment and hard labor for a period not less than one year." *Held*, that where a person is convicted of grand larceny sentence can be executed only in a penitentiary. *Id.*

See EXTRADITION.

INCEST.

1. BETWEEN FATHER AND ILLEGITIMATE DAUGHTER.— Under Penal Code, section 302, providing that "persons, being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, . . . who shall commit adultery or fornication with each other, shall, upon conviction, be punished," etc., a father who has sexual intercourse with his illegitimate daughter is guilty of incest. *People v. Lake*, 364.

2. VARIANCE IN NAME.— An indictment for incest described the female as "Georgiana Towne, commonly known as 'Georgiana Lake.'" It appeared that her real name was Georgiana Jeanette Lake, and that she was generally spoken of as "Nettie Lake." *Held*, no variance, there being no question as to the identity of the female. *Id.*

3. ACCOMPLICE.— In a trial for the crime of incest, the party to the crime not on trial is an accomplice, and the other party cannot be convicted on her evidence, unless she be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission. *State v. Jarvis*, 367.

4. IMPEACHING QUESTION.— The declarations contained in an impeaching question, when contradicted, only tend to impeach the character of the witness attacked for truth and veracity, and are not evidence of the facts recited in such declarations. *Id.*

5. SINGLE SEXUAL ACT.— In a prosecution instituted and conducted under section 7019, Revised Statutes, it is not necessary to aver or prove more than a single sexual act. *State v. Brown*, 373.

6. ALLEGATION OF KINSHIP.— The kinship of the parties sufficiently appears by an averment that the sexual act was committed by persons who bore the relation of uncle and niece to each other; that kinship being, by law, nearer than that between cousins, it is unnecessary to allege that it is so. *Id.*

7. SAME.— An averment that the parties were not husband and wife is not necessary; for the statute (sec. 7019) prohibits sexual commerce between persons "nearer of kin . . . than cousins," whether they have gone through the form of marriage or not. *Id.*

INDICTMENT AND INFORMATION.

1. VENUE — VARIANCE.— Under Code of Iowa, section 4160, which provides that "when a public offense is committed on the boundary line between two or more counties, or within five hundred yards thereof, the jurisdiction is in either;" and section 4306, declaring that "no indictment shall be deemed insufficient . . . or . . . be affected by any matter which was formerly . . . a defect, but which does not tend to prejudice the substantial rights of the defendant on the merits,"— an indictment charging the offense to have been committed in R. county, when it was in fact committed in T. county, within five hundred yards of the T. county line, is sufficient, and not prejudicial to the rights of defendant. *State v. Pugsley*, 100.

2. ALTERNATIVE ALLEGATION.— A driver of a steam tram-car was prosecuted and convicted for having permitted smoke to escape from his engine, "contrary to the by-laws of the board of trade, made for the regulation of traffic on the said company's lines." The by-law in question provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or to the public," under a penalty. *Held*, that the by-law created offenses in the alternative, and that, as the information and conviction did not set forth distinctly with which of these alternative offenses the defendant was charged, the conviction was bad. *Cotterill v. Lempriere*, 383.

3. PRACTICE AS TO SETTING ASIDE INFORMATION.— An information will not be quashed, on the ground of illegality of the commitment, merely for slight informality or irregularity before the committing magistrate; but it must at least appear that the defendant was deprived of some substantial right. *People v. Rodrigo*, 53.

4. INDORSEMENT OF NAME OF DEFENDANT AS WITNESS.— If the defendant has testified before the grand jury, it is not necessary to indorse his name upon the indictment as a witness; and the failure to do so is not ground of motion to set aside the indictment. *People v. Northey*, 338.

5. TIME — ALLEGATION OF.— An indictment must allege a particular day on which the offense was committed, even if it be set out with a *continuando*. *State v. O'Donnell*, 390.

6. SAME.— Where an indictment, found on the first Tuesday of May, 1888, was rendered defective by charging the offense to have been committed, with a *continuando* on a date practically impossible (May 15, 1807), the entering a *nol. pros.* to acts prior to May 15, 1887, will not cure the defect. *Id.*

7. INDICTMENT PREFERRED EX MERO MOTU — MOTION TO QUASH — ORDERS OF DIFFERENT JUDGES.— If an indictment is preferred by a grand jury *ex mero motu*, not based on their personal knowledge, an investigation of some general or public evil to which their attention has been called by the charge of the court, or a bill sent in by the prosecuting attorney, and no preliminary hearing of the charge has been had by the accused, it is in the discretion of the court in which it is found to quash it; and when no extraordinary circumstances to justify such hasty procedure are shown, such as danger of escape, etc., it is not an abuse of such discretion to quash an indictment so found for keeping a disorderly house. *Com. v. Green*, 391.

8. SAME.— It is immaterial that the indictment was sent in by leave of the court after the grand jury had returned a presentment on which the indictment was framed by the prosecuting attorney, as such leave could be revoked after the court learned of the unauthorized manner in which the jury acquired knowledge of the offense. *Id.*

9. SAME.— Though such leave was granted by one judge, the motion to quash could be passed on and granted by another judge. *Id.*

10. GRAND JUROR AS WITNESS.— A member of the grand jury is competent to testify as to the manner in which the jury acquired information of the alleged offense. *Id.*

11. MOTION TO QUASH PENDING PLEA OF NOT GUILTY.— A motion to quash an indictment may be entered pending a plea of not guilty, and will not affect a withdrawal of the plea. *State v. Reeves*, 698.

12. OTHER INDICTMENT.— A plea in abatement setting up the pendency of another indictment against defendant for the same offense cannot be maintained. *White v. State*, 225.

13. GAMING — UNNECESSARY TO ALLEGE NAMES.— In an indictment for betting at a game played with cards called "stud-poker," it is not neces-

sary to allege the names of other persons who bet at the game at the same time, or to allege that they are to the grand jury unknown. *State v. Light*, 326.

14. STATUTORY OFFENSE.— In an indictment for a statutory offense it is generally sufficient to follow the descriptive words of the statute defining the crime. *Id.*

15. MOTION TO SET ASIDE INDICTMENT — CUMULATIVE PROOF OF BIAS — CONTINUANCES.— The court may properly refuse to delay the hearing of a motion to set aside an indictment for bias of the grand jurors when it appears from the statement of counsel asking the delay that he expects to prove the same sort of prejudice, partiality or bias of another grand juror, on the same facts as existed and were proved in regard to other jurors, which facts were no legal indication of bias or prejudice. *People v. Northey*, 338.

16. MISNAMING OFFENSE IN CAPTION.— A wrong name given to a crime in the preliminary part of an indictment is an irregularity only and not fatal. The charging part of the indictment must be looked to, to determine the character of the offense. *State v. Jarvis*, 367.

