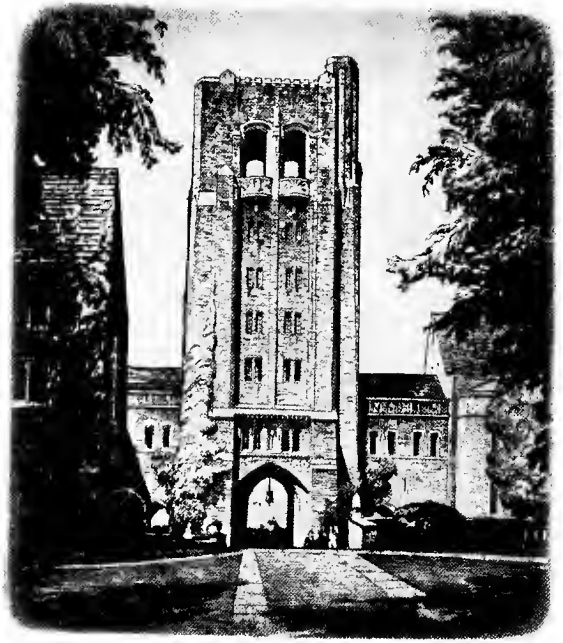

A TREATISE

ON THE LAW OF

EVIDENCE IN CRIMINAL ISSUES

BY

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CHAPTER X.

DEMONSTRATIVE EVIDENCE.

§ 518a. In general.—Demonstrative evidence is a direct, physical illustration of a fact presented to the court and the jury, taking the place of a verbal description of such fact by witnesses.[1]

[1] *Freeman* v. *Hutchinson,* 15 Ind. App. 639, 43 N. E. 16; *Com.* v. *Best,* 180 Mass. 492, 62 N. E. 748; *Gaunt* v. *State,* 50 N. J. L. 490, 14 Atl. 600, 8 Am. Crim. Rep. 297; *People* v. *Gonzalez,* 35 N. Y. 49; *Hubby* v. *State,* 8 Tex. App. 597; *Hiller* v. *Sharon Springs,* 28 Hun, 344; *Gentry* v. *McMinnis,* 3 Dana, 382; *Arkansas River Packet Co.* v. *Hobbs,* 105 Tenn. 29, 58 S. W. 278; *House* v. *State,* 42 Tex. Crim. Rep. 125, 96 Am. St. Rep. 797, 57 S. W. 825.

As to its competency, demonstrative evidence is measured by all the qualifications prescribed by law, and it must always be relevant to the issue.[2] Where it is offered to prove a minor fact, capable of being equally as well proved by other testimony, and the production of the object would be attended by prejudicial results, it should be rejected.[3] But where it is competent, and has a direct bearing upon the issue, it is not to be excluded because of its other effects on the jury.[4]

The method of its procurement, no matter how objectionable, does not affect its admissibility, where its production does not cause the party against whom it is offered to involuntarily incriminate himself.[5]

[2] *Tesney* v. *State,* 77 Ala. 33; *Com.* v. *Brelsford,* 161 Mass. 61, 36 N. E. 677; *United States* v. *Craig,* 4 Wash. C. C. 729, Fed. Cas. No. 14,883; *Ezell* v. *State,* 103 Ala. 8, 15 So. 818; *People* v. *Sullivan,* 129 Cal. 557, 62 Pac. 101; *People* v. *Westlake,* 134 Cal. 505, 66 Pac. 731.

[3] *Louisville & N. R. Co.* v. *Pearson,* 97 Ala. 211, 12 So. 176; *Perry* v. *Metropolitan Street R. Co.* 68 App. Div. 351, 74 N. Y. Supp. 1.

[4] *State* v. *Wieners,* 66 Mo. 13; *Turner* v. *State,* 89 Tenn. 547, 15 S. W. 838; *Hart* v. *State,* 15 Tex. App. 202, 228, 49 Am. Rep. 188; *Chicago & A. R. Co.* v. *Clausen,* 173 Ill. 100, 50 N. E. 680; *Early* v. *State,* 9 Tex. App. 476; *State* v. *Goddard,* 146 Mo. 177, 48 S. W. 82; *State* v. *Ward,* 61 Vt. 153, 17 Atl. 483, 8 Am. Crim. Rep. 207; *State* v. *Nordstrom,* 7 Wash. 506, 35 Pac. 382; *Maclin* v. *State,* 44 Ark. 115; *Story* v. *State,* 99 Ind. 413; *State* v. *Murphy,* 118 Mo. 7, 25 S. W. 95; *State* v. *Cadotte,* 17 Mont. 315, 42 Pac. 857; *Watkins* v. *State,* 89 Ala. 82, 8 So. 134; *Dorsey* v. *State,* 107 Ala. 157, 18 So. 199; *People* v. *Wright,* 89 Mich. 70, 50 N. W. 792; *State* v. *Buchler,* 103 Mo. 203, 15 S. W. 331; *State* v. *Porter,* 32 Or. 135, 49 Pac. 964; *King* v. *State,* 13 Tex. App. 277; *Savary* v. *State,* 62 Neb. 166, 87 N. W. 34; *Sullivan* v. *Com.* 93 Pa. 284; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Lewis* v. *Hartley,* 7 Car. & P. 405; *Baggs* v. *Martin,* 47 C. C. A. 175, 108 Fed. 33; *People* v. *Goldenson,* 76 Cal. 328, 19 Pac. 161; *Jupitz* v. *People,* 34 Ill. 516; *State* v. *Graham,* 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182; *Rice* v. *Rice,* 47 N. J. Eq. 559, 11 L.R.A. 591, 21 Atl. 286.

[5] *State* v. *Griswold,* 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046; *Drake* v. *State,* 75 Ga. 413; *Gindrat* v. *People,* 138 Ill. 103, 27 N. E. 1085; *State* v. *Pomeroy,* 130 Mo. 489, 32 S. W. 1002; *State* v. *Atkinson,* 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; *Com.* v. *Welsh,* 110

Its relevancy and admissibility are always questions to be determined by the court.[6]

Where the production of such evidence would obviously have other effects than that of illustration or demonstration, its admissibility should be determined by the court, in the first instance, in the absence of the jury in criminal cases. Being proof in itself, its effect cannot be limited by instructions, and there should be no premature and prejudicial exhibition of it, until the court has determined its admissibility.

§ 518b. Profert of person, showing age, identity, wounds, etc.—Where the person of the party of the witness is offered as evidence of his age, it is error to allow the jury to fix his age by looking at him.[1] So, it is error to present a child of six weeks or even seven months old, to a jury for comparison in order to establish its paternity,[2] but a child born to prosecutrix may be brought into court to corroborate her testimony as to its birth and identity as the result of the illicit intercourse.[3]

Mass. 359; *Com* v. *Ryan,* 157 Mass. 403, 32 N. E. 349; *Com.* v. *Tibbetts,* 157 Mass. 519, 32 N. E. 910; *State* v. *Burroughs,* 72 Me. 479; *State* v. *Edwards,* 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429; *State* v. *Flynn,* 36 N. H. 64; *State* v. *Sawtelle,* 66 N. H. 488, 32 Atl. 831, 10 Am. Crim. Rep. 347; *Reid* v. *State,* 20 Ga. 681; *Com.* v. *Hurley,* 158 Mass. 159, 33 N. E. 342; *People* v. *Murphy,* 93 Mich. 41, 52 N. W. 1042; *State* v. *Garrett,* 71 N. C. 85, 17 Am. Rep. 1; *State* v. *Fuller,* 34 Mont. 12, 8 L.R.A.(N.S.) 762, 85 Pac. 369, 9 A. & E. Ann. Cas. 648.

[6] *Jackson* v. *Pool,* 91 Tenn. 448, 19 S. W. 324; *Quincy Gas & Electric Co.* v. *Baumann,* 203 Ill. 295, 67 N. E. 807; *Gray* v. *State,* 55 Tex. Crim. Rep. 90, 22 L.R.A.(N.S.) 513, 114 S. W. 635.

[1] *Wistrand* v. *People,* 213 Ill. 72, 72 N. E. 748.

[2] *Copeland* v. *State,* — Tex. Crim. Rep. —, 40 S. W. 589; *Hilton* v. *State,* 41 Tex. Crim. Rep. 190, 53 S. W. 113; *State* v. *Harvey,* 112 Iowa, 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535.

[3] *State* v. *Danforth,* 73 N. H. 215, 111 Am. St. Rep. 600, 60 Atl. 839, 6 A. & E. Ann. Cas. 557; *State* v. *Neel,* 23 Utah, 541, 65 Pac. 494.

Contra, *Gray* v. *State,* 43 Tex. Crim. Rep. 300, 65 S. W. 375.

So, where it was necessary to determine the race of the person, it is proper to produce the party.[4]

And where the character and extent of physical injuries is in question it is proper to produce the party and to illustrate the manner of receiving, the nature and extent of the wounds,[5] but this will not be extended to an examination of the private parts of the person to determine questions raised.[6]

§ 518c. Objects illustrating offense.—The authorities are abundant that tracks[1] may be shown about the scene of crime, for comparison, identity, and other purposes relevant to the issue; so parts of the deceased, such as the skull,[2] jawbone,[3] that may illustrate the nature of the wounds and identify the assailant, or the instrument where that is essential. Not only the clothing[4] may be exhibited, but it may be arranged

[4] *Jones* v. *State*, 156 Ala. 175, 47 So. 100.

[5] *Selleck* v. *Janesville*, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975; *Carrico* v. *West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571; *Graves* v. *Battle Creek*, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757; *Hall* v. *Manson*, 99 Iowa, 698, 34 L.R.A. 207, 68 N. W. 922.

See *Houston & T. C. R. Co.* v. *Anglin*, 99 Tex. 349, 2 L.R.A. (N.S.) 386, 89 S. W. 966.

[6] *State* v. *Stevens*, 133 Iowa, 684, 110 N. W. 1037; *Bowers* v. *State*, 45 Tex. Crim. Rep. 185, 75 S. W. 299.

[1] *People* v. *Searcey*, 121 Cal. 1, 41 L.R.A. 157, 53 Pac. 359; *Johnson* v. *State*, 59 N. J. L. 535, 38 L.R.A. 373, 37 Atl. 949, 39 Atl. 646.

[2] *State* v. *Bailey*, 79 Conn. 589, 65 Atl. 951; *Thrawley* v. *State*, 153 Ind. 375, 55 N. E. 95; *State* v. *Novak*, 109 Iowa, 717, 79 N. W. 465; *State* v. *Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *People* v. *Besold*, 154 Cal. 363, 97 Pac. 871.

But see *Self* v. *State*, 90 Miss. 58, 12 L.R.A.(N.S.) 238, 43 So. 945.

[3] *People* v. *Way*, 191 N. Y. 533, 84 N. E. 1117, 119 App. Div. 344, 104 N. Y. Supp. 277.

[4] *State* v. *Nordstrom*, 7 Wash. 506, 35 Pac. 382; *State* v. *Brannan*, 206 Mo. 636, 105 S. W. 602; *State* v. *Craft*, 118 La. 117, 42 So. 718; *Pate* v. *State*, 150 Ala. 10, 43 So. 343; *Andrews* v. *State*, 159 Ala. 14, 48 So. 858; *State* v. *Churchill*, 52 Wash. 210, 100 Pac. 309; *State* v. *Rubaka*, 82 Conn. 59, 72 Atl. 566; *Bennefield* v. *United States*, 2 Okla. Crim. Rep. 44, 100 Pac. 34, 102 Pac. 647; *Rollings* v. *State*, 160 Ala. 82, 49 So. 329; *People* v. *Muhly*, 11 Cal.

upon a frame for convenience in exhibiting it to the jury,[5] and structures[6] and diagram of location[7] may all be used as an aid in determining the charge under trial.

§ 518d. Instruments of the crime.—As illustrating the instruments connected with the crime, and for the purpose of enabling the jury to use the physical senses in aid of their judgment, as well as to hear the testimony of the witnesses, any implement or means used in the commission of the crime, under proper limitations as to relevancy, is always admissible.[1]

§ 518e. Articles traced to the accused or connected with the offense, when admissible.—On the same principle as the admissions of the instruments or means connected with the offense, to illustrate the same, articles of personal property in the possession of the deceased at the time of the homicide or other criminal offense against him, or personal property in possession of the accused at the time and connected with the offense, either to identify the offense, the deceased, or the

App. 129, 104 Pac. 466; *State* v. *Moore,* 80 Kan. 232, 102 Pac. 475.

[5] *People* v. *Durrant,* 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499.

[6] *People* v. *Maughs,* 149 Cal. 253, 86 Pac. 187.

[7] *People* v. *Shears,* 133 Cal. 154, 65 Pac. 295; *People* v. *Del Vermo,* 192 N. Y. 470, 85 N. E. 690.

[1] Instances of admission in evidence of bullets, guns, knives, and other weapons on homicide and criminal assaults: *Crawford* v. *State,* 112 Ala. 1, 21 So. 214; *Fuller* v. *State,* 117 Ala. 36, 23 So. 688; *People* v. *Hill,* 123 Cal. 571, 56 Pac. 443; *People* v. *Sullivan,* 129 Cal. 557, 62 Pac. 101; *People* v. *Morales,* 143 Cal. 550, 77 Pac. 470; *People* v. *Weber,* 149 Cal. 325, 86 Pac. 671; *State* v. *Sherouk,* 78 Conn. 718, 61 Atl. 897; *Dill* v. *State,* 106 Ga. 683, 32 S. E. 660; *Boynton* v. *State,* 115 Ga. 587, 41 S. E. 995; *Roberts* v. *State,* 123 Ga. 146, 51 S. E. 374; *State* v. *Sigler,* 114 Iowa, 408, 87 N. W. 283; *Com.* v. *Best,* 180 Mass. 492, 62 N. E. 748; *People* v. *Flanigan,* 174 N. Y. 356, 66 N. E 988; *State* v. *Edwards,* 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429; *People* v. *Mar Gin Suie,* 11 Cal. App. 42, 103 Pac. 951.

accused, are properly admissible as a part of the demonstrating and illustrating evidence.[1]

§ 518f. Demonstrative evidence illegally obtained, not admissible in United States courts.—State courts, in some instances, in express terms, have stated their indifference to the methods used to obtain demonstrative evidence,[1] and

[1] *State* v. *Barrington*, 198 Mo. 23, 95 S. W. 235, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582; *Wilson* v. *State*, 128 Ala. 17, 29 So. 569; *Hill* v. *State*, 146 Ala. 51, 41 So. 621; *People* v. *Westlake*, 134 Cal. 505, 66 Pac. 731; *Williams* v. *State*, 119 Ga. 564, 46 S. E. 837; *Henry* v. *People*, 198 Ill. 162, 65 N. E. 120; *State* v. *Peterson*, 110 Iowa, 647, 82 N. W. 329; *State* v. *Keenan*, 7 Kan. App. 813, 55 Pac. 102; *People* v. *Kinney*, 124 Mich. 486, 83 N. W. 147; *State* v. *Goddard*, 146 Mo. 177, 48 S. W. 82; *State* v. *Gartrell*, 171 Mo. 489, 71 S. W. 1045; *State* v. *Hill*, 65 N. J. L. 626, 47 Atl. 814, 12 Am. Crim. Rep. 191; *People* v. *Neufeld*, 165 N. Y. 43, 58 N. E. 786; *State* v. *Porter*, 32 Or. 135, 49 Pac. 964; *State* v. *Garrington*, 11 S. D. 178, 76 N. W. 326.

[1] "Courts, in the administration of the criminal law, are not accustomed to be over sensitive in regard to the sources from which evidence comes." *Gindrat* v. *People*, 138 Ill. 103, 27 N. E. 1085.