17. DUPLICITY.— An indictment which charges more than one crime under our code is bad, and, if the objection be taken by demurrer at the proper time, it must prevail, but if the objection be not thus taken it is waived. *Id.*

18. DESCRIPTION OF STOLEN PROPERTY.— If bills alleged to be stolen are not sufficiently described in the indictment, the indictment should be demurred to. The witnesses may give such description of them in the testimony as may be consistent with truth and not inconsistent with what is stated in the indictment. *Roberts v. State*, 474.

See FALSE PRETENSES, 3, 8, 9.
Variance, see INCEST, 2; MAYHEM, 3; MURDER, 5, 6.
Quashing the, see PERJURY, 3, 4.
See ASSAULT — INDECENT ASSAULT; COUNTERFEITING, 5.

INSANITY.

1. ACTS OF DEFENDANT SUBSEQUENT TO HOMICIDE.— When insanity has been pleaded in defense to a prosecution for murder, acts of defendant subsequent to the homicide indicating insanity are admissible only when they tend to prove that he was insane at the time of the homicide. *State v. Lewis*, 574.

2. SAME.— The exclusion of certain questions is harmless error, when anything advantageous to the party asking them that could have been answered to them was brought out in other parts of the witness' testimony. *Id.*

3. NON-EXPERTS AS WITNESSES.— Witnesses who are not experts may testify to their belief as to the sanity or insanity of accused without giving the facts upon which their belief is based. *Id.*

4. SAME.— A person who had known accused for four months, had seen him every day during that time, had sat at the same table and eaten with him once or twice, had observed his manner of speech and conversation, had seen him in the evening and night before the homicide, and had had considerable conversation with him on the day after, is a competent witness as to sanity of accused. *Id.*

5. TEST OF CRIMINAL RESPONSIBILITY.— A man who has sufficient reason to know that the act he is doing is wrong and deserves punishment is legally of sound mind, and is criminally responsible for his act. *Id.*

6. BURDEN OF PROOF.— Insanity as a defense to crime must be established by a preponderance of evidence. *Id.*

7. INSANE DELUSION. — An insane delusion is an incorrigible belief, not the result of reasoning, in the existence of facts which are either impossible absolutely or are impossible under the circumstances of the particular case. *Id.*

8. SAME — WHEN IT WILL EXCUSE CRIME. — An insane delusion is not a defense to a prosecution for crime unless it would excuse the crime if the facts about which it exists are true. *Id.*

INSTRUCTIONS.

1. DEFINITION OF WORDS IN STATUTE. — It is not error for the court, in giving a general charge to a jury upon its own motion, to omit to give a definition of words used in the statute and indictment under which the trial is had; such words being of general use and not technical terms nor words of art. A party desiring such words defined to the jury should prepare and submit instructions for that purpose. *Henderson et al. v. People*, 5.

2. HARMLESS ERROR — INCONSISTENCY. — On an indictment for unlawful disinterment, a charge was made to the jury that before they could find the defendant guilty they must find that "he unlawfully dug open the grave mentioned in the indictment, and removed therefrom the remains, . . . or that he advised, assisted or was in some way connected with the digging up and removal of said remains:" and another paragraph of the charge said: "If you find from the evidence that the body was interred at M., and was, without legal authority, disinterred . . . . and removed, and that defendant aided, . . . encouraged, . . . enticed, or in any manner procured the same to be done, then you should find him guilty." *Held*, that although the first paragraph of instruction is erroneous, there being no evidence to show that defendant dug up, or aided or assisted in any way in the removal of the body from the grave, yet, in view of the second paragraph of the instruction, the jury could not have been misled, and that, therefore, the defendant was in no way prejudiced. *State v. Pugsley*, 100.

3. ALIBI. — An instruction that the introduction of false evidence of an *alibi* constituted a circumstance against defendant, and was inferential admission of guilt, but not conclusive; that the fact that he had been guilty of introducing it should be established beyond all question; and that, if the evidence of such fact was doubted, no weight should be given it, — was correct. *State v. Ward*, 207.

4. CREDIBILITY OF DEFENDANT'S WIFE AS AFFECTED BY HIS CHARACTER AND MOTIVES. — On the trial of defendant for the murder of one Kingsley, the court instructed the jury as follows: "Even though you may may believe from the evidence before you that the defendant has been of base and degraded life, and that he was, from sordid motives of personal gain, pressing a false charge against Kingsley, or even that defendant and his wife had conspired together to extort money from him, or that the evidence shows that defendant was guilty of other crimes not charged in this indictment, none of such considerations will warrant you in convicting the defendant on this indictment; nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive toward the deceased." Defendant's wife was a very important witness in his behalf. *Held*, that the instruction was erroneous. *State v. Billings*, 329.

5. TRIAL — IRREGULARITY — REMARKS OF JUDGE — INSTRUCTIONS CURING ERROR. — A remark of a judge, during a criminal trial, that he thought "the prosecution in criminal cases was too much handicapped," is not ground of reversal, if the judge subsequently instructs the jury to

disregard the remark, and so cautions them as to remove all apprehension that the remark would have any effect on the mind prejudicial to the defendant. *State v. Northey*, 338.

6. OMISSION OF COURT TO INSTRUCT JURY.— It is a general rule in all cases that an omission of the court to instruct the jury on any point is not error, unless a proper instruction is asked by counsel and an exception taken to the refusal of the court to give it. *Id.*

7. TAKEN AS A WHOLE — INSTRUCTION LIMITING EFFECT OF EVIDENCE.— If evidence is offered for a special purpose, which the party against whom it is offered fears may operate prejudicially if not limited in its scope to such purpose, he must request an instruction so limiting it, or he cannot assign the failure of the court to instruct on such point as error. *Id.*

8. INSTRUCTIONS.— Where an instruction on a certain point, standing alone, is open to criticism, but the instructions, taken as a whole, fairly state the law on such point, there is no ground of objection. *People v. Lee Chuck*, 434.

9. DEFINING DISTINCTION BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE.— An inaccurate statement in the charge as to the distinction the law makes between direct and circumstantial evidence will not vitiate the verdict, the court having correctly instructed the jury as to the legal definition of both classes of evidence, and afterwards charging that reasonable doubt was to be given in favor of the accused. *Roberts v. State*, 474.

10. INSTRUCTIONS — MUST BE BASED ON EVIDENCE.— In a trial for murder, occasioned by the collision of two vehicles, one of which defendants were driving, an instruction submitting to the jury the question whether defendants were active in causing the collision by urging their team on, no evidence of such fact having been introduced, and the only reference to it in the record being the statement of counsel explaining why it had not been proved, is improper. *Belk et al. v. People*, 507.

11. MURDER — WILFUL EXPOSURE.— An instruction that, if deceased was defendant's wife, and she was in such condition as to be unable to protect herself, and to reach shelter, and defendant knew her condition, and, from the circumstances, the temperature, his wife's wrappings, and where she lay, and the length of time he left her exposed, had reason to believe that leaving her there would endanger her life, and if he wilfully so left her, and her death was caused by such exposure, he is guilty of murder,— is proper. *Territory v. Manton*, 521.

12. MANSLAUGHTER — INSTRUCTION DEFINING — SURPLUSAGE.— Instructions defining manslaughter, voluntary and involuntary, in the words of the statute, are proper, and portions relating to "sudden heat of passion," and "the performance of a lawful act not felonious," or "without due care and caution," may be rejected as surplusage, and an instruction that "death resulting from the wilful omission of duty is murder," and if, beyond a reasonable doubt, deceased came to her death by reason of defendant's wilful neglect of duty towards her, he is guilty of murder, if all the other elements of the crime are proved,— is proper, and not objectionable because irreconcilable with those defining manslaughter. *Id.*

13. JUSTIFICATION — BURDEN OF PROOF.— An instruction that, "the killing being proved, the burden of proving circumstances of mitigation," or justification or excuse, is on defendant, is not objectionable as leading the jury to believe that, as soon as death is proved or admitted, the burden is then on defendant. *Id.*

14. INSTRUCTION NOT ASKED FOR.— An instruction to consider her drunkenness, on the question whether she was of so violent a disposition that defendant could not control her, is not erroneous, on the ground that

the jury should have been told to consider it in determining whether she died from drunkenness or exposure, where the latter instruction was not asked for. *Id.*

15. STATEMENT OF FACT.— An instruction that the jury may take into consideration any previous difficulties and quarrels between deceased and the prisoner as evidence of malice is not erroneous as stating a fact to the jury. *Id.*

16. A REQUEST TO CHARGE which embraces a statement that a material fact is not material, or that it makes no difference, should be denied. *McCord v. State*, 636.

See AFFRAY, 3.

Defining deadly weapon, see ASSAULT WITH DEADLY WEAPON; FALSE PRETENSES, 10, 11, 12.

INTOXICATING LIQUORS.

1. SALE TO MINOR.— A statute which forbids the sale, giving or furnishing of liquor to a minor is violated although the liquor delivered to the minor be intended for the use of an adult, the infant being only an agent in making the purchase. *People v. Garrett*, 399.

2. SALE OF BITTERS.— Whether the sale of "bitters," consisting of twenty per cent. alcohol, and the remaining eighty per cent. water, herbs, barks, roots, etc., is a violation of a prohibitory liquor law, depends upon the question whether in such article the distinctive character and effect of intoxicating liquor are present, so that it may be used as an intoxicating beverage, notwithstanding the other ingredients. If it cannot be so used, if the other ingredients are medicinal, and the alcohol is a necessary preservative or vehicle for them, the sale is lawful. *Carl v. State*, 404.

3. SAME.— It was competent to prove the intoxicating character of the bitters in question by the experimental effect of their use, or by the opinion of a witness not an expert, but who had had personal experience or observation such as to enable him to form a correct opinion. *Id.*

4. SAME.— It was also proper to prove that the bitters were bought and used for a beverage, and drunk as such by many persons in the community or elsewhere. *Id.*

5. PRACTICE.— Code of Criminal Procedure of New York, section 56, provides that "subject to the power of removal provided for in this chapter, courts of special sessions . . . have, in the first instance, exclusive jurisdiction to hear and determine" a complaint for violating the excise law. During a preliminary hearing on a complaint to determine whether a warrant should issue, the attorney for the complainant notified the justice that the people would proceed no further before him, but would go before the grand jury; whereupon the justice sent the papers to the district attorney, and did nothing further, though no order of discontinuance was entered. *Held*, to amount to a withdrawal and discontinuance of the case, surrendering the justice's jurisdiction, and giving the grand jury jurisdiction of the complaint. *People v. Andrews*, 410.

6. CLUB — SALE TO PERSON NOT A MEMBER.— Delivery by a steward of a club, of liquors, upon the order of a member, to a person not a member, and payment therefor by the member to the steward, is a sale of intoxicating liquors, within the New York statute forbidding such sale without a license. *Id.*

JUDGMENT.

1. EX POST FACTO LAWS — EXECUTION OF CRIMINAL.— Act of seventh general assembly of Colorado, substituting the state penitentiary for the county jail as the place of confinement pending execution, and

directing that the executions, which had before taken place publicly, should thereafter take place within the penitentiary walls, is not in these respects *ex post facto* as to one under sentence when the act took effect, as it does not change the punishment to his disadvantage. *In re Tyson*, 418.

2. SAME.— Nor is the act *ex post facto* in that it designates the confinement as solitary, where it also provides that the accused may be visited by "attendants, counsel, physician or spiritual adviser, . . . and members of his family." *Id.*

3. SAME.— Under the former law, the execution could not take place within fifteen days from sentence. The later act provided that the judge should designate "a week of time within which such sentence must be executed. Such week so appointed shall be not less than two nor more than four weeks from the day of passing such sentence." *Held* that the "week of time" was a calendar week, beginning Saturday at midnight, and hence the execution could not, under the new law, take place within fifteen days of sentence, and the law did not shorten the time before execution. *Id.*

JURY.

1. NUMBER OF CHALLENGES.— A defendant in a criminal trial is only entitled to two peremptory challenges unless he is on trial for a capital offense, and the facts that he had been indicted for murder in the first degree; that a jury of thirty-six had been summoned and were in attendance for his trial; that a *nolle* was then entered as to the charge of murder in the first degree; and that a jury to try him for murder in the second degree was being impaneled from the thirty-six jurors so in attendance,— did not enlarge his right in this respect. *Goins v. State*, 19.

2. OPINION OF JUROR AS TO GUILT OF ACCUSED.— A juror who states on his examination that he has formed an opinion on a matter affecting the guilt of the defendant from having heard the circumstances of the crime related by one who claimed to know them may nevertheless be competent to sit as a juror if he says on oath that he believes he can render an impartial verdict in the case, and the court is satisfied he can do so. *Id.*

3. MISCONDUCT — ATTENDING PRAYER-MEETING.— In a murder trial, before the arguments were finished, after adjournment for the night, the bailiff took the jury from the room where he was ordered to keep them, to a prayer-meeting conducted by the active prosecutor in the case, who assigned them seats. Some of the congregation left before and some after the jury. *Held*, that the misconduct of the bailiff and jury was so gross that a new trial must be granted, though the affidavits for the state show that no reference was made to "any law case," that no one spoke to the jury, and the affidavits of the latter were to the effect that they were in no way influenced in their verdict by anything occurring while absent from the jury-room. *Shaw v. State*, 426.

4. DRINKING LIQUOR.— The drinking of intoxicating liquor by a jury while deliberating on their verdict in a prosecution for murder is cause for setting aside a verdict of guilty, and it is not necessary to show that defendant was actually injured thereby, though the Penal Code of California (§ 1181, subd. 3) provides for a new trial where the misconduct prevents a fair consideration of the case. *People v. Lee Chuck*, 434.