However unfair or illegal may be the methods by which evidence may be obtained in a criminal case, if relevant, it is admissible, if the accused is not compelled to do any act which criminates himself. *Shields* v. *State*, 104 Ala. 35, 53 Am. St. Rep. 17, 16 So. 85, 9 Am. Crim. Rep. 149.

Notwithstanding some qualifications attached to these statements, they are not conducive to upholding that dignified and solemn procedure that should always characterize courts when passing upon questions of forfeiture of property, or life and liberty, of an accused. But such statements are a warrant to officers to exceed their authority, and, instead of being protective, to become oppressive. The value of all testimony is that it is free and voluntary, and the natural, unconstrained recital of facts. Demonstrative proof, the most persuasive of all, should be admitted only under circumstances where it becomes of aid to the court, and not as a means of oppression.

Under such view of the law as is indulged in the Illinois and Alabama cases, a man may be theoretically protected by the presumption of innocence guarding him throughout the trial, but in practice, he is forced to prove himself innocent. The unconscionable sweating of prisoners in city jails, and the oppressiveness of the executive machinery, arise out of the expressions set forth, and any limitations are utterly disregarded.

refuse to exclude it on the ground that it was illegally obtained. A different rule prevails in the United States courts, where the 4th Amendment, declaring that persons, houses, papers, and effects shall be secure against unreasonable search and seizure; and the 5th Amendment to the Constitution, declaring that no one shall be compelled, in any criminal case, to be a witness against himself, constitute valid grounds for the exclusion of such evidence, when obtained contrary to the provisions of such Amendments. "Both Amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the thing forbidden in the 5th Amendment. namely, compelling a man to be a witness against himself, is the object of a search and seizure of his private papers, it is an 'unreasonable search and seizure;' within the 4th Amendment." [2]

[2] *Boyd* v. *United States,* 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Counselman* v. *Hitchcock,* 142 U. S. 580, 35 L. ed. 1120, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *United States* v. *Wong Quong Wong,* 35 C. C. A. 327, 94 Fed. 833; *Thurston* v. *Clark,* 107 Cal. 290, 40 Pac. 437; *Newberry* v. *Carpenter,* 107 Mich. 570, 31 L.R.A. 164, 61 Am. St. Rep. 346, 65 N. W. 531; *Mallett* v. *North Carolina,* 181 U. S. 600, 45 L. ed. 1021, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; *Adams* v. *New York,* 192 U. S. 597, 48 L. ed. 580, 24 Sup. Ct. Rep. 372; *State* v. *Height,* 117 Iowa, 661, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 938; *State* v. *Faulkner,* 175 Mo. 606, 75 S. W. 135, 136; *Ex parte Wilson,* 39 Tex. Crim. Rep. 638, 47 S. W. 1000; *State* v. *Slamon,* 73 Vt. 214, 87 Am. St. Rep. 711, 50 Atl. 1098, 15 Am. Crim. Rep. 686; *McKnight* v. *United States,* 54 C. C. A. 358, 116 Fed. 981; *State* v. *Gardner,* 88 Minn. 138, 92 N. W. 533; *Re Green,* 86 Mo. App. 221; *Blum* v. *State,* 94 Md. 382, 384, 56 L.R.A. 322, 51 Atl. 29; *Hale* v. *Henkel,* 201 U. S. 71, 72, 50 L. ed. 664, 665, 26 Sup. Ct. Rep. 370; *Ballman* v. *Fagin,* 200 U. S. 195, 50 L. ed. 437, 26 Sup. Ct. Rep. 212; *State* v. *Sheridan,* 121 Iowa, 167, 96 N. W. 731.

In the cases of *Moyer* v. *Nichols,* 203 U. S. 221, 51 L. ed. 160, 27 Sup. Ct. Rep. 121; and *Pettibone* v. *Nichols,* 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 A. & E. Ann. Cas. 1047, the doctrine announced in *Boyd* v. *United States* would seem to be departed from on the question of illegal seizure, but a close inspection of these later cases will disclose that while the court held that, although the sei-

§ 518g. Demonstrative evidence not excluded in state courts by method of obtaining it.—It is not ground for exclusion of an article of demonstrative evidence, that it was taken from the possession of the accused,[1] even though it was forcibly taken from him,[2] or that it was obtained by illegal search and seizure.[3]

§ 518h. Admissibility of evidence obtained through art and science.—Courts always avail themselves of any

zure of the persons of the petitioners might have been unlawful, yet any investigation of that fact as to the motives would be irrelevant and improper, for the reason that inasmuch as the proceedings were in the nature of interstate extradition, it was not necessary to go behind the indictment and mandate of the respective governors of the states of Idaho and Colorado, to inquire how the petitioners came within reach of the process of the Idaho court in which the indictments were pending.

[1] *Gindrat* v. *People*, 138 Ill. 103, 27 N. E. 1085; *Siebert* v. *People*, 143 Ill. 571, 32 N. E. 431; *State* v. *Nordstrom*, 7 Wash. 506, 36 Pac. 382; *Shields* v. *State*, 104 Ala. 35, 53 Am. St. Rep. 17, 16 So. 85, 9 Am. Crim. Rep. 149.

[2] *Com.* v. *Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Com.* v. *Smith*, 166 Mass. 370, 44 N. E. 503.

[3] *Spies* v. *People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *State* v. *Burroughs*, 72 Me. 479; *Com.* v. *Brelsford*, 161 Mass. 61. 36 N. E. 677; *State* v. *Kaub*, 15 Mo. App. 433; *Langdon* v. *People*, 133 Ill. 397, 24 N. E. 877; *Glennon* v. *Britton*, 155 Ill. 245, 246, 40 N. E 598; *Starchman* v. *State*, 62 Ark 540, 36 S. W. 940; *State* v. *Griswold*, 67 Conn. 306, 33 L.R.A. 229, 34 Atl. 1047; *State* v. *O'Connor*, 3 Kan. App. 598, 43 Pac. 860; *Williams* v. *State*, 100 Ga. 518, 519, 39 L.R.A. 271, 28 S. E. 626; *State* v. *Pomeroy*, 130 Mo. 498, 32 S. W. 1004; *State* v. *Atkinson*, 40 S. C. 372, 42 Am. St. Rep. 877, 18 S. E. 1025; *State* v. *Van Tassel*, 103 Iowa, 15, 72 N. W. 500; *State* v. *Davis*, 108 Mo. 669, 32 Am. St. Rep. 640, 18 S. W. 895; *State* v. *Krinski*, 78 Vt. 165, 62 Atl. 37; *State* v. *Royce*, 38 Wash. 116, 117, 80 Pac. 270, 3 A. & E. Ann. Cas. 351; *Woods* v. *Cottrell*, 55 W. Va. 481, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 47 S. E. 277, 2 A. & E. Ann. Cas. 933.

But see *State* v. *Sheridan*, 121 Iowa, 167, 96 N. W. 731; *Hammock* v. *State*, 1 Ga. App. 126, 58 S. E. 66; *Hughes* v. *State*, 2 Ga. App. 29, 58 S. E. 390.

Courts will not consider as an issue the method of obtaining evidence. *Imboden* v. *People*, 40 Colo. 142, 90 Pac. 608.

progress in art or science that can be safely relied upon to furnish facts of evidentiary value. The principles of evidence apply to such enlarged field with equal correctness and certainty.

So recent as 1877, testimony offered of a telephone conversation or a phonographic record would have been rejected, but the improvement in the art of speech and sound transmission is such that to-day the value of the same is essential in daily life. Recently a graphophone record was admitted to reproduce before the court the sounds caused by certain machinery in a neighborhood where it was complained against as a common nuisance.[1]

We may well hold that the later inventions of the moving-picture and snap-shot cameras can be relied upon as furnishing evidence of identity, and that these would be competent and admissible upon proper preliminary proof. No sufficient reason can be urged against the exclusion of picture films showing a prize fight, where the parties were indicted for the violation of the antiprize fight law, or, on manslaughter, where one of the parties was killed, where identification was sought by such means; nor the snap-shot of a fleeing assassin, nor the flash-light photograph of burglars entering, leaving, or burglarizing premises; nor of photographs taken by the authorities for identification purposes; nor of the anthropometric measurements and physical description of parties furnished by the Bertillon Code.

And it seems that, where evidence is admitted of this character, even on acquittal, the defendant is not entitled to have it expunged from the record.[2]

[1] *Boyne City, G. & A. R. Co.* v. *Anderson*, 146 Mich. 328, 8 L.R.A. (N.S.) 306, 109 N. W. 429.

[2] *Molineux* v. *Collins*, 177 N. Y. 395, 65 L.R.A. 104, 106, 69 N. E. 727.

In the above case the court observes: "While the court can command the superintendent of prisons to do his duty, it is not his duty to give up a record made under the authority of a statute, and until

§ 518i. Photographs.—Courts take judicial notice that photography is the result of art guided by certain principles of science, and produces correct likenesses, the production being governed by the operation of natural laws.[1] But while

the legislature makes it his duty to surrender the record in question, it should remain in his custody, because the state put it there and has not authorized its removal. An innocent man accused of crime is sometimes compelled to make sacrifice and undergo suffering for the benefit of society. Like payment of taxes and service on juries, it is a part of the price paid for the privilege of living in a country governed by law. One, for the good of all, may be required to submit to imprisonment, incur expense, and endure mental distress, because the state cannot exist without the preservation of order, and order cannot be preserved without the punishment of the guilty, which necessarily involves sometimes the trial of the innocent."

The above opinion is based upon a statute, but the argument in support of the retention of the record is not convincing. On a court record the words, "found not guilty," exonerate the accused, but to continue the exposition of a man's personality, by which he was identified as a criminal, takes away the protection to which he is entitled by law, and, in the absence of a mandatory statute, courts would readily expunge an unnecessary and oppressive record. *Schulman* v. *Whitaker,* 117 La. 704, 7 L.R.A. (N.S.) 274, 42 So. 227, 8 A. & E. Ann. Cas. 1174.

But see *Downs* v. *Swann,* 111 Md. 53, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586, 73 Atl. 653; *People* v. *Sheridan,* 15 N. Y. S. R. 938, 1 N. Y. Supp. 61; *People* v. *Burleigh,* 1 N. Y. Crim. Rep. 522; *People* v. *Quigg,* 59 N. Y. 88. *Casterton* v. *Vienna,* 163 N. Y. 368, 57 N. E. 622.

[1] *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311, 313.

"It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photographs as an established means of producing a correct likeness. The Daguerrean process was first given to the world in 1889. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and common mode of taking and preserving news as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in

they are admissible in evidence, in the absence of the original, still to entitle them to be received they must be shown to have been accurately taken, and to be correct representations of what they purport to represent.[2] Where they are offered as a general representation of physical objects, but slight proof of such accuracy is required, but where handwriting is involved, or any object where minute differences of height or breadth are important, then more convincing proof is required.[3] We shall treat of photographs as evidence in this connection only in criminal cases.

§ 518j. Photographs, continued.—With the purpose of proving identity, it was held competent on the trial of a person for a crime committed four years before, to introduce photographs in evidence, of the defendant and his alleged confederates, shown to be good likenesses of them at the time the crime was committed, and proved to have been shown to witnesses for the government shortly afterward, who were then able to identify them as the men seen together at the place of the crime on the evening before its commission.[1] And a photograph of a person charged to have been murdered, although taken two years before her death, is admissible in evidence when shown to be a fair representation of her as

general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing likenesses."

Wurmser v. *Frederick,* 62 Mo. App. 634.

[2] 9 Enc. Ev. p. 771; *United States* v. *Pagliano,* 53 Fed. 1001; *State* v. *Cook,* 75 Conn. 267, 53 Atl. 589; *Chicago & A. R. Co.* v. *Meyers,* 86 Ill. App. 401.

[3] *Cunningham* v. *Fair Haven & W. R. Co.* 72 Conn. 244, 43 Atl. 1047.

An X-ray photograph held admissible in murder, showing the position of the bullet, on the ground of judicial notice. *State* v. *Matheson,* 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 A. & E. Ann. Cas. 430.

[1] *Considine* v. *United States,* 50 C. C. A. 272, 112 Fed. 342, 348; *Cowley* v. *People,* 83 N. Y. 464, 38 Am. Rep. 464; *Com.* v. *Connors,* 156 Pa. 147, 27 Atl. 366.

she was at the time of the homicide.[2] And photographs of handwriting are admissible in a criminal case in which the question in issue is the identification.[3] On a trial for homicide, photographs showing the condition of things in the vicinity where the body was found, and disclosing the presence of objects correctly placed on the ground by witnesses to indicate where the body, the knife, hat, and coat of deceased were located at the time of the first visit of the witnesses to the place of homicide, are admissible.[4] And on a prosecution for cruelty to animals for depriving horses of necessary sustenance on and after January 1st, and on April 6th, defendant offered in evidence photographs of the animals taken after May 1st, together with an offer to prove that on the days of the alleged offense the horses were in the condition shown by such photographs, and the court held the same admissible if the preliminary fact had been established as to the similarity of condition, and that this was a question to be decided by the court.[5] A photograph taken of a man found

[2] *People* v. *Durrant*, 116 Cal. 179, 213, 10 Am. Crim. Rep. 499, 48 Pac. 75; Rice, Crim. Ev. 154; Thomp. Trials, § 869.

In addition to the photograph of Blanche Lamont, there was exhibited to the jury a dressmaker's frame, to allow the clothing of the dead girl to be seen by the jury and as a convenient mode of displaying it. Error was predicated on the use of the frame and the refusal of the court to order the garments removed from it. The court held there was no error in such refusal, and that there was no more impropriety or error in the plan pursued than as if the garments had been hung on a clothesline or huddled in a corner, the frame used not being claimed to represent the dead girl either in height, size, or figure. *People* v. *Durrant*, 116 Cal. 179, 210, 10 Am. Crim. Rep. 499, 48 Pac. 75.

[3] *People* v. *Mooney*, 132 Cal. 13, 63 Pac. 1070.

[4] *People* v. *Mahatch*, 148 Cal. 200, 82 Pac. 779; *People* v. *Crandoll*, 125 Cal. 133, 57 Pac. 785.

[5] *State* v. *Cook*, 75 Conn. 267, 53 Atl. 589.

"We cannot say the accused could not prove, as he offered to, that the photographs were accurate, and that the horses were in the same condition of flesh when the photographs were taken as on the 11th of March and the 6th of April." *State* v. *Cook*, 75 Conn.

dead on the prairie, with his legs extended in a peculiar manner,—one lying rigid along the ground and the other elevated and also stiffened, would be competent evidence when the question to be determined by the jury was time and manner of death, and the place and time where cadaveric rigidity set in and concluded.

§ 518k. Photographs, continued.—On a prosecution for adultery, a photograph proven to be of defendant's alleged paramour was held admissible to identify her as the woman with whom the defendant had lived while residing in another state, though the photograph was taken several years before.[1] In a prosecution for assault with intent to murder, an X-ray photograph admitted to show the position of the bullet in the body of the deceased was not objectionable on the ground that it was not sufficiently identified as a representation of anything in evidence, but was admissible as a photograph.[2]

267, 270, 53 Atl. 589; *Harris* v. *Ansonia,* 73 Conn. 359, 364, 47 Atl. 672.

[1] *State* v. *Hasty,* 121 Iowa, 507, 96 N. W. 1115.

[2] *State* v. *Matheson,* 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 A. & E. Ann. Cas. 430.

As to the admissibility of photographs in various instances in criminal prosecutions, see *State* v. *Powell,* 5 Penn. (Del.) 24, 61 Atl. 966; *Shaffer* v. *United States,* 24 App. D. C. 417; *State* v. *Rogers,* 129 Iowa, 229, 105 N. W. 455; *State* v. *Hersom,* 90 Me. 273, 38 Atl. 160; *Com.* v. *Chance,* 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *State* v. *Finch,* 54 Or. 482, 103 Pac. 505; *Com.* v. *Best,* 108 Mass. 492, 62 N. E. 748; *Com.* v. *Felding,* 184 Mass. 484, 69 N. E. 216; *State* v. *Fulkerson,* 97 Mo. App. 599, 71 S. W. 704; *State* v. *Roberts,* 28 Nev. 350, 82 Pac. 100; *Smith* v. *Territory,* 11 Okla. 669, 69 Pac. 805; *State* v. *Miller,* 43 Or. 325, 74 Pac. 658; *Com.* v. *Keller,* 191 Pa. 122, 43 Atl. 198; *Grooms* v. *State,* 40 Tex. Crim. Rep. 319, 50 S. W. 370; *Com.* v. *Tucker,* 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127; *Louisville & N. R. Co.* v. *Brown,* 127 Ky. 732, 13 L.R.A.(N.S.) 1135, 106 S. W. 795; *Higgs* v. *Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 446, 15 L.R.A.(N.S.) 1162, 114 N. W. 722, 15 A. & E. Ann. Cas. 97; *Willis* v. *State,* 49 Tex. Crim. Rep. 139, 90 S. W. 1100;

So, to show that the defendant on a certain date wore side whiskers.[3] But on a trial for homicide it was held error to admit a photograph of a porch on which deceased was standing when killed, with a man lying in an assumed position in which the body was alleged to have been found, neither the man who took the picture nor the man lying prone having at any time seen the body of the deceased on the porch.[4] Likewise it was held error to introduce in evidence in a prosecution for murder photographic representations of *tableaux vivants* carefully arranged by the chief witness for the state, intended to exhibit the situations of the parties and the scene of the tragedy according to such witness's account of it.[5]

While conclusive effect as a matter of law should not be accorded by the jury to such photographs admitted in evidence, yet the weight given them should depend upon the skill, accuracy, and manner in which they are shown to have been taken, and should be considered under the same tests as other evidence.[6]

State v. *McCoy,* 15 Utah, 136, 49 Pac. 420; *Paulson* v. *State,* 118 Wis. 89, 94 N. W. 771, 15 Am. Crim. Rep. 497; *Wilson* v. *United States,* 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; *Malachi* v. *State,* 89 Ala. 134, 8 So. 104; *Mann* v. *State,* 22 Fla. 600; *Ortiz* v. *State,* 30 Fla. 256, 11 So. 611; *Franklin* v. *State,* 69 Ga. 36, 47 Am. Rep. 748; *State* v. *Windahl,* 95 Iowa, 470, 64 N. W. 420; *State* v. *Holden,* 42 Minn. 350, 44 N. W. 123; *State* v. *O'Reilly,* 126 Mo. 597, 29 S. W. 577; *Marion* v. *State,* 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911; *Ruloff* v. *People,* 45 N. Y. 213; *People* v. *Buddensieck,* 4 N. Y. Crim. Rep. 230; *People* v. *Jackson,* 111 N. Y. 362, 19 N. E. 54, 6 N. Y. Crim. Rep. 393; *Com.* v. *Connors,* 156 Pa. 147, 27 Atl. 366.

[3] *Com.* v. *Morgan,* 159 Mass. 375, 34 N. E. 458.

[4] *People* v. *Maughs,* 149 Cal. 253, 265, 86 Pac. 187.

[5] *Fore* v. *State,* 75 Miss. 727, 23 So. 710.

[6] *Higgs* v. *Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 446, 15 L.R.A.(N.S.) 1162, 114 N. W. 722, 15 A. & E. Ann. Cas. 97; and case note to *Dederichs* v. *Salt Lake City R. Co.* 35 L.R.A. 803.

§ 5181. Photographs; X-ray photographs.—The most common use of photographs as evidence in criminal prosecutions is to establish the identity of the person or persons charged with the commission of the crime, in impeachment of a witness, to prove the paternity of children, and the character and disposition of persons, as well as the race to which they belong.[1] They are also admissible to show by X-rays and otherwise, the nature and extent of physical injuries and wounds, and the scene of the crime if proved to be a correct representation of the *locus in quo* as it was at the time of the commission of the crime.[2] These photographs are admissible on the same ground as diagrams, plats, etc., made by a surveyor or other party after it has been shown to be correct by the delineator or suveyor, the better to explain the testimony of the witnesses and enable the jury to apply the evidence.[3] And it is not necessary that such photograph should be taken by a professional. It is only necessary to

[1] *Marion* v. *State,* 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911; 9 Enc. Ev. p. 773; *Com.* v. *Fielding,* 184 Mass. 484, 69 N. E. 216.

[2] *People* v. *Johnson,* 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; 9 Enc. Ev. pp. 780, 781.

[3] *Gibson* v. *State,* 53 Tex. Crim. Rep. 349, 370, 110 S. W. 41; Mcclain, Crim. Law, § 406; *Com.* v. *Robertson,* 162 Mass. 90, 38 N. E. 25; *State* v. *O'Reilly,* 126 Mo. 597, 29 S. W. 577; *People* v. *Jackson,* 111 N. Y. 362, 19 N. E. 54; *Blair* v. *Pelham,* 118 Mass. 420; *Church* v. *Milwaukee,* 31 Wis. 512; *Cowley* v. *People,* 83 N. Y. 464, 38 Am. Rep. 464.

In the last case the court says: "We do not fail to notice judicially that all civilized countries rely upon photographic pictures for taking resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. . . . A plan or picture, whether made by hand of man or by photography, is admissible in evidence if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case." *Marcy* v. *Barnes,* 16 Gray, 161, 77 Am. Dec. 405; *Hollenbeck* v. *Rowley,* 8 Allen, 473; *Ruloff* v. *People,* 45 N. Y. 213; *Mow* v. *People,* 31 Colo. 351, 72 Pac. 1069; *Keyes* v. *State,* 122 Ind. 527, 23 N. E. 1097; *Gibson* v. *State,* 53 Tex. Crim. Rep. 349, 370, 110 S. W. 41.

show, if otherwise competent, that it is a correct likeness of the objects it purports to represent.[4] But in cases of X-ray photographs only the operator can testify to their correctness.[5]

§ 518m. Photographs in rogues' gallery.—Photography being a trustworthy scientific source through which testimony is presented to a court, its largest use, as applied to criminal law, is the taking of photographs for the express purpose of identification, to be exhibited at police headquarters in towns and cities, in the rogues' gallery, so named. These photographs are not only so exhibited, but are exchanged among the various police and detective bureaus, and afford a ready and a very certain means of identification. Such exhibits are subject to the rules of evidence in criminal cases, such as proper foundation and identification. So, where a man has been convicted of an offense, that he has frequently been arrested and is an associate of criminals, the facts warrant

[4] *Mow* v. *People,* 31 Colo. 351, 72 Pac. 1069; *State* v. *Hersom,* 90 Me. 273, 38 Atl. 160; *Com.* v. *Chance,* 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *Com.* v. *Robertson,* 162 Mass. 90, 38 N. E. 25; *Shaw* v. *State,* 83 Ga. 92, 9 S. E. 768, 8 Am. Crim. Rep. 426.

It has also been held that where such photographs are shown to be correct representations of a place or locality where the transaction under investigation took place as it appeared at the time of the transaction, they are admissible in evidence without regard to the time when they were taken. 9 Enc. Ev. p. 778; *Barker* v. *Perry,* 67 Iowa, 146, 25 N. W. 100; *Baustian* v. *Young,* 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *Leeds* v. *New York Teleph. Co.* 79 App. Div. 121, 80 N. Y. Supp. 114.

In this last case cited the injury was received in April, 1902, and the photograph was taken in October of the same year, but there was proof that it correctly represented the situation at the time of the accident, except that the hole shown in it was deeper than when the picture was taken. The photograph was held admissible.

[5] Stewart, Legal Medicine, § 13.

the taking of his photograph and placing it in the rogues' gallery.[1]

Officers have the right to take and use photographs of persons in jail on a criminal charge for purposes of identification, and where it is not shown that an improper use is to be made of the same, injunction will not lie to restrain such officers.[2]

It seems, however, that there is no right to place such picture in the rogues' gallery of a person who has been arrested, but not convicted on a criminal charge, or the publication of his Bertillon record, where he is not an habitual criminal.[3]

[1] *People ex rel. Joyce* v. *York*, 27 Misc. 658, 59 N. Y. Supp. 418.

[2] *Mabry* v. *Kettering*, 89 Ark. 551, 117 S. W. 746, 16 A. & E. Ann. Cas. 11_3; *Mabry* v. *Kettering*, 92 Ark. 81, 122 S. W. 115.

[3] *Downs* v. *Swann*, 111 Md. 53, 64, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586, 73 Atl. 653.

CHAPTER XI.

DOCUMENTS.

General Considerations.

§ 519. Definition of the term "document."—Recent statutes having used the term "document" to designate the objects of forgery, as well as in some measure of larceny, it becomes our duty to inquire, in the first place, what the term "document" includes. And the answer is, that a document, in this sense, is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term "document" applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be, as is elsewhere seen, on stone or gems,[1] or on wood (*e. g.*, as is the case with tallies) [2] as well as on paper or parchment.[3] "Document," it will be therefore seen, is a term at once more comprehensive and more exact than "instrument in writing," a term at one time generally used in the same relation. An "instrument in writing," it might well be argued, does not include printed books; and it clearly does not include engravings on wood or stone. "Document," however, includes not merely books, but any other thing on which is impressed a meaning which, emanating from one party, is calculated to affect the rights of another party.[4]

[1] See Wharton, Ev. § 220.

[2] *Kendall* v. *Field*, 14 Me. 30, 30 Am. Dec. 728; *Rowland* v. *Burton*, 2 Harr. (Del.) 288.

[3] Wharton, Ev. § 614.

[4] As to what constitutes a document within the definition of the text, see the following cases: *Arnold* v. *Pawtuxet Valley Water Co.* 18 R. I. 189, 19 L.R.A. 602,

§ 520. Pencil writing sufficient.—Ink and paper, or ink and parchment, it has been said, are necessary to constitute a valid writing, when a writing, as such, is to be proved. But the mode of writing is immaterial, if the thing written be legible; and it has been frequently held that pencil writing, if identified, is sufficient to constitute a writing receivable in evidence.[1] In fact, some kind of pencils leave marks more permanent and ineffaceable than some kinds of ink.[2]

§ 521. Production of documents; reference to other documents; criminating documents.—When a document is produced in evidence, the requirement of accuracy is complied with, because the document itself contains all of the words. A question may sometimes arise as to whether or not the entire document should go in evidence by the party producing it. This is a matter that, if questioned, ought to be left entirely to the discretion of the trial judge. The better rule is that a party offering a document should offer only

26 Atl. 55; *Fitzgerald* v. *Hedstorm*, 98 Ill. App. 109; *Dederichs* v. *Salt Lake City R. Co.* 13 Utah, 34, 44 Pac. 649; *German Theological School* v. *Dubuque*, 64 Iowa, 736, 17 N. W. 153; *Barker* v. *Perry*, 67 Iowa, 146, 25 N. W. 100; *Geneva* v. *Burnett*, 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275; *Record* v. *Chickasaw Cooperage Co.* 108 Tenn. 657, 69 S. W. 334; *McCullough* v. *Olds*, 108 Cal. 529, 41 Pac. 420; *Stouter* v. *Manhattan R. Co.* 53 Hun, 634, 6 N. Y. Supp. 163; *State* v. *Sawtelle*, 66 N. H. 488, 32 Atl. 831, 10 Am. Crim. Rep. 347; *Johnson Steel Street Rail Co.* v. *North Branch Steel Co.* 48 Fed. 191; *Merrick* v. *Wakley*, 8 Ad. & El. 170, 3 Nev. & P. 284, 1 W. W. & H. 268, 8 Car. & P. 283, 7 L. J. Q. B. N. S. 190, 2 Jur. 838; *Nagle* v. *Fulmer*, 98 Iowa, 585, 67 N. W. 369.

Dates and initials carved on wood as a document, admissible in evidence to identify accused. *State* v. *Kent*, 83 Vt. 28, 26 L.R.A.(N.S.) 990, 74 Atl. 389, 20 A. & E. Ann. Cas. 1334.

[1] *Millett* v. *Marston*, 62 Me. 477; *True* v. *Bryant*, 32 N. H. 241; *Hill* v. *Scott*, 12 [illegible]. 168; *Gratz* v. *Beates*, 45 Pa. 495; *May* v. *State*, 14 Ohio, 461, 45 Am. Dec. 548; *Rembert* v. *Brown*, 14 Ala. 360.

See Wharton, Ev. § 64.

[2] Compare authorities in Wharton, Crim. Pl. & Pr. § 278a.

that part relevant to the question at issue, leaving to the other side to use the remainder afterwards.[1] And when one writing refers directly or indirectly to another for a fuller description, the admissibility of the first writing involves the admissibility of the second writing.[2] To make the production complete, such second writing should be produced and offered at the same time; and this principle also applies to another writing not expressly mentioned, but, from its nature, necessary to a proper understanding of the first writing.[3] The admission of a writing involves the admission of all self-disserving indorsements made thereon by the holder or with his permission.[4] Whenever a document is offered against a party, as containing an admission prejudicing him, he is entitled to have the context put in evidence in his defense.[5]

In harmony with the underlying principle of our jurisprudence, that no man should be compelled to criminate himself, the accused cannot be required to produce any document containing evidence that will criminate him.[6]

But the rule appears well settled that, upon investigation by

[1] *Waller* v. *State,* 102 Ga. 684, 28 S. E. 284.

[2] *Nesham* v. *Selby,* L. R. 13 Eq. 191, 41 L. J. Ch. N. S. 173, 26 L. T. N. S. 145; *Clark* v. *Crego,* 47 Barb. 599; *Re Washington Park Comrs.* 52 N. Y. 131; *Blair* v. *Hum,* 2 Rawle, 104; *Satterlee* v. *Bliss,* 36 Cal. 489; *Jordan* v. *Pollock,* 14 Ga. 145; post, § 688; Wharton, Ev. § 1103.

[3] *Thornton* v. *Stephen,* 2 Moody & R. 45; *Barber* v. *International Co.* 73 Conn. 587, 48 Atl. 758; *Elmore* v. *Overton,* 104 Ind. 548, 54 Am. Rep. 343, 4 N. E. 197; *Johnson* v. *Gilson,* 4 Esp. 21.

See *United States* v. *Doebler,* Baldw. 519, Fed. Cas. No. 14,977.

[4] *Harper* v. *West,* 1 Cranch, C. C. 192, Fed. Cas. No. 6,093; *Clarke* v. *Ray,* 1 Harr. & J. 318; *Gilpatrick* v. *Foster,* 12 Ill. 355; *Lloyd* v. *McClure,* 2 G. Greene, 139; *Carey* v. *Philadelphia & C. Petroleum Co.* 33 Cal. 694, 1 Mor. Min. Rep. 349.

[5] Post, § 688.

See *Early* v. *State,* 9 Tex. App. 476.

[6] *Boyle* v. *Smithman,* 146 Pa. 255, 23 Atl. 397; *Boyd* v. *United States,* 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *State* v. *Davis,* 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894.