5. COMPETENCY OF JUROR.— A juror stated on his *voir dire* that he did not know the defendant or the prosecutrix, but remembered reading of the case when it occurred, and thought it a hard case, and could not say that he had no opinion in the case, but that his opinion would not prejudice him as a juror; that, although the newspaper report pro-

duced an opinion in his mind, if sworn as a juror he would be governed only by the evidence, and would pay no attention to what he had read; that his attention would be drawn from the newspaper account, and that he could give defendant a fair trial. *Held*, construing his whole examination together, he was qualified. It being a question of fact, all doubts should be resolved favorably to the finding of the trial court, and as it did not clearly appear that the juror had such an opinion as to bias his mind, the decision favorable to his competency should be sustained. *State v. Cunningham*, 669.

KIDNAPING.

1. INDICTMENT — FRAUDULENT INTENT.— Revised Statutes of Indiana, section 1915, provides that whoever kidnaps or forcibly or fraudulently carries off from his place of residence, or arrests or imprisons, any person with intent to have such person carried away from his residence, unless in pursuance of the laws of Indiana or the United States, is guilty of kidnaping. *Held*, that a count in an indictment charging that defendant did carry away forcibly from his residence one K., and that the arrest was not in pursuance of the laws of Indiana or the United States, but not alleging that it was with the intent of having such person carried away from his residence, is bad. *State v. Sutton*, 452.

2. SAME.— A second count charging in addition that the felonious and fraudulent arrest was made with the felonious and fraudulent intention of carrying K. from his residence is good. *Id.*

LARCENY.

1. INTENT.— While secrecy is the usual evidence of a felonious intent when one takes the goods of another, it is by no means the only evidence of such intent. *State v. Powell*, 456.

2. SAME — QUESTION FOR JURY.— Prosecutor dropped some money and the prisoner caught it up. Prosecutor asked for the money, whereupon prisoner said: "Oh, hell! You ain't going to get this money." Prosecutor started toward prisoner, and prisoner put his hand to his breast and threatened to kill prosecutor if he followed him. *Held*, that it was proper to instruct the jury that it was for them to say whether the taking of the money was with a felonious intent or not. *Id.*

3. THE OWNERSHIP OF PROPERTY STOLEN can be charged in an indictment for larceny as being in a bailee. *Id.*

4. INDICTMENT — DUPLICITY.— A bill of indictment charging A. with larceny, and containing a count against B. for aiding, etc., will be sustained, it not being shown how A. was prejudiced thereby. *Id.*

5. POSSESSION OBTAINED BY TRICK.— Where the owner of goods parts with their possession without the purpose of parting with the property therein, and expects their return or disposition according to his direction, or expects payment for them to complete a sale thereof, the taking and conversion with the felonious intent to deprive the owner of the goods is larceny. So, if possession of the goods is obtained by a trick, artifice or false pretense, with the felonious intent on the part of accused to convert them to his own use, he is guilty of larceny. *State v. Hall*, 463.

6. AUTOMATIC BOX — DROPPING ANYTHING BUT MONEY IN SLIT.— Against the wall of a public passage was fixed what is known as an "automatic box," the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the center of one of its sides was a projecting button or knob. The box was so constructed that upon a penny piece being dropped into the slit and the knob being pushed in, a cigarette would be ejected from the box on to a

ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not half-pennies;" "To obtain an Egyptian Beauties cigarette, place a penny in the box and push the knob as far as it will go." The prisoners went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc, about the size and shape of a penny, and thereby obtained a cigarette, which he took to the other prisoners. *Held*, that the prisoners were guilty of larceny. *Reg. v. Hands and others*, 469.

7. LARCENY BY EMPLOYEE.— One who has the bare custody of property as the employee or servant of the owner is guilty of larceny if he fraudulently appropriates such property to his own use. *Crocheron v. State*, 473.

8. SIMPLE LARCENY.— Larceny committed in a house may be simple larceny. If bills be lost in a house, and, when found therein, the owner or his agent be present, but the finder, instead of making his discovery known, conceals it, takes and retains the bills wrongfully, fraudulently and with intent to steal the same, he may be convicted of simple larceny. *Roberts v. State*, 474.

9. COMMUNITY PROPERTY — PROPERTY OF WIFE.— Personal ornaments purchased by a wife on her husband's credit, but without his authority, for which he afterwards pays, and which he never gave to her as her own, though she took and retained possession of them, are community property, and her possession being that of her husband, her consent to the taking thereof by one knowing the facts would not prevent such taking from being larceny. *People v. Swalm*, 477.

10. SAME.— Defendant having taken the property with the consent of the wife, with whom he was on terms of criminal intimacy, and attempted, under an assumed name, to convey it out of the state, and having, when arrested, falsely stated the property to be that of another person, and attempted to escape by the bribery of an officer, the evidence sufficiently shows his felonious intent to warrant his conviction of larceny. *Id.*

11. DEFENDANT'S ADULTERY WITH WIFE.— The fact of defendant's adultery with the wife is relevant to show that he knew the taking to be without the husband's consent, and that he intended to deprive the husband of the property. *Id.*

12. SEPARATE PROPERTY OF THE WIFE.— The court having informed the jury in the general charge that the law presumes ornaments in a wife's possession to be her separate property until the contrary is shown, it is not error to refuse an instruction reiterating that principle. *Id.*

Description of property, see INDICTMENT, 18.

LIBEL.

1. VENUE.— A newspaper containing an alleged libelous article was published in Lincoln county, but *held* that sufficient evidence was introduced to sustain a finding by the jury that the newspaper and the alleged libelous article were also published in Saline county. *State v. Wait*, 482.

2. PUBLICATION CONCERNING ATTORNEY.— An article published in a newspaper concerning an attorney at law which would tend to injure his character and reputation as an honest and honorable attorney at law and citizen, would, like any similarly injurious article published against any other person, be *prima facie* libelous; and the fact that it had some connection with judicial proceedings, though not a report of any portion thereof, would not render it privileged or conditionally privileged. *Id.*

3. EVIDENCE THAT JUROR WAS BRIBED.— A part of the alleged libelous article was that the person alleged to be libeled, who was an attorney

at law assisting in the defense in a criminal prosecution for murder, had at the time no possible hope of being able to clear his client with a fair jury, but his only hope lay in a packed jury, and that his manner of conducting the trial showed that he relied upon hanging the jury by a "fixed man," or, in other words, by a bribed juror; and evidence was introduced tending to prove these matters; and the defendant in the libel case then, for the purpose of showing that one of the jurors was "fixed" or bribed, and that he did in fact hang the jury in the murder case, offered to introduce other evidence to show the conduct of this juror in the jury-room while the jury were deliberating upon their verdict in the murder case, and what he then and there said and did, and what he omitted to say and do, and how he voted, and how the other members of the jury voted, and that in fact he did hang the jury; but the court excluded all this evidence. *Held*, error. *Id.*