See *Louisville & N. R. Co.* v. *Com.* 21 Ky. L. Rep. 239, 51 S. W. 167.

a judicial body, or a nonjudicial body with judicial functions, that such body may compel a corporation to produce all documents in its possession, and that all records kept by corporations are quasi public and must be produced on demand, regardless of the objection that they may contain criminating testimony.[7]

II. Statutes; Legislative Journals; Executive Documents, etc.

§ 522. Recitals in public statutes.—A public statute may be received to prove the facts which it recites.[1] Hence, in England it is held that a recital of a state of war, contained in a public statute, is evidence of such war;[2] and that a recital in a public statute of disturbances and riots is proof of such disturbances and riots.[3] In this country we have a series of cases to the same effect, in which the legislation of Congress was referred to, to indicate the extent and duration of the late Civil War.[4] But such proof is only prima facie, and may be limited or explained by other testimony.[5]

[7] *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658; *United States* v. *Collins,* 146 Fed. 553; *United States* v. *Three Tons of Coal,* 6 Biss. 379, Fed. Cas. No. 16,515; *People* v. *Coombs,* 158 N. Y. 532, 53 N. E. 527; *United States* v. *Distillery No. 28,* 6 Biss. 483, Fed. Cas. No. 14,966; *Santa Fe P. R. Co.* v. *Davidson,* 149 Fed. 603; *Co-operative Bldg. & Loan Asso.* v. *State,* 155 Ind. 463, 60 N. E. 146; *Washington Nat. Bank* v. *Daily,* 166 Ind. 631, 77 N. E. 53; *State ex rel. Boston & M. Consol. Copper & S. Min. Co.* v. *District Ct.* 27 Mont. 441, 99 Am. St. Rep. 831, 71 Pac. 602; *Re Moser,* 138 Mich. 302, 101 N. W. 588, 5 A. & E. Ann. Cas. 31.

See *Cassatt* v. *Mitchell Coal & Coke Co.* 10 L.R.A.(N.S.) 99, 81 C. C. A. 96, 150 Fed. 32.

[1] See Wharton, Ev. §§ 286–292; *Whiton* v. *Albany City Ins. Co.* 109 Mass, 30; *Henthorn* v. *Doe,* 1 Blackf. 157; *State* v. *Sartor,* 2 Strobh. L. 60.

[2] *Rex* v. *De Berenger,* 3 Maule & S. 67; Wharton, Ev. § 339.

[3] *Rex* v. *Sutton,* 4 Maule & S. 532.

[4] Wharton, Ev. §§ 286, et seq.

[5] *Rex* v. *Greene,* 6 Ad. & El. 548, 1 Nev. & P. 631, W. W. & D. 291.

§ 523. Recitals in private statutes bind only parties thereto.—Recitals in private statutes are held to be evidence only so far as concern the parties, not reaching further.[1] As against the party for whose relief the statute was passed,[2] and as against the State,[3] such recitals are prima facie proof; but they are not evidence against strangers.

§ 523a. Recitals in statutes, when directory and when conclusive.—It is very doubtful whether or not the legislative power can make a recital in a statute that will be conclusive. Legislative recitals are generally merely directory or explanatory of purposes and motives, and not determinations of fact. The general rule is that such recitals cannot be made evidentially conclusive.[1]

In criminal law the legislative power is generally broader than in dealing with civil matters, in respect to the conclusiveness of recitals defining crimes, and stating facts that may become evidentially conclusive. The limitation of the legislative power in criminal matters in this respect would seem to depend upon the fact that such statute must not in any way contravene the constitutional provisions against *ex post facto* laws, or those against cruel or unusual punishments, or the deprivation of life and liberty without due process of law.[2] Within these limits the legislature can create and define what

[1] *Shrewsbury Peerage,* 7 H. L. Cas. 13; *Beaufort* v. *Smith,* 4 Exch. 450, 19 L. J. Exch. N. S. 97; *Cowell* v. *Chambers,* 21 Beav. 619; *Mills* v. *Colchester,* 36 L. J. C. P. N. S. 214, L. R. 2 C. P. 476, 16 L. T. N. S. 626, 15 Week. Rep. 955; *Taylor* v. *Parry,* 1 Mann. & G. 604, 1 Scott, N. R. 576, 9 L. J. C. P. N. S. 298; *Ballard* v. *Way,* 1 Mees. & W. 529, 2 Gale, 61, 1 Tyrw. & G. 851, 5 L. J. Exch. N. S. 207; *Elmondorff* v. *Carmichael,* 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

[2] *State* v. *Beard,* 1 Ind. 460.

[3] *Lord* v. *Bigelow,* 8 Vt. 460.

[1] *Birdsong* v. *Brooks,* 7 Ga. 88; *Koehler* v. *Hill,* 60 Iowa, 543, 564, 14 N. W. 738, 15 N. W. 609.

[2] *Barker* v. *People,* 3 Cow. 686, 15 Am. Dec. 322; *Wynehamer* v. *People,* 13 N. Y. 378, 420.

should constitute a crime,[3] and recite in such act the facts that are conclusive.[4]

§ 524. Journals of legislature admissible.—The journals of Congress and of the state legislatures are the proper evidence of the action of those bodies,[1] and are prima facie proof of the facts they recite.[2] They are records to be proved by inspection,[3] and cannot ordinarily be varied by parol.[4]

§ 525. Executive documents as proof.—Official public documents issued by the executive are to be received as prima facie proof of facts stated in them,[1] and such is also the case with state papers when published under the authority of Congress,[2] with diplomatic correspondence communicated by the President to Congress,[3] with the ordinances of foreign states promulgated by Congress,[4] and with the proclamations of a state executive,[5] the authorized reports of state officials,[6] and the charter of a city,[7] so far as concerns the state from which these documents proceed. But it has been held that a report

[3] *State* v. *Kingsley*, 108 Mo. 135, 18 S. W. 994.

[4] *Voght* v. *State*, 124 Ind. 358, 24 N. E. 680.

See *Snyder* v. *Bonbright*, 123 Fed. 817.

See *Allen* v. *Armstrong*, 16 Iowa, 508.

[1] Wharton, Ev. §§ 290–295; *Jones* v. *Randall*, Cowp. pt. 1, p. 17, Lofft, 383, 428.

[2] See Wharton, Ev. § 637.

[3] *Coleman* v. *Dobbins*, 8 Ind. 156.

[4] *Wabash R. Co.* v. *Hughes*, 38 Ill. 176; *Covington* v. *Ludlow*, 1 Met. (Ky.) 296, Wharton, Ev. § 980a.

[1] *Thelluson* v. *Cosling*, 4 Esp. 266; *Franklin's Trial*, 17 How. St. Tr. 638; *Talbot* v. *Seeman*, 1 Cranch, 1, 2 L. ed. 15; *Ross* v. *Cutshall*, 1 Binn. 399.

[2] Wharton, Ev. § 525; *Whiton* v. *Albany City Ins. Co.* 109 Mass. 30.

[3] *Bryan* v. *Forsyth*, 19 How. 334, 15 L. ed. 674; *Radcliff* v. *United Ins. Co.* 7 Johns, 38.

[4] *Talbot* v. *Seeman*, 1 Cranch, 1, 2 L. ed. 15; *Wetmore* v. *United States*, 10 Pet. 647, 9 L. ed. 567; Wharton, Ev. § 297.

[5] *Lurton* v. *Gilliam*, 2 Ill. 577, 33 Am. Dec. 430.

[6] *Dulaney* v. *Dunlap*, 3 Coldw. 307.

[7] *Howell* v. *Ruggles*, 5 N. Y. 444.

of the register of the state land office cannot be received to prove that lands have been patented to a railroad company.[8]

§ 525a. Judicial acts and proceedings.—Judicial acts, proceedings, and records ascertaining and declaring certain facts are admissible in other proceedings to prove facts relevant to the charge then on trial. But such documents, to be admissible in themselves, must be a complete and final record of the fact sought to be established.[1] Thus, on an issue, the former conviction and record of the judgment of conviction and sentence, from the court wherein the defendant was tried, is admissible on trial of another indictment for homicide;[1a] but a mere entry on a judge's docket, not shown to be in his own handwriting, is not a judicial record, though it might furnish a basis for a record.[2]

Where records of former convictions become material, as, for instance, where a second conviction increases the penalty or the grade of the offense, such records, aided by proof of identity, are admissible to establish the former conviction;[3] but where the accused had appealed from a judgment of conviction, and the appeal had not been determined, the record of such conviction was not admissible for the purpose of proving the second offense.[4]

[8] *Gordon* v. *Bucknell,* 38 Iowa, 438.

A pardon granted by an executive, under the great seal of the state, is a document that is evidence *per se*. *United States* v. *Wilson,* Baldw. 78, Fed. Cas. No. 16,730.

[1] As to admissibility in evidence of records of other states, see note in 5 L.R.A.(N.S.) 938.

[1a] *Williams* v. *State,* 130 Ala. 31, 30 So. 336.

[2] *Smith* v. *State,* 62 Atl. 29.

[3] *People* v. *Hettick,* 126 Cal. 425, 58 Pac. 918; *McWhorter* v. *State,* 118 Ga. 55, 44 S. E. 873; *Williams* v. *People,* 196 Ill. 173, 63 N. E. 681; *State* v. *Smith,* 129 Iowa, 709, 4 L.R.A.(N.S.) 539, 106 N. W. 187, 6 A. & E. Ann. Cas. 1023; *State* v. *Monicke,* 139 Mo. 545, 41 S. W. 223; *State* v. *Cox,* 69 N. H. 246, 41 Atl. 862 (complaint with clerk's indorsement of plea of guilty and fine imposed); *Bullard* v. *State,* 40 Tex. Crim. Rep. 270, 50 S. W. 348.

See *Thomas* v. *Com.* 22 Gratt. 912.

[4] *State* v. *Volmer,* 6 Kan. 379.

On an issue of insanity as a defense to a crime, the record of the proceedings in a probate court is receivable in evidence;[5] but where such record relates to civil proceedings only, it is not admissible on a criminal issue.[6]

The issuance and return of a subpœna, although a judicial act, is not admissible to establish the nonexistence of the person subpœnaed in the county to which the subpœna issued;[7] nor is such document admissible to show that the witnesses subpœnaed were witnesses to the crime charged,[8] but it is admissible to show that the witnesses named could not be served, on account of absence.[9]

Judicial entries, orders, proceedings, and reports of a semijudicial or semiofficial character are admissible to establish the facts recited therein.[10] But the minutes of evidence taken before a grand jury are not competent as independent evidence, without the testimony of the grand jurors who were

[5] *State* v. *McMurry,* 61 Kan. 87, 58 Pac. 961.

[6] *Davis* v. *State,* 44 Fla. 32, 32 So. 822; *Johnson* v. *State,* 57 Fla. 18, 49 So. 40.

[7] *People* v. *Lee,* 128 Cal. 330, 60 Pac. 854.

[8] *Logan* v. *State,* — Tex. Crim. Rep. —, 53 S. W. 694.

[9] *People* v. *Barker,* 144 Cal. 705, 78 Pac. 266.

[10] *People* v. *Rodley,* 131 Cal. 240, 63 Pac. 351 (in perjury, admitting affidavit of publication); *Thompson* v. *State,* 120 Ga. 132, 47 S. E. 566 (teachers' school report); *Barton* v. *State,* 154 Ind. 670, 57 N. E. 515 (entry showing bail bond forfeited, as evidence of flight); *State* v. *Kesner,* 72 Kan. 87, 82 Pac. 720 (entry of forfeiture of bail bond, as evidence of flight); *Com.* v. *Meehan,* 170 Mass. 362, 49 N. E. 648 (police court docket; *People* v. *Kuney,* 137 Mich. 436, 100 N. W. 596 (commitment admissible to prove that party was legally subject to control of a detention home); *State* v. *Shaw,* 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51 (docket entries admissible to show court's action with reference to committing accused); *May* v. *State,* 15 Tex. App. 430 (notary's certificate of protest admissible to show protest of a draft in a prosecution of one accused of obtaining money on the same by false representations; *State* v. *Bringgold,* 40 Wash. 12, 82 Pac. 132, 5 A. & E. Ann. Cas. 716 (complaint filed in justice's court).

present, or of the witnesses who testified to the facts;[11] nor a memorandum in a court minute-book, showing dismissal of an indictment and a rereference to the grand jury, to show continuous prosecution.[12]

III. Nonjudicial Registries and Records.

§ 526. Official registry receivable in evidence.—Where a statute requires the keeping of an official record for the public use, by an officer duly appointed for the purpose, and subject not merely to private suit but to official prosecution for any errors, such record, so far as concerns entries made in it in the course of business, is admissible in the courts of such state as prima facie proof of the facts it contains. Nor is it necessary to verify such record by the oath of the person keeping it. That it is directed by statute to be kept for the public benefit, and that it is kept, so far as appears on its face, with regularity and accuracy, entitles it to be received in evidence, and throws the burden of impeaching it on the opposite side. To make the record itself evidence, it is only necessary that it be produced, and that it should be proved to have come from the proper depositary.[1] But such documents, to be in evidence, must be kept by public officers in pursuance of an official duty. Hence it has been held in a Maryland case, that police records, kept by the detective police of a city, in order to show charges made against particular individuals, cannot be put in evidence by a party so accused, in order to show the injury done him by being charged with theft; such records not being prescribed by statute, nor in any way traceable to the party sued for the injury.[2]

[11] *State* v. *Porter*, 105 Iowa, 677, 75 N. W. 519.

[12] *Kentucky Gravel Road Co.* v. *Com.* 16 Ky. L. Rep. 153.

[1] Wharton, Ev. § 526; *State* v. *Chambers*, 70 Mo. 625.

[2] *Garvey* v. *Wayson*, 42 Md. 187.

At the same time, entries of this class, though inadmissible as public records, may become evidence when made by a deceased person against his interest,[3] or, as will be seen, when in discharge of a business duty.[4]

§ 527. Records of public corporations admissible.—Not merely are the records of public officers, national or state, when kept in accordance with statutes, thus admissible, but admissibility has been extended to official records duly kept by municipal or other corporations, which, as to third parties, are prima facie evidence of the facts duly entered by officers of such bodies, in the course of their duties.[1] Even a public officer's entry, when in the regular discharge of his duties, in a book he is by law required to keep, is prima facie evidence in his own favor when the performance of the acts registered is at issue.[2]

§ 527a. Documents evidencing official acts in general.—Documents evidencing official acts or proceedings are admissible in evidence when kept in the line of official duty, to establish facts relevant in the trial of criminal charges. Thus, on the trial of a clerk for embezzling postoffice funds, his quarterly report, shown to be in his handwriting, is admissible to establish the amount of money chargeable to his department;[1] a jail record is admissible to show that accused was discharged from jail about the time the crime charged against him was committed;[2] a clerk's certificate containing a brand

[3] Wharton, Ev. § 226; *Reg.* v. *Buckley,* 13 Cox, C. C. 293.

[4] Wharton, Ev. § 238; post, §§ 527–530.

[1] Wharton, Ev. § 527.

[2] Wharton, Ev. § 527.

[1] *McBride* v. *United States,* 42 C. C. A. 38, 101 Fed. 821; *Lorenz* v. *United States,* 24 App. D. C. 337; *Com.* v. *Berney,* 28 Pa. Super. Ct. 61; *State* v. *Hall,* 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325; *Hempton* v. *State,* 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657; *State* v. *Dudenhefer,* 122 La. 288, 47 So. 614.

[2] *State* v. *Kennedy,* 154 Mo. 268, 55 S. W. 293; *People* v. *Bradbury,*

recorded in his office is admissible as evidence of the recorded brand;[3] a conviction of larceny may be proved by the trial docket where that is the only record of the court, and is the one in which the final judgments are entered;[4] the record of the accused's measurements, taken as required by the department of justice, is admissible, though the person making entry did not make the measurement, but took it down from dictation;[5] the records of the town clerk are admissible to prove the want of a license to sell intoxicating liquors.[6]

But where records are required to be kept, a mere certificate containing a summary of their contents, in the absence of a statute authorizing it, is not admissible in evidence, but the fact should be proved by certified copies of the record.[7]

§ 527c. Certificates of copies and transcripts of records.—When properly proved, original documents are always admissible, but when their absence is properly accounted for, or they are such records and documents that the

155 Cal. 808, 103 Pac. 215 (judgment roll).

[3] *Bayless* v. *State,* 121 Tenn. 75, 113 S. W. 1039; *Garrett* v. *State,* 42 Tex. Crim. Rep. 521, 61 S. W. 129; *Wilson* v. *State,* 3 Tex. App. 206.

See *Pilgrim* v. *State,* 3 Okla. Crim. Rep. 49, 104 Pac. 383 (judge's address); *Seaborn* v. *State,* — Tex. Crim. Rep. —, 90 S. W. 649.

[4] *Gandy* v. *State,* 86 Ala. 20, 5 So. 420.

[5] *United States* v. *Cross,* 9 Mackey, 365.

[6] *Com.* v. *Foss,* 14 Gray, 50.

See *Com.* v. *Bolkom,* 3 Pick. 281.

But a stub book showing the issuance of a license, its date, and expiration, is not admissible to prove that the license actually issued. *Earl* v. *State,* 44 Tex. Crim. Rep. 493, 72 S. W. 376.

[7] *State* v. *Ruth,* 21 Kan. 583; *Goff* v. *Com.* 5 Ky. L. Rep. 325 (certificate of votes); *People* v. *Lambert,* 5 Mich. 349, 72 Am. Dec. 49 (marriage certificate); *State* v. *Missio,* 105 Tenn. 218, 58 S. W. 216 (list of corporations). The return of a search warrant is not admissible to show that the accused kept intoxicating liquors with the intent to sell the same illegally. *State* v. *Costa,* 78 Vt. 198, 62 Atl. 38; *Com.* v. *McGarry,* 135 Mass. 553 (minutes of a vote); *State* v. *Behrman,* 114 N. C. 797, 25 L.R.A. 449, 19 S. E. 220 (marriage certificate).

original is not required to be produced, certified copies of the same are generally admissible in evidence.

Where the question is controlled by statute, the provisions of the statute must be complied with, but, in the absence of a statute, the general rule prevails in the United States that the lawful custodian of a judicial document has the authority to certify the same, either under his hand and seal as such custodian, or under the seal of the office or court from which the copy is taken, and such copies are usually received in evidence without further proof.[1] Such copies are called "examined," "certified," "exemplified," and "official," according to the manner in which they are authenticated. A sworn or an examined copy differs from a certified copy in that the official custodian of the record gives out the copy certified or attested by him, while the sworn or examined copy is made by some other person than the custodian, and sworn to by such person, testifying on the witness stand.

Thus, where a clerk of a court is made custodian of the coroner's documents, a copy of such documents, certified by such clerk, is admissible, without producing the original;[2] so proof of the contents of an indictment pending in another county can be made by a copy of such indictment duly certified;[3] and a paper purporting to be a copy is sufficiently authenticated where the clerk uses the words, "A copy. Attest."[4]

In accordance with the general rule, certified copies and transcripts are admissible where it is evident that they are certified from the proper custody,[5] but, in a prosecution for

[1] *State* v. *Banks*, 106 La. 480, 31 So. 53.

[2] *State* v. *Roland*, 38 La. Ann. 18.

[3] *Childs* v. *State*, 55 Ala. 28.

[4] *Com.* v. *Quigley*, 170 Mass. 14, 48 N. E. 782.

[5] *Stanley* v. *State*, 88 Ala. 154, 7 So. 273 (transcripts of clerk's reports); *Sandford* v. *State*, 11 Ark. 328 (a transcript of judgment proving original sentence); *Redman* v. *State*, 28 Ind. 205 (transcript of record to prove pendency of prosecution, appearance, and a finding of

bigamy, a copy of a marriage registry showing the first marriage is not admissible where it does not first appear that the keeping of the registry was required by law,[6] nor is a transcript of such marriage in a foreign country prima facie evidence of marriage, without proof of the law requiring such registry to be made and kept.[7]

§ 527d. Private writings and publications as documentary evidence.—Private writings, such as letters, telegrams, memoranda; and private publications, such as circulars or newspaper articles, when properly proved, are admissible in evidence in criminal cases, when relevant to the issues on trial. Such writings and publications are documents, within the definition of that word as used in this work. The rule of admission is not extended in favor of such writings and publications, because, as a predicate of their admission, they must be duly authenticated and proved with the same solemnity as formal writings. But, when this condition is satisfied, the

guilty); *Hudgens* v. *Com.* 2 Duv. 239 (judgment of conviction admissible to prove that prisoner was in legal custody; *State* v. *Elam*, 21 Mo App. 290 (certified copy of duplicate registry issued by board of pharmacy admissible in prosecution for selling liquor without prescription); *McInerney* v. *United States*, 74 C. C. A. 655, 143 Fed. 729 (verified copy of ship's manifest); *Hereford* v. *People*, 197 Ill. 222, 64 N. E. 310 (transcript of testimony of official reporter in prosecution for perjury); *State* v. *Tripp*, 113 Iowa, 698, 84 N. W. 546 (certified copy of deed admitted over objection that it was not the deed offered in the indictment, where it only differed as to name of the grantee and his residence, on prosecution for false representations; *Com.* v. *Neehan*, 170 Mass. 362, 49 N. E. 648 (entries in police court docket); *People* v. *Bradbury*, 155 Cal. 808, 103 Pac. 215 (judgment roll in civil action admissible to prove jurisdiction, testimony, and its materiality on prosecution for perjury alleged to have been committed in such case); *Baker* v. *State*, 56 Tex. Crim. Rep. 16, 118 S. W. 542 (marriage license and return thereon admissible without further attestation of official character of person performing the ceremony than the statement following the official signature).

[6] *State* v. *Dooris*, 40 Conn. 145.

[7] *Stanglein* v. *State*, 17 Ohio St. 453.

admissibility of such writings is dependent on their relevancy to the issues joined, and not upon their scope or character, as both court and jury are entitled to have all the aid that such evidence can legally bring to charge on trial.

Such writings are introduced not to determine the reciprocal rights of parties under the writing, but as collateral evidence merely, tending to prove or disprove some fact in issue. The instances in which such writings are properly in evidence are to be determined from the issues in the concrete case, as is shown by the decisions.[1] The reception of such evidence

[1] *Com.* v. *Robinson,* 1 Gray, 555 (newspaper containing time-table, to determine the arrival of a stage-coach, admissible; *Com.* v. *Hildreth,* 11 Gray, 327 (newspaper containing article by defendant, concerning sales of liquor, admissible); *State* v. *Porter,* 26 Mo. 201 (printed blank returns admissible, as showing course of duty of defendant as clerk of a corporation; *Britt* v. *State,* 21 Tex. App. 215, 71 S. W. 255 (bill of sale admitted on trial for theft of cattle; *United States* v. *Dunbar,* 60 Fed. 75 (telegram from prosecuting witness to defendant admitted to corroborate verbal admissions of defendant to such witness); *Burton* v. *State,* 107 Ala. 108, 18 So. 284 (on homicide trial, defendant's letters concerning matters he desired to conceal, found on person of deceased, admissible); *Rumph* v. *State,* 91 Ga. 20, 16 S. E. 104 (unsigned letter written by accused charged with larceny, addressed to owner of property, admissible; *Westbrook* v. *People,* 126 Ill. 81, 18 N. E. 304 (letter containing threats to kill, written to deceased's brother, by defendant, admitted as against general objections); *Simons* v. *People,* 150 Ill. 66, 36 N. E. 1019 (letters written by defendant to deceased, but found on defendant's person, and not proved to have been delivered, held admissible to show relations between deceased and defendant; *Stricklin* v. *Com.* 83 Ky. 566 (letters written by a woman held as an accessory to the accused, showing guilty relations, admissible; *State* v. *Watson,* 63 Me. 128 (on trial for arson, letter written by defendant to show ownership, admissible); *Com.* v. *Jeffries,* 7 Allen, 548, 83 Am. Dec. 712 (telegram admitted as evidence of defendant's declarations); *Com.* v. *Vosburg,* 112 Mass. 419 (telegram admitted as relevant, to explain conversation between police officer and defendant); *State* v. *Adams,* 108 Mo. 208, 18 S. W. 1000 (letters written by prosecuting witness to defendant admissible in corroboration of charges; *State* v. *Winningham,* 124 Mo. 423, 27 S. W. 1107 (unsigned letters admitted); *State* v. *Sibley,* 131 Mo. 519, 31 S. W. 1033 (letters dictated by defendant, but signed by the wife,

rests in the discretion of the trial court, and his ruling will not be disturbed unless an abuse of his discretion is shown.[2] But letters will not be admitted as evidence, although written and mailed to the accused, without proof that the accused actually received them.[3] Also, letters written by a third party, stating

admissible against defendant); *People* v. *Higgins,* 127 Mich. 291, 86 N. W. 812 (story in defendant's handwriting, found in box he had stolen, and bearing a close resemblance to the facts of a murder for which he was being tried, admitted); *Territory* v. *Claypool,* 11 N. M. 568, 71 Pac. 463 (bill of sale admitted on question of purchasing stolen stock, even where such bill of sale was not witnessed and acknowledged as required by law); *Seaborn* v. *State,* — Tex. Crim. Rep. —, 90 S. W. 649 (bill of sale admitted); *State* v. *Wetherell,* 70 Vt. 274, 40 Atl. 728 (magazine mailed by accused to prosecutrix admissible to show criminatory communication); *Williams* v. *State,* 123 Ala. 39, 26 So. 521 (letter written by defendant, after robbery, stating that he had $15, admissible, with other evidence, to prove amount taken); *Thalheim* v. *State,* 38 Fla. 169, 20 So. 938 (letters found in letter files admitted on question of agency); *Eatman* v. *State,* 48 Fla. 21, 37 So. 576 (letters tending to contradict a witness, relative to the issue, should be admitted); *State* v. *Renaud,* 50 La. Ann. 662, 23 So. 894 (letter written by prisoner in jail, admitted against him); *Com.* v. *Burtan,* 183 Mass. 461, 67 N. E. 419 (in false pretenses, proof of telegram referring to defendant admitted); *State* v. *Armstrong,* 106 Mo. 395, 13 L.R.A. 419, 27 Am. St. Rep. 361, 16 S. W. 604 (pasting the letter in, as a part of an indictment, does not destroy its character as evidence in the case); *State* v. *Soper,* 148 Mo. 217, 49 S. W. 1007 (letter containing confession, admissible); *People* v. *Fletcher,* 44 App. Div. 199, 60 N. Y. Supp. 777, 14 N. Y. Crim. Rep. 328 (two letters, one in the form of an advertisement offering a reward for stolen property, and the other offering to return stolen property, apparently in the same handwriting, admissible on charge of larceny against the defendant); *State* v. *McDaniel,* 39 Or. 161, 65 Pac. 520 (letter in defendant's handwriting, found in deceased's bedroom, admitted); *State* v. *Marsh,* 70 Vt. 288, 40 Atl. 836 (note written by one codefendant to the other, while in jail, admitted); *Monteith* v. *State,* 114 Wis. 165, 89 N. W. 828 (letter from defendant to another, admissible to show relations between them).

[2] *Gaode* v. *State,* 50 Fla. 45, 39 So. 461; *People* v. *Mayne,* 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654; *State* v. *Eldred,* 8 Kan. App. 625, 50 Pac. 153; *Turner* v. *Com.* 25 Ky. L. Rep. 2161, 80 S. W. 197.

[3] *James* v. *State,* 40 Tex. Crim. Rep. 190, 49 S. W. 401; *Dawson* v.

that he, and not the defendant, was guilty of the crime, are not admissible, unless preserved in the form of a deposition or proved by the sworn testimony of the writer.[4]

§ 527e. Admissibility of entries in miscellaneous records.—In addition to books of account kept in the usual course of business, semiofficial records, and other documents of a generally recognized character, miscellaneous records, books, memoranda, and the entries therein, are admissible, when shown to be relevant to the issue and properly authenticated and a proper predicate laid for the introduction, as evidence, of collateral facts that may tend to establish or disprove the charge on trial.[1]

State, 38 Tex. Crim. Rep. 9, 40 S. W. 731; *Ford* v. *State,* — Tex. Crim. Rep. —, 56 S. W. 338; *People* v. *Lee Dick Lung,* 129 Cal. 491, 62 Pac. 71; *State* v. *Shive,* 58 Kan. 783, 51 Pac. 274.

[4] *Mays* v. *State,* 72 Neb. 723, 101 N. W. 979; *People* v. *Greenfield,* 23 Hun, 454.

[1] *Davis* v. *State,* 91 Ga. 167, 17 S. E. 292 (car inspector's notes of car numbers admitted to identify brasses stolen from them); *People* v. *Brow,* 90 Hun, 509, 35 N. Y. Supp. 1009 (school teacher's record admissible to prove complainant's age, on prosecution for abduction); *People* v. *McLaughlin,* 2 App. Div. 419, 37 N. Y. Supp. 1005 (on prosecution of police officer for extortion, there being evidence that B was defendant's agent, an entry in the books of S showing moneys paid to defendant per B admissible to show date and payment); *Moots* v. *State,* 21 Ohio St. 653 (railroad freight book entries admissible to show a particular shipment); *Shriedley* v. *State,* 23 Ohio St. 130 (check slips, showing transfer of goods from one car to another, with car numbers and descriptive mark of the goods, admissible to show that the goods were marked and shipped); *State* v. *Mace,* 6 R. I. 85 (on prosecution for keeping a cock pit, entry on the cash book of the gas company, showing payment by defendant for gas furnished at the cock pit, admissible to establish the fact of keeping it the date referred to); *Rogers* v. *State,* 26 Tex. App. 404, 9 S. W. 762 (on indictment for arson, entries in the books of accused, in his own handwriting, representing merchandise pretended to have been received just before the fire, admissible in corroboration of witness who testified that defendant said he had fixed his books so as to show merchandise equal to

But such private writings are not admissible where the witness who testified to the fact distinctly recalls the transaction, independently of the entry;[2] nor where such entries are

the amount of insurance); *Shinn* v. *Com.*, 32 Gratt. 899 (corporation's annual report admissible to show disposition of certain checks by accused); *White* v. *United States*, 164 U. S. 100, 41 L. ed. 365, 17 Sup. Ct. Rep. 38 (county-jail record, showing dates of receiving and discharging prisoner, admissible, even where not kept under statute); *Easton* v. *Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522 (books of bank admissible to show receipt of deposit and bank officer's knowledge when bank was insolvent); *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 730 (entries in books in legal possession of another person competent against accused); *Brown* v. *United States*, 73 C. C. A. 187, 142 Fed. 1 (bank books admissible to show amount of indebtedness due it on issue of insolvency of a corporation); *Peters* v. *United States*, 36 C. C. A. 105, 94 Fed. 127 (county treasurer's cash book admitted on question of whether or not a deposit had been made in bank); *Jones* v. *State*, 99 Ga. 46, 25 S. E. 617 (stub book of tickets, containing same figures as the tickets themselves, admissible to prove weights, where the ticket itself had been lost but properly accounted for); *Cook* v. *People*, 177 Ill. 146, 52 N. E. 273 (hotel register admissible to show that party had registered under an assumed name); *Simpson* v. *State*, 45 Tex. Crim. Rep. 320, 77 S. W. 819; *State* v. *Hairston*, 121 N. C. 579, 28 S. E. 492 (entries in Bible admissible to prove age of child); *Collins* v. *State*, 39 Tex. Crim. Rep. 441, 46 S. W. 933 (book containing entries of purchases of live stock admissible to show erasures and change of original dates); *Smith* v. *State*, — Tex. Crim. Rep. —, 73 S. W. 401 (physician's book of original entry, in possession of his son after his death, admissible on question of age of prosecutrix); *Jackson* v. *State*, 49 Tex. Crim. Rep. 248, 91 S. W. 574 (delivery book of express company admissible to show delivery of package); *State* v. *Powers*, 72 Vt. 168, 47 Atl. 830 (when entry on the book of a livery-stable keeper was offered to establish an *alibi*, it was proper to admit the page in evidence, to explain interlineations and changes); *Secor* v. *State*, 118 Wis. 621, 95 N. W. 942 (on prosecution of an accountant, books for the keeping of which he was responsible, though not in his handwriting, are admissible against him).