4. JUSTIFICATION — BURDEN OF PROOF.— In a criminal prosecution for libel, where the defendant justifies upon the ground that the alleged libelous matter was and is true, and was published for justifiable ends, it is necessary for him to prove, or in some manner to show, only its substantial truth and that it was published for justifiable ends; and it is not necessary for him to prove or show the truth of any of the alleged libelous matter, except such as would in fact be libelous if not true, and it is not necessary for him to prove or show the truth of even that portion of the alleged libelous matter by a preponderance of the evidence, but only by evidence sufficient to create a reasonable doubt in the minds of the jury. His proof, however, should extend to all the alleged libelous matters that would in fact be libelous if not true. *Id.*

5. READING LAW TO JURY.— In a criminal prosecution for libel the court permitted the counsel for the state in his closing argument to read to the jury, from an opinion published in the Supreme Court Reports, statements with regard to certain matters in another criminal case as evidence of certain facts in the libel case. *Held*, error. *Id.*

MANSLAUGHTER.

1. DISTINCTION BETWEEN MANSLAUGHTER AND MURDER.— In a murder case, in which there was no evidence that deceased, in striking defendant, caused pain or bloodshed, the court instructed that "adequate cause" sufficient to reduce the homicide to manslaughter is such as would commonly produce a degree of rage or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection, and that mere insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, are insufficient; but that, if pain or bloodshed is caused by an assault and battery, it is such adequate cause. *Held* error, as the jury should have been left to determine the question of "adequate cause" from all the facts, and not restricted to a single cause not shown by the evidence. *Cochran v. State*, 496.

2. SAME— SELF-DEFENSE.— The true test as to murder in the second degree and manslaughter is that if the homicide was committed under the immediate influence of sudden passion, for which there was adequate cause, the homicide, if not justifiable, would be manslaughter, but if such cause did not exist, and the homicide was not justifiable, then it would be murder in the second degree. Any circumstance capable of and actually creating sudden passion, such as anger or terror, rendering the mind incapable of reflection, whether or not accompanied by bodily pain, is "adequate cause;" and if defendant killed deceased at a time when the latter's actions and words, in connection with his physical strength, produced such "adequate cause," and defendant, under its influence, and while not acting in self-defense, killed deceased, he would be guilty of manslaughter. *Id.*

3. SAME — DEGREE OF DANGER.— In judging of the danger the circumstances must be viewed as they appeared to defendant, and if, when he shot deceased, the latter was violently attacking him under circumstances which reasonably indicated an intention to murder, maim, or inflict serious bodily injury, and the weapon and the manner of its use were reasonably calculated to produce either of such results, then the law presumes that deceased intended to murder, maim, or inflict such injury on defendant (Penal Code Tex., art. 571), and the homicide would be justifiable; and though the danger was not real, but merely apparent, the homicide would be justifiable, if at the time the conduct of deceased was such, under the circumstances, as to reasonably induce defendant to believe that deceased was about to kill or inflict serious bodily injury on him. *Id.*

4. TESTIMONY OF BY-STANDER.— The tesitmony of a person, who was, at the time, standing to the left of defendant, that he passed behind defendant from his left to his right side because he expected deceased would strike at defendant with a billiard cue, and that he feared being hit, is admissible as bearing on the effect likely to be produced on defendant's mind by the conduct of deceased. *Id.*

5. NEGLIGENCE — CRIMINAL LIABILITY — CONTRIBUTORY NEGLIGENCE.— Where a team and wagon run into another wagon, and the horses hitched to the latter are frightened and run away, throwing an occupant out, and causing injuries from which she dies, the collision is the proximate cause of the death; and it is no excuse of the criminal liability of those causing the collision that the runaway horses might have been checked by the driver by the exercise of diligence and care. *Belk et al. v. People*, 507.

6. SAME — HOMICIDE.— Upon an indictment for murder, where it appeared that the deceased had come to her death in consequence of the collision of a vehicle driven by defendants with that in which deceased was riding, criminal liability of the defendant depends, not merely upon the question whether they were active in inducing their team to run, thereby causing the collision, but also whether they recklessly or wantonly permitted the collision. *Id.*

7. UNFORESEEN CONSEQUENCES.— The mere unlawfulness of an act done, the same being *malum in se*, will not make the doer criminally liable for its unforeseen consequences, such act being neither dangerous in its nature nor dangerous from its mode of execution. *Estell v. State*, 514.

8. NEGLIGENCE OF RAILROAD ENGINEER.— An indictment alleging that defendant, a railroad engineer, carelessly and negligently ran his engine into a passenger car, thereby causing the death of a certain person, is sufficient, as charging an offense under Revised Statutes of Indiana, 1881, section 1908, providing that "whoever unlawfully kills any human being without malice, . . . either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter." *State v. Dorsey*, 518.

MAYHEM.

1. WHAT CONSTITUTES — INTENT.— A specific intent to maim is not necessary to conviction under the Code of Tennessee, section 5357, providing that a person who unlawfully and maliciously disfigures or maims another shall be, on conviction, imprisoned, etc. *Terrill v. State*, 532.

2. SUFFICIENCY OF EVIDENCE.—The testimony of the prosecutor, corroborated by several witnesses, showed that defendant made a violent and unprovoked assault on the former, thereby severely injuring him. Defendant's unsupported testimony went to show provocation and apprehension of danger from the prosecutor when the assault was made. *Held*, that the evidence is sufficient to support a verdict of guilty. *Id.*

3. INDICTMENT — AIDER BY PLEA OF GUILTY. — In pleading guilty to an indictment, the defendant confesses himself guilty in manner and form as charged in the indictment, and, if the indictment charges no offense against the law, none is confessed. *State v. Watson*, 543.

4. SAME. — When the indictment charged the defendant with "feloniously" inflicting a wound less than mayhem, and omitted the statutory definition of the offense, *held*, that no judgment could be entered upon the plea of guilty, as the indictment charged no offense against the law. The law, to make the inflicting of the wound an offense, requires that it must be done maliciously and wilfully. *Id.*

5. FELONIOUS, WILFUL, ETC. — The word "feloniously" is not equivalent in meaning to "wilfully and maliciously." It has no well-defined meaning in American law, but is used in this state to describe more particularly offenses which were felonies at common law, or offenses of gravity which are declared felonies by statute law. *Id.*

6. THE OFFENSE CHARGED against defendant was not felony at common law, nor has it been made one by statute. *Id.*

7. INDICTMENT — LANGUAGE OF STATUTE. — Offenses must be charged in the words of the statute which describe them, or in words which convey the clear meaning of the language used in the statute. *Id.*

MOTIVE.

See BODY STEALING; FALSE PRETENSES.

MURDER.