[2] *People* v. *McLaughlin*, 150 N. Y. 365, 44 N. E. 1017.

made up from a book of original entries and other memoranda;[3] nor where the defendant had no knowledge of, and did not consent to, an entry in the books of his employer.[4]

Statements made by accused in a criminal matter cannot be proved by a written memorandum of them made by a witness at the time.[5] Where there was a prosecution for perjury in falsely verifying the list of property, the assessor's notes of the property returned by accused were not admissible to show amount of property returned by him.[6]

On a criminal prosecution, a train register is not competent to prove the time of arrival and departure at the station on the night of the alleged crime, where the conductor who made it was not called and the agent had no actual knowledge of the time.[7]

Entries on the books of a railroad company, made by an agent still living, but absent, are not admissible in a criminal prosecution to prove statements therein entered.[8]

§ 528. Books and registries kept by public institutions admissible.—When a registry of current events kept in a public voluntary institution is the only evidence attainable of a fact in litigation, such registry, on the principle that the best evidence is admissible evidence,[1] may be admitted as prima facie proof. In accordance with this view, a record of weather kept at such a public institution has been held admissible to prove the temperature on a day as to which

[3] *Donner* v. *State,* 72 Neb. 263, 117 Am. St. Rep. 789, 100 N. W. 305.

[4] *State* v. *Ames,* 119 Iowa, 680, 94 N. W. 231.

[5] *People* v. *Elyea,* 14 Cal. 144.

[6] *People* v. *Quinn,* 18 Cal. 122.

[7] *People* v. *Mitchell,* 94 Cal. 550, 29 Pac. 1106.

[8] *State* v. *Thomas,* 64 N. C. 74; *Wade* v. *State,* 37 Tex. Crim. Rep. 401, 35 S. W. 663.

[1] See Wharton, Ev. §§ 72, 170–172.

witnesses could not accurately speak.[2] Such entries, however, must be subjected to the same tests as to genuineness and primariness, as will presently be noticed in respect to parish records.

§ 529. Log book admissible under act of Congress.—Under certain acts of Congress, log books may be evidence of the facts they state. Their admissibility, however, is limited to the points the statutes designate; and they must be identified as duly kept. But independent of the statutory provisions, a log book is admissible if kept by a deceased officer when in the performance of his duties, or by an officer whose attendance is unobtainable.[1]

IV. Records and Registries of Birth, Marriage, and Death.

§ 530. When duly kept, marriage and baptismal registries are admissible to prove facts.—An official registry, as we have already seen, is admissible, when kept in conformity with law and when duly authenticated, to prove such facts as the law requires to be registered. It follows that whenever a baptismal, marriage, or burial registry is kept in accordance with statute, such registry, being duly authenticated, is admissible to prove the facts which are within the statutory authority.[1] Even though there be no enabling stat-

[2] *De Armond* v. *Neasmith*, 32 Mich. 231.

See *The Catherine Maria*, L. R. 1 Adm. & Eccl. 53, 12 Jur. N. S. 380.

See supra, §§ 526, 527; *Sisson* v. *Cleveland & T. R. Co.* 14 Mich. 497, 90 Am. Dec. 252.

[1] Wharton, Ev. § 529.

[1] Gilbert, Ev. 3d ed. 77; *Wihen* v. *Law*, 3 Starkie, 63, 23 Revised Rep. 757; *May* v. *May*, 2 Strange, 1073; *Draycott* v. *Talbot*, 3 Bro. P. C. 564; *Doe ex dem. Wollaston* v. *Barnes*, 1 Moody & R. 389.

See *State* v. *Wallace*, 9 N. H. 515; *State* v. *Horn*, 43 Vt. 20; *Jackson* v. *People*, 3 Ill. 232; *Glenn* v. *Glenn*, 47 Ala. 204.

See *Kopke* v. *People*, 43 Mich. 41,

ute, there is much strength in the position that as the canon law, so far as concerns the law of marriage, is part of English common law,[2] and as parish records are public records by the canon law, they are to be regarded by us as public records, and hence admissible in evidence, by our own common law.[3] Yet as this position is open to doubt, and is in conflict with English rulings excluding registries by dissenting religious bodies, unless supported by proof *aliunde* as to their accuracy;[4] it is proper, in order to authenticate the facts stated in such records, to call the person by whom they were made, if living, to testify to their accuracy, or if he be dead, to prove that the entries were made by him in discharge of his duties. It should at the same time be remembered that a copy of a foreign registry will be admitted wherever such registry is kept in accordance with the law of the place of entry,[5] supposing that the identity, authority, and signature of the registrar be duly proved.[6]

4 N. W. 551, cited infra, § 533; *Birt* v. *Barlow*, 1 Dougl. K. B. 172; *Lewis* v. *Marshall*, 5 Pet. 470, 8 L. ed. 195; *Sturla* v. *Freccia*, 40 L. T. N. S. 861.

[2] See Wharton, Confl. L. §§ 169 et seq.

[3] *Stainer* v. *Droitwich*, 1 Salk. 281, S. C. 12 Mod. 86, Holt, 290; *Kingston* v. *Lesley*, 10 Serg. & R. 383; *American L. Ins. & T. Co.* v. *Rosenagle*, 77 Pa. 507; *Chouteau* v. *Chevalier*, 1 Mo. 343.

See *Kennedy* v. *Doyle*, 10 Allen, 165, cited infra, § 531.

[4] Wharton, Ev. § 653.

[5] *Re Earldom of Perth*, 2 H. L. Cas. 865, 873, 874, 876, 877; *Abbott* v. *Abbott*, 29 L. J. Prob N. S. 57; 4 Swabey & T. 254; *American L. Ins. & T. Co.* v. *Rosenagle*, 77 Pa. 507; *Huet* v. *Le Mesurier*, 1 Cox, Ch. Cas. 275; *Cood* v. *Cood*, 1 Curt. Eccl. Rep. 766.

[6] *State* v. *Dooris*, 40 Conn 145.

Where a parent was not able to read or write, but testified that from time to time he got neighbors to record the dates of the birth of his children, on a piece of paper which he kept for that purpose, and it was identified by the parent and by one of the neighbors who had made one of the records on the paper, such record was held competent to show the age of prosecutrix. *State* v. *Neasby*, 188 Mo. 467, 87 S. W. 468.

Baptismal certificate not competent to prove date of birth. *State* v. *Snover*, 63 N. J. L. 382, 43 Atl. 1059, 11 Am. Crim. Rep. 655.

§ 531. Admissible also when kept by deceased persons in the course of their business.—As a general rule, entries kept by a deceased person in the course of his business are admissible as prima facie proof of all facts relating to such business, in all cases in which the entries bear genuineness on their face, and were made at or near the time of the events they register. Independently of statutory prescriptions, the entries regularly made in his own books, or his official books, by a clergyman, or by the recording officer of a parish, or by the proper functionary of a religious society, are, after his decease, evidence of all facts which it was his duty officially to enter.[1]

§ 532. Registry only proves facts that it was the writer's duty to record.—A registry of baptisms, however, has been ruled not to be proof of the alleged time of the child's birth, but only that he was born at the date of the baptism;[1] though it seems that it may be used, with other indicatory evidence, to show the place of birth,[2] to indicate age,[3] and to infer illegitimacy.[4] In Massachusetts it has been accepted, cumulatively with other evidence, to prove the date of birth.[5] Where, however, the statute provides that births shall be registered,

[1] Wharton, Ev. § 654; *Kennedy* v. *Doyle*, 10 Allen, 165.

[1] *Rex* v. *Clapham*, 4 Car. & P. 29; *Burghart* v. *Angerstein*, 6 Car. & P. 690; *Wilnen* v. *Law*, 3 Starkie, 63, 23 Revised Rep. 757; *Morrissey* v. *Wiggins Ferry Co.* 47 Mo. 521.

See *Re Wintle*, L. R. 9 Eq. 373, 21 L. T. N. S. 781, 18 Week. Rep. 394.

[2] *Rex* v. *North Petherton*, 5 Barn. & C. 508, 8 Dowl. & R. 325, 4 L. J. K. B. 213, 29 Revised Rep. 305.

See *Rex* v. *Lubbenham*. 5 Barn. & Ad. 968, 3 Nev. & M. 37, 3 L. J. Mag. Cas. N. S. 50; *Clark* v. *Trinity Church*, 5 Watts & S. 266.

[3] *Reg.* v. *Weaver*, L. R. 2 C. C. 85, 43 L. J. Mag. Cas. N. S. 13, 29 L. T. N. S. 544, 22 Week. Rep. 190. 12 Cox, C. C. 527; *Whitcher* v. *McLaughlin*, 115 Mass. 168.

[4] *Cope* v. *Cope*, 1 Moody & R. 271, 5 Car. & P. 604; *Blackburn* v. *Crawford*, 3 Wall. 175, 18 L. ed. 186.

[5] *Whitcher* v. *McLaughlin*, 115 Mass. 168.

then the registry is prima facie proof of the birth and its date.[6] The identity of the person referred to, however, must be proved *aliunde*.[7] The marriage registry proves not only the fact of marriage, but the time of celebration.[8] The mode of proving marriage will be found more fully discussed in a prior chapter.[9]

§ 533. Entries must be first-hand and prompt.—Entries in such a registry, however, must be made at first-hand in order to be admissible.[1] Thus, a minister's entry of a baptism, administered by another person before his own official service began, the information of the baptism having been given him by the clerk, has been ruled inadmissible,[2] though an entry by the proper officer may verify an act done by his official subaltern.[3] Immediateness of entry, however, is not essential, if the entry be made by the officer himself, and there is no suspicious delay,[4] though the registry must come from the proper custody,[5] and the proper officer.[6] But in a criminal issue, where the fact of marriage must be proved beyond reasonable doubt,[7] the statute must be strictly complied with to make the registry by itself sufficient proof. Thus, in Michigan, in a prosecution for bigamy, the only evidence of a first marriage was that of a ceremony in Ohio before a

[6] *Derby* v. *Salem*, 30 Vt. 722; *Stoever* v. *Whitman*, 6 Binn. 416.

See *Carskadden* v. *Poorman*, 10 Watts, 82, 36 Am. Dec. 145.

[7] *Morrissey* v. *Wiggins Ferry Co.* 47 Mo. 521.

[8] *Doe ex dem. Wollaston* v *Barnes*, 1 Moody & R. 386; *Reg.* v. *Hawes*, 1 Den. C. C. 270, 2 Cox, C. C. 432.

[9] Supra, §§ 170, 171.

[1] See supra, § 251; Wharton, Ev. § 246.

[2] *Doe ex dem. Warren* v. *Bray*, 8 Barn. & C. 813, 3 Mann. & R. 428, 7 L. J. K. B. 161; *Walker* v. *Wingfield*, 18 Ves. Jr. 443, 11 Revised Rep. 232.

[3] *Doe ex dem. Wollaston* v. *Barnes*, 1 Moody & R. 386

[4] *Derby* v. *Salem*, 30 Vt. 722.

[5] 6 Wharton, Ev. §§ 194, et seq.

[6] *Doe ex dem. Arundel* v. *Fowler*, 19 L. J. Q. B. N. S. 151, 14 Q. B. 700, 14 Jur. 179.

[7] Supra, § 171.

justice, under a license issued not by a judge of probate, as required by statute, but by one signing himself "deputy clerk," with a full knowledge on the part of the justice of his want of authority, the defendant being at the time under arrest, there being also proof of a refusal of the defendant to live with the woman as his wife at any time after such ceremony. This was ruled insufficient to sustain the verdict.[8]

§ 534. Certificate at common law inadmissible.—At common law, as we have already seen, a certificate from a party, even when acting officially, that he has done a particular thing, is inadmissible to prove such thing. If living, he must be called to prove the fact; if dead, it may be proved by his official entries.[1] This rule applies to certificates of marriage and of birth, in cases where such certificates are not otherwise made evidence. Thus the certificate of a clergyman given sixteen years after a marriage, that he had married the husband to one claiming to be a prior wife, cannot, by itself, be received to establish such prior marriage, there being no record of such marriage in the registry of the church.[2] Under the Connecticut statute, however, a certificate of baptism, by a duly authorized minister, is admissible;[3] and such seems to be the rule under the Maine statute.[4] When made evidence by statute, such certificates become only prima facie proof of the facts they duly set forth.[5]

§ 535. Copies inadmissible.—Copies of administrative records, or of papers deposited in public archives, are at com-

[8] *Kopke* v. *People*, 43 Mich. 41, 4 N. W. 551; supra, §§ 169, 173a, et seq.

See post, § 827; *State* v. *Bowe*, 61 Me. 171.

[1] See supra, § 195.

[2] *Gaines* v. *Chew*, 2 How. 619, 11 L. ed. 402.

[3] *Huntly* v. *Compstock*, 2 Root, 99.

[4] *Dole* v. *Allen*, 4 Me. 527.

[5] *Derby* v. *Salem*, 30 Vt. 722; *Jones's Succession*, 12 La. Ann. 397.

See *Beates* v. *Retallick*, 23 Pa. 288.

mon law inadmissible when the original can be had. Thus, a sworn copy of a marriage contract, executed in the presence of the lieutenant governor and Spanish commandant of Upper Louisiana, with a certificate of the commandant that the original was deposited in the archives of the territory, is not admissible to prove the marriage.[1] Yet, when the original cannot be had, an exemplification is admissible, for the reason that it is the best evidence attainable.[2]

Where a statute, as is the case in several states, requires the return of a certificate of marriage to be made by the officiating minister to the county clerk for record, the proper mode of proving such fact is by an exemplification of the certificate.[3] But an exemplification of a foreign certificate of marriage will not be received unless it be proved that the record was kept in conformity with law, and that the person officiating was authorized to officiate.[4]

§ 536. Family records admissible to prove family events.—We have already observed that for the purpose of proving pedigree, and other matters of family interest, family Bibles and other records may be received.[1] For the same purpose a family chart regarded as authoritative by the family may be put in evidence.[2]

[1] *Chouteau* v. *Chevalier,* 1 Mo. 343.

See *State* v. *Dooris,* 40 Conn. 145.

[2] *Alivon* v. *Furnival,* 1 Cromp. M. & R. 277, 4 Tyrw. 751, 3 L. J. Exch. N. S. 241; *Boyle* v. *Wiseman,* 10 Exch. 647, 3 C. L. R. 482, 24 L. J. Exch. N. S. 160, 1 Jur. N. S. 115, 3 Week. Rep. 206; *Quilter* v. *Jorss,* 14 C. B. N. S. 747, 11 Week. Rep. 888; *Cood* v. *Cood,* 1 Curt. Eccl. Rep. 765; *Hyam* v. *Edwards,* 1 Dall. 2, 1 L. ed. 11; *American L. Ins. & T. Co.* v. *Rosenagle,* 77 Pa. 507.

[3] *Niles* v. *Sprague,* 13 Iowa, 198.

[4] *State* v. *Dooris,* 40 Conn. 145; Wharton, Ev. § 659.

[1] Wharton, Ev. § 219.

As to evidence of entries in family Bible or other religious book, see also note in 41 L.R.A. 449.

[2] *North Brookfield* v. *Warren,* 16 Gray, 171; Wharton, Ev. § 660.

§ 536a. Weight of documents as testimony.—As a general rule documents are only prima facie evidence of the facts which they are offered to prove,[1] except where the statute itself may make a provision as to the weight and conclusiveness of the evidence. It also follows that recitals in documents are merely prima facie evidence.[2]

Although a document may only be prima facie evidence of the fact, it is not overcome by the testimony of a single witness who may testify to it,[3] but such oral testimony must be clear and satisfactory.[4] The introduction of a document by a party does not of itself preclude him from introducing other testimony relevant to the fact sought to be established, even where the oral testimony may discredit the document.[5]

V. Books of History and Science; Maps.

§ 537. Approved books of history and geography by deceased authors receivable.—Unless, as in prosecutions for libel, for the purpose of imputing certain facts to author or publisher, a history by a living author cannot be put in evidence. As a record of facts, it is, as to third parties, hearsay, and if the author's authority for these facts is sought, he

[1] *United States* v. *Hutcheson,* 2 L.R.A. 805, 39 Fed. 540; *People ex rel. Martin* v. *Brown,* 55 N. Y. 180; *Anderson* v. *State,* 8 Heisk. 13.

[2] *State* v. *Beard,* 1 Ind. 460.

[3] *Lindsay* v. *Cusimano,* 12 Fed. 504; *Glos* v. *Holmes,* 228 Ill. 436, 81 N. E. 1064.

[4] *Dickenson* v. *State,* 20 Neb. 72, 29 N. W. 184; *Bunce* v. *Gallagher,* 5 Blatchf. 481, Fed. Cas. No. 2,133; *Raymond* v. *Nye,* 5 Met. 151; *Kingman* v. *Tirrell,* 11 Allen, 97; *Fogg* v. *Farr,* 16 Gray, 396; *Henny Buggy Co.* v. *Patt,* 73 Iowa, 485, 35 N. W. 587; *Hoffman* v. *Hendricks,* 21 Okla. 479, 96 Pac. 589, 17 A. & E. Ann. Cas. 379.

[5] *Bunce* v. *Gallagher,* 5 Blatchf. 481, Fed. Cas. No. 2,133; *Waldron* v. *Evans,* 1 Dak. 11, 46 N. W. 607; *American T. & Sav. Bank* v. *Zeigler Coal Co.* 91 C. C. A. 72, 165 Fed. 34; *Raymond* v. *Nye,* 5 Met. 151; *Kingman* v. *Tirrell,* 11 Allen, 97; *Fogg* v. *Farr,* 16 Gray, 396; *Canner* v. *New England Steam & Gas Pipe Co.* 40 N. H. 537; *Henny Buggy Co.* v. *Patt,* 73 Iowa, 485, 35 N. W. 587.

must be called as a witness, whenever he is within the process of the court.[1] Nor can such book be received when secondary, even though the author and all others who could speak to the facts are dead. Thus Dugdale's Monasticon Anglicanum has been rejected as evidence to show that the Abbey de Sentibus was an inferior abbey, because the original records were procurable.[2] But where the author is out of the reach of such process, then a book of history, travels, or chronicles, when not a compilation from another book which is producible, is admissible for what it is worth, so far as concerns facts out of the memory of living men.[3] And, as a rule, any such approved public and general history (and of the fact of approval the court will take judicial notice),[4] when not secondary, as a secondhand reduction of another producible work, is admissible to prove ancient facts of a public nature either at home or abroad. It is otherwise, however, as to matters of a private nature; such as the descent of families, or even the boundaries of counties.[5] College catalogues,[6] and peerage lists, and army and navy lists,[7] are likewise inadmissible, if offered as to matters which could be proved by living witnesses. And the Gazetteer of the United States, without further authentication, cannot be received to prove the relative distances of geographical points.[8]

But to illustrate the meaning of words and allusions, books

[1] *Houghton* v. *Gilbart*, 7 Car. & P. 701; *Fuller* v. *Princeton*, 2 Dane, Abr. chaps. 48, 49; *Morris* v. *Harmers*, 7 Pet. 554, 8 L. ed. 781; *United States* v. *Jackalow*, 1 Black, 484, 17 L. ed. 225; *Edwards* v. *Morris*, 1 Ohio, 524.

See Wharton, Ev. § 338.

[2] *Stainer* v. *Droitwich*, 1 Salk. 281.

[3] See Wharton, Ev. § 537, for cases.

[4] Wharton, Ev. § 282.

[5] *Steyner* v. *Droitwich*, Skinner, 623, 1 Salk. 281, 12 Mod. 85; *Evans* v. *Getting*, 6 Car. & P. 586; *McKinnon* v. *Bliss*, 21 N. Y. 206.

[6] *State* v. *Daniels*, 44 N. H. 383.

[7] Marchmont Peer Min. Ev. 62, 77; *Wetmore* v. *United States*, 10 Pet. 647, 9 L. ed. 567.

[8] *Spalding* v. *Hedges*, 2 Pa. St. 240; Stephen's Digest of Ev. art. 37.

of general literary history may be referred to.[9] Thus, in a case before the English court of exchequer,[10] it was ruled that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the course of literary composition, and explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause.[11]

§ 537a. Plats, diagrams, etc., as illustrating testimony.—Courts would be deprived of a very great aid unless they could avail themselves of plats, diagrams, and sketches, which, although not evidence themselves, serve to illustrate and explain testimony of witnesses. Such documents have generally been received to identify and explain localities, and to enable the jury the better to understand the oral testimony. There is no presumption as to correctness of such documents, but, in order that they may be used, the witness who prepared them must be called to prove their correctness from his own knowledge, and that they faithfully represent the thing to be illustrated. If the accuracy of the illustration is disputed, it is a question for the jury, turning upon the credibility of the witness.[1] While such document must be proved, it is admissible for any other of the witnesses to refer to it

[9] Wharton, Ev. § 282.

[10] *Darby* v. *Ouseley*, 1 Hurlst. & N. 1, 25 L. J. Exch. N. S. 227, 2 Jur. N. S. 497, 4 Week. Rep. 463.

[11] See 2 Co. Litt. 264a; Best, Ev. 802.

[1] *State* v. *Harrison*, — N. C. —, 58 S. E. 754; *Hisler* v. *State*, 52 Fla. 30, 42 So. 692; *Charter* v. *State*, 39 Tex. Crim. Rep. 345, 46 S. W. 236, 48 S. W. 508; *Territory* v. *Emilio*, 14 N. M. 147, 89 Pac. 239; *Com.* v. *Johnson*, 213 Pa. 432, 62 Atl. 1064; *People* v. *Johnson*, 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; *Burton* v. *State*, 107 Ala. 108, 18 So. 284; *People* v. *Smith*, 121 N. Y. 578, 582, 24 N. E. 852; *West* v. *State*, 53 Fla. 77, 43 So. 445.

while testifying.[2] Such documents are generally used to illustrate the *locus in quo* of a crime, and their admission, not as testimony, but as illustrating testimony, resting in the discretion of the trial court, is not a ground for error.[3]

§ 538. Books of inductive science not usually admissible.—For reasons elsewhere discussed at large,[1] treatises on such of the inductive sciences as are based on *data* which each successive year corrects and expands must be refused admission when offered to prove the truth of facts contained in such treatises. Books of this class, therefore, though admissible, if properly authenticated, to prove the state of science at a particular epoch, when that is in issue, are inadmissible as independent substantive evidence to prove the facts they set forth.[2] In an argument to a court, such works may, at

[2] *Burton* v. *State*, 115 Ala. 1, 22 So. 585, 107 Ala. 108, 18 So. 284.

[3] *State* v. *Jerome*, 33 Conn. 265; *Moon* v. *State*, 68 Ga. 687; *Com.* v. *Holliston*, 107 Mass. 232; *State* v. *Lawlor*, 28 Minn. 216, 9 N. W. 698; *People* v. *Johnson*, 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; *Smith* v. *State*, 21 Tex. App. 277, 17 S. W. 471; *Wilkinson* v. *State*, 106 Ala. 23, 17 So. 458; *Adams* v. *State*, 28 Fla. 511, 10 So. 106; *Carter* v. *Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Mann* v. *State*, 134 Ala. 1, 32 So. 704; *Jarvis* v. *State*, 138 Ala. 17, 34 So. 1025; *Ragland* v. *State*, 71 Ark. 65, 70 S. W. 1039; *People* v. *Phelan*, 123 Cal. 551, 56 Pac. 424; *Rawlins* v. *State*, 40 Fla. 155, 24 So. 65; *State* v. *Cummings*, 189 Mo. 626, 88 S. W. 706; *State* v. *Smith*, 68 N. J. L. 609, 54 Atl. 411; *State* v. *Wilcox*, 132 N. C. 1120, 44 S. E. 625; *State* v. *Shaw*, 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51; *State* v. *Hunter*, 18 Wash. 670, 52 Pac. 247; *Noel* v. *State*, 161 Ala. 25, 49 So. 824; *State* v. *Finch*, 54 Or. 482, 103 Pac 505.

[1] Wharton, Ev. § 665.

[2] *Darby* v. *Ouseley*, 1 Hurlst. & N. 12, 25 L. J. Exch. N. S. 227, 2 Jur. N. S. 497, 4 Week. Rep. 463; *Collier* v. *Simpson*, 5 Car. & P. 73; *Tarry* v. *Ashton*, 34 L. T. N. S. 97; *Ashworth* v. *Kittridge*, 12 Cush. 193, 59 Am. Dec 178; *Whiton* v. *Albany City Ins. Co.* 109 Mass. 24; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Com.* v. *Brown*, 121 Mass. 69; *State* v. *O'Brien*, 7 R. I. 336; *Yoe* v. *People*, 49 Ill. 410; *Carter* v. *State*, 2 Ind. 617; *Gehrke* v. *State*, 13 Tex. 568.

See *Ordway* v. *Haynes*, 50 N. H. 159; *Bowman* v. *Woods*, 1 G. Greene, 441; *Bowman* v. *Torr*, 3

the discretion of the court, be read not as establishing facts (unless such books are regarded as matters of notoriety, as are ordinary dictionaries),[3] but as exhibiting distinct processes of reasoning which the court, from its own knowledge as thus refreshed, is able to pursue.[4] But if read to establish facts capable of proof by witnesses, such books cannot be received. Medical works, consequently, are inadmissible for the purpose of proving the facts they contain.[5] So, in action for libel, charging the plaintiff with being a rebel and traitor "because he was a Roman Catholic," the defendant was not allowed to justify by citing books of authority among the Roman Catholics which seemed to show that their doctrines were inimical to loyalty.[6] It is true that an expert, when called to state the sense of his profession on a particular topic,

Iowa, 571; *Brodhead* v. *Wiltse*, 35 Iowa, 429 (by statute); *Cory* v. Silcox, 6 Ind. 39; *Luning* v. *State*, 1 Chand. (Wis.) 264; *Ripon* v. *Bittel*, 30 Wis. 614; *Staudenmeier* v. *Williamson*, 29 Ala. 558; *Merkle* v. *State*, 37 Ala. 139.

See article in 5 Cent. L. J. 439; note by Mr. Lawson, 22 Am Law Reg. 105 et seq.; and note in 40 L.R.A. 561.

[3] See *Alder* v. *State*, 55 Ala. 16; *Dempsey* v. *State*, 3 Tex. App. 429, 30 Am. Rep. 148; 1 Redf. Wills, p. 145. See cases cited; *Yoe* v. *People*, 49 Ill. 410; *State* v. *Spencer*, 21 N. J. L. 196; *Legg* v. *Drake*, 1 Ohio St. 286; *Rex* v. *Waddington*, 1 East, 155, 166, 6 Revised Rep. 238; *Marshall* v. *Brown*, 50 Mich. 148, 15 N. W. 55; *Pinney* v. *Cahill*, 48 Mich. 584, 12 N. W. 862.

See 22 Am. Law Reg. 105, et seq.; *State* v. *Hoyt*, 46 Conn. 330; *Stilling* v. *Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906.

See *Com.* v. *Wilson*, 1 Gray, 338; *Com.* v. *Sturtivant*, 117 Mass. 123, 19 Am. Rep. 401; see discussions in 24 Alb. L. J. 266, 284; Wharton, Ev. §§ 665, 666; 1 Greenl. Ev. § 44, and note.

See *People* v. *Draper*, 1 N. Y. Crim. Rep. 139.

[4] See fully Wharton, Ev. §§ 282, 335; *Harvey* v. *State*, 40 Ind. 516.

Contra, *Reg.* v. *Taylor*, 13 Cox, C. C. 77; *Com.* v. *Wilson*, 1 Gray, 337.

[5] *Com.* v. *Wilson*, 1 Gray, 337; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Com.* v. *Brown*, 121 Mass. 69.

See *Jones* v. *State*, 65 Ga. 506; supra, § 407.

[6] *Darby* v. *Ouseley*, 1 Hurlst. & N. 1, 25 L. J. Exch. N. S. 227, 2 Jur. N. S. 497, 4 Week. Rep. 463; Powell, Ev. 4th ed. 105.

may cite authorities as agreeing with him, and may refresh his memory by referring to standard works in his specialty,[7] and may be cross-examined as to standard works so as to probe his capacity.[8] But such witnesses are not permitted, in their testimony, to read extracts from books on physical philosophy, as primary proof.[9] It is clear, however, that when an expert cites certain works as authority, they may be put in evidence to contradict him, [10] though unless he has been examined in reference to them, they cannot be used to impeach him.[11]

The reasons advanced for the nonadmissibility of books on the inexact sciences are that discovery and experiment are so constantly changing the theories in such sciences that a work upon such subjects which is of value to-day may be not only useless, but inaccurate and misleading, as compared with the advances made to-morrow.

Against these reasons, and in favor of a more liberal rule of admissibility for works upon scientific subjects, there exists the fact that such works are as trustworthy as human testimony can be; they are generally written as contributions to the science to which the author has devoted the best years of his life, generally without expectancy of financial reward, and with a complete absence of the personal factor. They are

[7] Supra, § 407; *Cocks* v. *Purday*, 2 Car. & K. 270; *Collier* v. *Simpson*, 5 Car. & P. 73; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130, note; *Pierson* v. *Hoag*, 47 Barb. 243; *Cory* v. *Silcox*, 6 Ind. 39; *Harvey* v. *State*, 40 Ind. 516; *Bowman* v. *Torr*, 3 Iowa, 571; *Ripon* v. *Bittel*, 30 Wis. 614; *State* v. *Terrell*, 12 Rich. L. 321; *Merkle* v. *State*, 37 Ala. 139.

See supra, § 407.

[8] *Connecticut Mut. L. Ins. Co.* v. *Ellis*, 89 Ill. 516.

[9] *Com.* v. *Wilson*, 1 Gray, 337; *Washburn* v. *Cuddihy*, 8 Gray, 430; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Boyle* v. *State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827.

See fully supra, § 407; *State* v. *Gillick*, 10 Iowa, 98.

[10] *Ripon* v. *Bittel*, 30 Wis. 614.

[11] *Knoll* v. *State*, 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369.

also written, knowing that they will be subject to professional criticism, and will be discredited if not well founded, and that the author's reputation as a man of science depends upon the correctness of the facts and the accuracy of his inductions. These considerations are as certain to secure trustworthiness as an oath administered in open court. If the author of such a work was tendered as an expert to the court, and properly qualified as such, his evidence would be received and be given weight by the jury. Surely the final results of his work, written with the purpose of contributing to the particular science, for the information and betterment of humanity, should have equal weight when expressed on the printed page. This has been recognized by two states,[12] and has been favorably regarded in the Federal courts,[13] but, as will be seen, at this time the weight of authority is against the admission of any work or treatise pertaining to the inexact sciences, as evidence of the facts treated therein.

Hence, with the exception of the jurisdictions noticed, works upon the medical sciences cannot be introduced as evidence, even though they are standard works upon the topic to which they they relate.[14] However, when such works are offered

[12] *Bowman* v. *Woods*, 1 G. Greene, 445; *Merkle* v. *State*, 37 Ala. 139; *Birmingham R. Light & P. Co.* v. *Moore*, 148 Ala. 115, 42 So. 1024; *People* v. *Goldenson*, 76 Cal. 348, 19 Pac. 170.

[13] *Western Assur. Co.* v. *J. H. Mohlman Co.* 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811.