1. MOTIVE. — Upon a trial for murder, where the evidence tends to show that the accused was actuated by malice, as well as by the motive of defense of his house and person from an attack for the purpose of an unlawful arrest, it is proper to charge the jury to find upon the whole question of motive, whether of defense or of malice. *State v. Scheele*, 545.

2. MALICE — EXPRESS — IMPLIED. — Upon a trial for murder the jury were instructed as to the meaning of malice, the difference between express and implied malice, and the effect of unlawful killing without malice; and that, if defendant, without saying a word to the deceased, and while the deceased was at some distance from his house, and had made no assault upon it, shot at and killed him, such an act would not be a reasonable exercise of the right to resist an attack upon defendant's house for the purpose of unlawfully arresting him. *Held*, that a further instruction that "such killing, if done with express malice aforethought, . . . would be murder in the first degree," was proper and not objectionable, as telling the jury in effect that, the shooting not being justifiable, the accused was guilty of murder in the first degree. *Id.*

3. INSTRUCTION — RIGHT OF DEFENSE. — It is proper to instruct the jury that under such circumstances the killing would be an unreasonable exercise of the right of defense, where it is submitted to the jury to say what were the facts and circumstances, and whether the act of the accused was reasonable and without malice. *Id.*

4. SAME. — An instruction that if the killing was done on account of provocation in a sudden heat of passion caused thereby, and not of express malice, it amounted only to manslaughter; but if the killing was the result of malice and deliberate premeditated intent, it would be murder, — was not objectionable as telling the jury that, if the accused was defending his house or liberty, and acted with any deliberation whatever, and was not in a sudden heat of passion, they must find him guilty of murder. *Id.*

5. INDICTMENT — ABORTION.— An indictment which in one count charges that defendant committed an abortion on deceased with instruments, and thereby caused her death, and in the other count that he used drugs for the purpose, is not void for duplicity, since it only charges one offense, in accordance with Code of Iowa, section 4300, which declares that an "indictment must charge but one offense, but it may be charged in different forms to meet the testimony." *State v. Baldwin*, 566.

6. SAME.— An indictment which charges that defendant attempted to perform an abortion on a woman, thereby causing her death, but does not allege an intent to take her life, charges murder in the second degree only. *Id.*

7. WAIVER AS TO DEGREE.— Where an indictment charges murder in the first degree, the state may waive a trial as to that degree and claim a conviction for murder in the second degree. *Id.*

8. DYING DECLARATION.— Whether dying declarations are admissible is a question for the court, to be determined in view of the circumstances under which they were made. *Id.*

9. SAME.— Evidence that deceased, whose dying declarations are offered in evidence, was at the time she made them in a dying condition; that she had expressed to her physician a fear of dying, and asked if he could do anything for her; that he told her of her symptoms, but promised to do what he could; that she heard him express the opinion that she might die at any time; and that she repeatedly expressed a belief that she would die,— is sufficient to show that she was conscious of impending death, and had given up all hope of recovery. *Id.*

10. SAME.— On indictment of "Lawson Baldwin" for murder, committed in an attempt to perform an abortion, dying declarations of deceased: "He is the cause of my death. Oh, those horrible instruments! Laws, is the cause of my death,— he is my murderer. They abused me terribly,"— are not admissible, since they may have referred to defendant as the seducer, and not as concerned in the abortion. *Id.*

11. ARREST WITHOUT WARRANT — CONSTRUCTION OF ORDINANCE.— If the ordinance of the city of Charlottesville, providing that every policeman, when any offense is committed within the town, shall try to detect and arrest the offender, confers greater power on policemen in respect to arrests than is conferred by the general laws on constables, and authorizes them to arrest without warrant, for misdemeanors not committed in their presence, it is void; and, on trial for murder in killing a police officer of that city who was trying to arrest defendant, without warrant, for an alleged past misdemeanor, an instruction, based on such ordinance, that a police officer has no right to arrest without warrant, except for offenses committed in his presence, or where he has cause to suspect that a felony has been committed, "or in pursuance of legal ordinances of the city of whose police force he is a member," is misleading and erroneous. *Muscoe v. Com.*, 602.

12. SUBMITTING LEGALITY OF ARREST TO JURY.— A subsequent instruction, leaving it entirely to the jury to say whether or not the arrest of defendant by deceased was legal, is reversible error, though by the same instruction the jury are told that a police officer who exceeds his powers in making an arrest is a trespasser, and that one may resist an unlawful arrest, but are not told what the police officer's powers are, except as in the former instruction. *Id.*

NUISANCE.

1. SINGING RIBALD SONG.— When a ribald song containing the stanza charged in the indictment is sung in a loud and boisterous manner on

the public streets, in the presence of divers persons then and there present, and such singing continues for the space of ten minutes, this is a nuisance, though the special words charged may not have been repeated. *State v. Toole*, 608.

2. REFINERY EMITTING NOXIOUS VAPORS.— Where defendants are charged with maintaining a public and common nuisance by operating an oil refinery in a city, which emitted noxious and offensive vapors, and in which are stored and used inflammable, explosive and dangerous oils and gases, it being denied that the business is a public and common nuisance, the character of the location when the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, are proper matters for consideration by the jury in determining whether it is a public nuisance. *Com. v. Miller*, 619.

3. INSTRUCTION CONCERNING.— The court charged that these facts had "weight, and are to be considered in determining the degree of the injury produced, and whether the effects are so annoying, so productive of inconvenience and discomfort, that it can be said to be really so prejudicial to the public as to be a nuisance," but further stated that they were "no defense to an indictment for erecting and maintaining a nuisance." *Held*, that this was not an adequate presentation of the defense. *Id.*

OBSCENE LETTER.

1. DEPOSITING OBSCENE LETTER IN MAILS.— The knowingly depositing an obscene letter in the mails, inclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, is not an offense within the act of July 12, 1876 (19 Stat., 90, ch. 186). *United States v. Chase*, 649.

2. SAME.— A sealed and addressed letter is not a "writing" within the meaning of that act. *Id.*

3. CERTIFICATE OF DIVISION — PRACTICE.— A certified question: "Does the indictment charge the defendant with any offense?" is too general to be made the subject of a certificate of division. *Id.*

PERJURY.

1. OATH AS TO QUALIFICATION OF ELECTOR.— The oath prescribed for electors by the Code, section 2681, omits some of the essential requisites to voting contained in the constitution, and is confined to those indispensable qualifications set out in article 6, section 1, of the constitution. The oath does not extend to disqualification incident upon conviction for crime. *State v. Houston*, 625.

2. SAME.— Under the Code, section 2681, the voter swears to his possessing the qualifications of an elector. Under the Code, section 2684, he swears that he has not lost the right to vote by any provision of the constitution or laws which takes that right from him. *Id.*

3. SAME — INDICTMENT.— Therefore, where an indictment charged the defendant with perjury, in that he swore, at the time he *registered as a voter*, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a duly qualified voter, he having been convicted of larceny in 1884, and the judgment suspended on such conviction, *held*, that the indictment was properly quashed. *Id.*

4. REBUTTING THE TESTIMONY AS TO MOTIVE.— On a trial for perjury, where the evidence in behalf of the state tends to show that the accused testified under the motive of pecuniary interest created by bribery, he has the right to reply to such evidence by proving that before there was opportunity for offering him a bribe, and within

about one hour after the occurrence touching which he testified, he related the facts and circumstances (these being now recited) substantially in accordance with his account of them as subsequently given by him on oath as a witness, his testimony, as then given, being the alleged perjury. *McCord v. State*, 636.

5. WEIGHT OF EVIDENCE.—Whether the time when the accused was first known as a witness is of any weight in his behalf is a question for the jury, under all the circumstances of the case. Such a fact may have weight for or against him where there is an imputation of bribery. *Id.*

6. ACCOUNT GIVEN BY ACCUSED OUT OF COURT.—It is not admissible to prove in general terms that the account given by the accused out of court before he testified was the same as that to which he testified; the witness judging of the coincidence, and not detailing the account heard by him to the jury, so as to enable them to judge of it for themselves. *Id.*

7. REPELLING IMPUTATION OF BRIBERY.—Evidence that the person in whose behalf the accused testified when the alleged perjury was committed was insolvent, or of limited means, is not admissible to repel the imputation of bribery. *Id.*

8. THE ASSIGNMENT OF PERJURY embracing several particulars, it was not prejudicial to the accused for the court to lay stress on one of them, as being the main, material matter, in charging the jury. *Id.*

9. KNOWLEDGE THAT TESTIMONY IS FALSE.—Knowledge by a witness that his testimony is false is tested, like intention generally, by a sound mind and discretion, and by all the circumstances; soundness of mind, where nothing to the contrary appears, being assumed. *Id.*

10. INSTRUCTION — STATEMENT OF JUDGE.—It is not improper for the judge to inform the jury that he charges them on the prisoner's statement because the law obliges him to do so. The charge touching the statement, and the right and duty of the jury in dealing with it, was substantially correct. *Id.*

PRACTICE.

1. EVIDENCE — HARMLESS ERROR.—The admission or rejection of evidence that is not of a controlling character, nor of such a nature that its introduction or rejection would have affected the issue, cannot be assigned as error. *State v. Pugsley*, 100.

2. SAME — INSTRUCTIONS.—A refusal to charge as requested by defendant is not error when the legal thought of such instruction was contained, substantially, in the general charge. *Id.*

3. REHEARING.—The court will not consider, upon petition for rehearing, any point waived, either expressly or tacitly, upon the argument by not being then urged or suggested; and this rule applies to criminal cases, and will not be dispensed with except in a case of peculiar or real hardship. Technical points urged on petition for rehearing, for the first time, will not be considered. *People v. Northey*, 338.

4. MOTION TO EXCLUDE EVIDENCE.—Where the evidence is excluded from the jury upon a motion of the defendant in a criminal trial on the ground that the indictment charges no offense against him, the jury should be discharged without rendering a verdict, there being no offense of which to acquit him, and no evidence for them to consider. *State v. Brown*, 373.

5. EXCLUSION OF EVIDENCE — HARMLESS ERROR.—The exclusion of apparently irrelevant questions is not error where the bill of exceptions does not show that they were introductory to material and relevant facts. *State v. Lewis*, 574.

6. VIEW OF PREMISES — DISCRETION OF COURT. — While a request by defendants that the jury be allowed to view the alleged nuisance and see its situation and surroundings, and observe its operations, before passing upon them, is a reasonable one, it is within the discretion of the court to refuse it. *Com. v. Miller*, 619.

7. SAME. — It is also within the discretion of the court to refuse permission to counsel for defendants to comment to the jury upon the fact that counsel for the commonwealth refused to join in the request for examination of the premises by the jury; objected to it; and objected also to such comment. *Id.*

Affidavit for continuance, see CONTINUANCE.
General verdict on several counts, see VERDICT.
See PROSECUTING ATTORNEY; BRIBERY AT ELECTIONS; OBSCENE LETTER.
Remarks of court, see EMBEZZLEMENT, 7; INSTRUCTIONS, 5.

PRESUMPTIONS.

Presumption of continuance of *status* of marriage, see ADULTERY, 5.

PRIZE-FIGHTING.

1. WHAT CONSTITUTES. — As it is doubtful whether, to constitute a "prize-fight," there must be fighting in public, and as the act of Mississippi of March 7, 1882, making it "unlawful for any person to engage in prize-fighting in this state," was intended to prohibit prize-fighting which is public in character, and tends to disturb the peace, it is not sufficient to indict under this statute by the use of statutory words only, but the facts which, if proved, would show the defendant to be guilty of the statutory offense must be charged. *Sullivan v. State*, 656.

2. INDICTMENT — SUFFICIENCY OF. — The indictment must charge that the persons fought together, and against each other, in order to constitute the offense of "engaging" in the fight, and an indictment which charges that S. did unlawfully engage in a prize-fight with K., "to wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in said ring, beat, strike and bruise said" K., is defective, as the *videlicet* excludes the conclusion that K. fought. *Id.*

PROSECUTING ATTORNEY.

ARGUMENT. — Where the district attorney, in arguing for the admission of improper testimony, commented at length upon it with the evident intent of prejudicing the minds of the jury against defendant, the refusal of the judge to prevent his remarks was error. *People v. Lee Chuck*, 434.

RAPE.

1. INSTRUCTION — FORCE — SUBSEQUENT CONSENT. — In a prosecution for rape there was a conflict in the testimony as to the resistance of the prosecutrix, and also as to the resort to force by the accused. The latter asked an instruction in substance cautioning the jury against prejudice which was liable to be aroused against the accused because of the heinous nature of the charge, and to call their attention to the difficulty of defending against the accusation; and that if the carnal knowledge while she had the power to resist was with the voluntary consent of the woman, no matter how tardily given or how much force had previously been employed, it was no rape. *Held*, the instructions asked should have been given. *Reynolds v. State*, 664.

2. EVIDENCE. — Objections were predicated on certain testimony of an expert, but it appeared from the record that the testimony objected to had been first drawn out on cross-examination by the attorney for the prisoner. *Held*, that the objections could not be considered. *Id.*

3. MENTAL WEAKNESS OF PROSECUTRIX — CONSENT.— The evidence showed that the prosecutrix, while mentally weak, was not insane, but was able to attend to her household duties. About dark defendant entered her house, dragged her out, despite her resistance and protests, placed her in a wagon, which was driven by another man, lay down with her and covered her and himself up with a tarpaulin. After driving for some time, they stopped at a saloon about two hours, prosecutrix remaining in the wagon in a state of apparent unconsciousness. Defendant then had intercourse with her. She appeared during all the time to be dazed, and was in an advanced state of pregnancy. After delivery she became insane, and hence unable to testify. *Held*, that though it did not appear that she resisted or that force was used when intercourse was effected, the evidence showed want of her consent; as resistance and force are only facts bearing on the question of consent, and, in case of mental weakness, less evidence of want of consent is necessary than where the female is of sound mind. *State v. Cunningham*, 669.

4. ASSAULT WITH INTENT — FORCE — INSTRUCTION.— Penal Code of Texas, article 529, having defined "force," for the purpose of a prosecution for rape, where the use of force is relied on for a conviction, as much as may reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case, an assault with intent to commit rape by force can only be committed where there was an intent to use the amount of force indicated by such statute, and in a prosecution for such an assault the failure of the court to so charge is error. *Brown v. State*, 677.

5. HUSBAND GUILTY WHO PROCURES ANOTHER TO COMMIT.— A husband who, by threats of death, constrains another to attempt to ravish his wife, is guilty of an assault with intent to commit rape. *State v. Dowell*, 681.

6. SAME — INDICTMENT.— On an indictment against a husband for assault with intent to ravish, it cannot be objected that there was no criminal intent where it appears that he, by threats, compelled another to attempt to ravish his wife. *Id.*

REASONABLE DOUBT.

A doubt that would cause one to pause and hesitate is, if fairly derived from the evidence, a reasonable one within the meaning of the criminal law, and an instruction to the jury that "it is such a doubt as would influence or control you in your actions in any of the important transactions of life" is erroneous. *Com. v. Miller*, 619.

See ASSAULT WITH DEADLY WEAPON.

RECEIVING STOLEN GOODS.

1. INDICTMENT — ACCESSORY.— A count in an indictment for larceny, which charges that defendant was an accessory before the fact,— that is, that he procured certain others to commit the larceny for his benefit,— is not prejudicial to defendant, as such charge is embraced in a count for larceny. *Sanderson v. Com.*, 687.

2. JOINDER OF OFFENSES.— In Kentucky a count for receiving stolen goods may be joined with a count for larceny. *Id.*

3. Where one partner, without his copartner's knowledge, receives stolen goods, knowing them to be stolen, and his copartner, afterwards learning of the theft, takes charge of the stolen goods, both are guilty of receiving stolen goods. *Id.*

4. INSTRUCTIONS AS TO KNOWLEDGE OF DEFENDANT.— An instruction that if the person who stole the property placed it in defendant's house

for him, and defendant knowing it to be stolen, and placed there for him, took control of it to fraudulently deprive the owner of his property, this was in law a felonious receiving of the property, is correct. *Id.*

5. BRIBING WITNESS FOR STATE.— Where it appears that defendant paid a witness for the commonwealth to leave the county, and also paid half of a sum afterwards demanded by the witness in a letter to defendant's partner, who was also concerned in receiving the stolen property, the letter is admissible to show why the money was advanced. *Id.*

ROBBERY.

WHAT SUFFICIENT TAKING TO CONSTITUTE.— While B. was in his smokehouse, about fifteen paces from his house, defendant came up and said that if B. put his head out he would "shoot it off." While B. was thus detained co-defendant entered the house and carried off valuables belonging to B., who did not know for what purpose he was being detained until defendants had left. *Held*, a sufficient taking in the presence of B. to constitute robbery. *Clements et al. v. State*, 692.

SEDUCTION.

1. INSTRUCTION — SUFFICIENCY OF EVIDENCE.— Under Revised Statutes of Missouri, sections 1259, 1912, making it a felony to "seduce and debauch" an unmarried female of good repute under promise of marriage, and providing that, unless the evidence of the woman as to such promise is "corroborated to the same extent required of the principal witness in perjury," it is error, on a trial for such an offense, to instruct that, as to the promise of marriage, there must be evidence to corroborate that of the woman, which may be supplied from the circumstances of the case, as the degree of proof required by the statute is ignored by such an instruction. *State v. Reeves*, 698.

2. SAME.— The instruction is also faulty for failing to designate the circumstances which would supply the necessary corroboration, and for the omission to define "corroboration." *Id.*

3. SAME — OMITTING ELEMENT OF THE CRIME.— In such case, an instruction that, if the defendant promised the prosecutrix, an unmarried female of good repute, to marry her, on the faith of which she allowed him to have sexual intercourse with her, the defendant should be convicted, is erroneous, for omitting the element of seduction from the essentials of the crime. *Id.*

4. SAME.— An instruction that, if defendant had carnal intercourse with the prosecutrix, and that she submitted to him without promise of marriage, he should be found not guilty, should be given at the instance of defendant, there being evidence tending to establish that state of facts. *Id.*

5. EVIDENCE — COMPETENCY.— There being conflicting evidence as to the material facts in the case, and no prosecution having been instituted until more than a year after the birth of the child alleged to be the result of the connection between the prosecutrix and defendant, during which time the latter married, it is error to refuse to allow the prosecutrix to be asked, on cross-examination, if the idea of prosecuting him did not first present itself to her after his marriage, as that fact might tend to throw light on the *animus* of the prosecutrix. *Id.*

6. FELONY.— Under said section 1259, making said offense punishable either by confinement in the penitentiary or by fine and imprisonment in the county jail, and section 1676, defining a "felony" as any offense liable to be punished by confinement in the penitentiary or death, such offense is a felony and not within the statute of limitations. *Id.*

VERDICT.

1. GENERAL — ON INDICTMENT CONTAINING SEVERAL COUNTS. — When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective the judgment will be supported by the good count; and, in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other counts, unless the error was such as might or could have affected the verdict on them. *State v. Toole*, 608.

2. PRACTICE — RIGHT OF DEFENDANT TO SEPARATE VERDICTS. — A defendant has the right to require a separate verdict to be rendered on each count, as he has the right to require the jury to be polled; but this is a privilege, and there is not error unless the defendant asks for a separate verdict, or that the jury be polled, and is refused. He waives the right to insist on them, if not asked for in apt time. *Id.*

WITNESSES.

1. WITNESS — IMPEACHMENT — CONVICTION OF FELONY. — A party seeking to impeach a witness may ask him with respect to a judgment in a prosecution for felony against him, and this includes the right to ask him whether he was convicted of felony, and, if so, what sentence was imposed on him. *People v. Rodrigo*, 53.

2. SAME — EVIDENCE — REPUTATION. — Until it is shown that a witness has lived in the same county with or knows the defendant's general reputation in the county, it is not proper to question him in regard thereto. *Id.*

3. SAME — EXAMINATION — DAMAGING ANSWERS. — No just complaint can be made when it happens that, as an incidental consequence of his answers to competent questions concerning his residence and occupation, a witness discloses facts that tend to impair his credibility as a witness or to impeach his moral character. *State v. Pugsley*, 100.