[14] *Epps* v. *State*, 102 Ind. 541, 1 N. E. 491, 5 Am. Crim. Rep. 517; *State* v. *Peterson*, 110 Iowa, 647, 83 N. W. 329; *State* v. *Carpenter*, 124 Iowa, 5, 98 N. W. 775; *Com.* v. *Wilson*, 1 Gray, 337; *Com.* v. *Brown*, 121 Mass. 69; *Com.* v. *Sturtevant*, 117 Mass. 122, 19 Am. Rep. 401; *Carter* v. *State*, 2 Ind. 617; *Plake* v. *State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *State* v. *Baldwin*, 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *People* v. *Hall*, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357; *State* v. *Coleman*, 20 S. C. 441; *Marshall* v. *Brown*, 50 Mich. 148, 15 N. W. 55; *Boyle* v. *State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827; *State* v. *Winter*, 72 Iowa, 627, 34 N. W. 475; *State* v. *O'Brien*, 7 R. I. 336; *People* v. *Millard*, 53 Mich. 63, 18 N.

in evidence, the objection must go to their incompetency as evidence, and, to insure a review of error alleged in the admission of such works, the objection must be specifically pointed out.

§ 539. Books of exact science.—Another state of facts arises when we approach books of exact science, in which conclusions from certain and constant *data* are reached by processes too intricate to be elucidated by a witness when on examination on a stand. The books containing such processes, if duly sworn to by the persons by whom they are made, are the best evidence that can be produced in that particular line.[1] When the authors of such books cannot be reached, the next best authentication of the books is to show that they have been accepted as authoritative by those dealing in business with the particular subject. Hence the Carlisle and Northampton tables have been admitted by the courts as showing what is the probable duration of life under particular conditions.[2] In order to verify the book it is proper to prove, by a witness

W. 562; *Reg.* v. *Taylor,* 13 Cox, C. C. 77; *Ware* v. *Ware,* 8 Me. 42; *Ripon* v. *Bittel,* 30 Wis. 614; *State* v. *Sexton,* 10 S. D. 127, 72 N. W. 84; *Kreuziger* v. *Chicago & N. W. R. Co.* 73 Wis. 158, 40 N. W. 657; *People* v. *Draper,* 1 N. Y. Crim. Rep. 139.

[1] See supra, §§ 8, et seq., § 203.

For note on question of admissibility of books of exact science, see note in 40 L.R.A. 553.

[2] *Mills* v. *Catlin,* 22 Vt. 106; *Schell* v. *Plumb,* 55 N. Y. 598; *Lancaster Bank* v. *Hogendobler,* 3 Clark (Pa.) 37; *Baltimore & O. R. Co.* v. *State,* 33 Md. 542; *Williams' Case,* 3 Bland, Ch. 221; *Donaldson* v. *Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *David* v. *Southwestern R. Co.* 41 Ga. 223.

Statutes often provide for the admission of life and mortuary tables as evidence in cases to determine the duration of life, and as a basis for estimating damages depending largely upon the question of whether or not the injuries alleged are permanent or temporary in their character. Where the statute names a specific table or compilation, that, of course, is controlling, yet in the absence of such statute the Carlisle and Northampton tables are standard on the subject of the duration of life. *Donaldson* v. *Mississippi & M. R. Co.* 18 Iowa 289, 87 Am. Dec. 380; *Chase* v.

qualified to speak to the point, that it is in use in the particular line of business to which the book relates.[3] It should, at the same time, be remembered that while the Carlisle and other tables may be received to prove certain results of a large induction, they cannot be permitted to control a litigation as to the value of a life estate, so as to work substantial injustice.[4] An almanac, also, has been received in order to show the period of sunset and of moonlight.[5] In the exact sciences are works of mathematics, containing standard tables and calculations upon which men rely in the ordinary business affairs of life, and in this are also included astronomical calculations, tables of logarithms, and almanacs, which are admissible as prima facie evidence.[6] In the inexact sciences are included medical works and other inductive sciences.

Burlington, C. R. & N. R. Co. 76 Iowa, 675, 39 N. W. 196; *Deisen* v. *Chicago, St. P. M. & O. R. Co.* 43 Minn. 454, 45 N. W. 864; *McKeigue* v. *Janesville,* 68 Wis. 50, 31 N. W. 298; *Mulcairns* v. *Janesville,* 67 Wis. 24, 29 N. W. 565; *Hunn* v. *Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502 (state papers); *San Antonio & A. P. R. Co.* v. *Bennett,* 76 Tex. 151, 13 S. W. 319 (American Legion of Honor tables); *Louisville, N. A. & C. R. Co.* v. *Miller,* 141 Ind. 533, 37 N. E. 343; *Friend* v. *Ingersoll,* 39 Neb. 717, 58 N. W. 281; *Richmond & D. R. Co.* v. *Hissong,* 97 Ala. 187, 13 So. 209; *Kansas P. R. Co.* v. *Lundin,* 3 Colo. 94; *Campbell* v. *York,* 172 Pa. 205, 33 Atl. 879; *Steinbrunner* v. *Pittsburgh & W. R. Co.* 146 Pa. 504, 28 Am. St. Rep. 805, 23 Atl. 239; *Townsend* v. *Briggs,* — Cal. —, 32 Pac. 307; *Greer* v. *Louisville & N. R. Co.* 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. 649; *Arkansas Midland R. Co.* v. *Griffith,* 63 Ark. 491, 39 S. W. 550.

[3] *Rowley* v. *London & N. W. R. Co.* L. R. 8 Exch. 226, 42 L. J. Exch. N. S. 153, 29 L. T. N. S. 180, 21 Week. Rep. 869.

[4] Wharton, Ev. § 667.

[5] *State* v. *Morris,* 47 Conn. 179; *Munshower* v. *State,* 55 Md. 11, 39 Am. Rep. 414.

See *Tutton* v. *Darke,* 5 Hurlst. & N. 649, 29 L. J. Exch. N. S. 271, 6 Jur. N. S. 983, 2 L. T. N. S. 361, 15 Eng. Rul. Cas. 315; *Sprowl* v. *Lawrence,* 33 Ala. 674; *People* v. *Chee Kee,* 61 Cal. 404.

See Wharton, Ev. § 282; *Reed* v. *Wilson,* 41 N. J. L. 29.

[6] *Tucker* v. *Donald,* 60 Miss. 460, 45 Am. Rep. 416.

§ 539a. Testimonial uses of scientific books.—While scientific and medical books are not admissible as evidence, nevertheless witnesses, testifying as experts on the topics to which such books relate, may give their opinion, together with the basis therefor, not only from their own observation and experience, but may give opinions based on information derived from such books.[1] So an attorney may use the statements in a medical work for the purpose of framing questions to be propounded to an expert witness as to his own opinions.[2]

An expert witness may refresh his recollection by reference to a standard authority,[3] and may use an engraving in a scientific work to illustrate his testimony,[4] but care must be observed that the opinion which the witness gives must be his own, and not merely that of the author,[5] and opinions founded merely upon medical, or scientific books of medical instruction, are not admissible.[6]

Courts are in direct conflict as to how far, and for what purpose, medical works may be used to sustain an expert witness.[7] While the rule as to the inadmissibility of such works

[1] *State* v. *Terrell,* 12 Rich. L. 321; *Marshall* v. *Brown,* 50 Mich. 148, 15 N. W. 55; *State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377.

[2] *State* v. *Coleman,* 20 S. C. 441; *Connecticut Mut. L. Ins. Co.* v. *Ellis,* 89 Ill. 516.

See *Hess* v. *Lowrey,* 122 Ind. 233, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156; *Tompkins* v. *West,* 56 Conn. 478, 16 Atl. 237.

[3] *State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *Huffman* v. *Click,* 77 N. C. 55.

[4] *Ordway* v. *Haynes,* 50 N. H. 159; *People* v. *Gosset,* 93 Cal. 641, 29 Pac. 246.

[5] *State* v. *Baldwin,* 31 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *Huffman* 1. Click, 77 N. C. 55.

[6] *Soquet* v. *State,* 72 Wis. 659, 40 N. W. 391.

[7] The following authorities hold that an expert cannot be sustained nor contradicted by the facts and opinions found in medical works: *Gallagher* v. *Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869; *Fox* v. *Peninsular White Lead & Color Works,* 84 Mich. 676, 48 N. W. 203; *Davis* v. *State,* 38 Md. 15; *State* v. *Winter,* 72 Iowa, 627, 34 N. W. 475; *People* v. *Sutton,* 73 Cal. 243, 15 Pac. 86; *Knoll* v. *State,* 55 Wis. 249, 42 Am. Rep. 704, 12 N.

in evidence cannot be evaded by using them upon cross-examination, still they may be used to test the learning of the witness, by asking him whether or not he has read particular medical books, and whether or not his opinion is based upon statements in such books, and to inquire generally the extent of his knowledge and familiarity with the standard works of his profession.[8]

And the rule against their admission also limits the admission of such works, upon the argument of counsel. The line is distinct and clear that such works cannot be used as evidence, but may be used merely as a matter of illustration.[9]

But it would be an abuse of the privilege to make the right to use them, as an illustration, the pretense of getting inadmissible evidence before the jury, and the court, in all such cases, should instruct the jury that such books are not evidence, and are not to be so regarded, but that they are used simply as a part of the argument.[10]

W. 369; *Macfarland's Trial,* 8 Abb. Pr. N. S. 57.

See *People* v. *Vanderhoof,* 71 Mich. 158, 39 N. W. 28.

The following authorities hold that such works may be used to sustain or to discredit a witness: *Union P. R. Co.* v. *Yates,* 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 584; *People* v. *Millard,* 53 Mich. 63, 18 N. W. 562; *Ripon* v. *Bittel,* 30 Wis. 614; *Pinney* v. *Cahill,* 48 Mich. 584, 12 N. W. 862; *Egan* v. *Drydock, E. B. & B. R. Co.* 12 App. Div. 556, 42 N. Y. Supp. 188.

[8] *Hall* v. *Murdock,* 114 Mich. 233, 72 N. W. 150; *State* v. *Wood,* 53 N. H. 484; *Hutchinson* v. *State,* 19 Neb. 262, 27 N. W. 113; *Hess* v. *Lowrey,* 122 Ind. 233, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156; *Fisher* v. *Southern P. R. Co.* 89 Cal. 399, 26 Pac. 894.

[9] *Reg.* v. *Crouch,* 1 Cox, C. C. 99; *Burt* v. *State,* 38 Tex. Crim. Rep 397, 39 L.R.A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *Ashworth* v. *Kittridge,* 12 Cush. 193, 59 Am. Dec. 178; *Com.* v. *Brown,* 121 Mass. 69; *Baldwin* v. *Bricker,* 86 Ind. 221; *Jones* v. *Doe,* Smith (Ind.) 47.

[10] *Legg* v. *Drake,* 1 Ohio St. 287; *Melvin* v. *Easley,* 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171; *Yoe* v. *People,* 49 Ill. 410; *Harvey* v. *State,* 40 Ind. 516; *Cavanah* v. *State,* 56 Miss. 300; *Cross* v. *State,* 11 Tex. App. 84; *Hudson* v. *State,* 6 Tex. App. 565, 32 Am. Rep. 593; *Luning* v. *State,* 1 Chand. (Wis.) 178, 52 Am. Dec. 153.

VI. Official Publications and Public Documents.

§ 540. Distinction between official publications and those which concern private individuals.—The evidentiary character of official publications is generally regulated by statute. At common law a distinction is taken between those announcements or proclamations which are issued by the government and those which concern individuals in their private character only. Thus it has been held that a newspaper in which the official acts of the governor are required to be made public is admitted as evidence of the existence of such acts and the fact stated in it, until the contrary is shown.[1] It has been held that the distinct authority for printing and publishing of laws need not be made to appear, where such laws purport to be published by official authority.[2] In general, where there is an official printer, duly appointed, printed copies of official documents are admissible, and they are suf-

These same observations apply to works upon law and evidence. It is the duty of the jury in criminal cases to receive and accept the law of the case as given them by the court, although extracts from law works may be entitled to consideration as a part of the argument. See *Steiner* v. *Coxe,* 4 Pa. 13; *McMath* v. *State,* 55 Ga. 303; *Curtis* v. *State,* 36 Ark. 284; *People* v. *Treadwell,* 69 Cal. 226, 10 Pac. 502, 7 Am. Crim. Rep. 152; *Baldwin's Appeal,* 44 Conn. 37.

See *State* v. *Hoyt,* 46 Conn. 330; *People* v. *Anderson,* 44 Cal. 65.

The almanac is regarded and held as part of the law of the land, and as such need not be specially pleaded nor proved, and is admitted in evidence to show the hours at which the sun rises and sets on certain designated days in the year, and other facts that rest upon exact calculations: *Finney* v. *Callendar,* 8 Minn. 41, Gil. 23; *State* v. *Morris,* 47 Conn. 179; *Munshower* v. *State,* 55 Md. 11, 39 Am. Rep. 414; *Wilson* v. *Van Leer,* 127 Pa. 372, 14 Am. St. Rep. 854, 17 Atl. 1097; *People* v. *Chee Kee,* 61 Cal. 404.

See *Case* v. *Perew,* 46 Hun, 57; *Collier* v. *Nokes,* 2 Car. & K. 1012; *Tutton* v. *Darke,* 5 Hurlst. & N. 647, 2 L. T. N. S. 361, 29 L. J. Exch. N. S. 271, 6 Jur. N. S. 983, 15 Eng. Rul. Cas. 315.

[1] *Lurton* v. *Gilliam,* 2 Ill. 577, 33 Am. Dec. 430.

[2] *Wilt* v. *Cutler,* 38 Mich. 196.

But see *Marks* v. *Orth,* 121 Ind. 10, 22 N. E. 668.

ficiently authenticated if they appear to be printed by such authority. Under such rulings, American state papers, printed diplomatic correspondence, and officially printed editions of legislative journals, have been received in evidence.[3] Extracts from, and certified copies of, official papers preserved by the United States, are competent evidence of the facts or transactions to which they relate.[4]

§ 541. Newspapers admissible to show certain facts.— When it is important to ascertain whether certain information was current in a community at a particular time, so as to impute knowledge to a particular person, then it may be admissible to put in evidence the newspapers circulating at the time in such community for the purpose of showing that the fact in question was one of common local notoriety.[1] And the same course is taken when the object is to prove notice of dissolution of a partnership, or of market prices,[2] when the newspaper containing the facts alleged is shown to have been likely to be read by, or its contents familiar to, the party charged.[3]

[3] *Dutillet* v. *Blanchard,* 14 La. Ann. 97; *Nixon* v. *Porter,* 34 Miss. 697, 69 Am. Dec. 408; *Radcliff* v. *United Ins. Co.* 7 Johns. 50; *Root* v. *King,* 7 Cow. 636; *Watkins* v. *Holman,* 16 Pet. 55, 10 L. ed. 885; *Bryan* v. *Forsyth,* 19 How. 334, 15 L. ed. 674; *Post* v. *Kendall County,* 105 U. S. 667, 26 L. ed. 1204.

[4] *Oakes* v. *United States,* 174 U. S. 778, 43 L. ed. 1169, 19 Sup. Ct. Rep. 864.

[1] Wharton, Ev. § 672.

[2] *Mt. Vernon Brewing Co.* v. *Teschner,* 108 Md. 158, 16 L.R.A. (N.S.) 758, 69 Atl. 702; *Terry* v. *McNiel,* 58 Barb. 241; *Tri-State Mill. Co.* v. *Breisch,* 145 Mich. 232, 108 N. W. 657; *Henkle* v. *Smith,* 21 Ill. 238; *Aulls* v. *Young,* 98 Mich. 231, 57 N. W. 119; *Sisson* v. *Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

Contra, *Whelan* v. *Lynch,* 60 N. Y. 469, 19 Am. Rep. 202; *National Bank* v. *New Bedford,* 175 Mass. 257, 56 N. E. 288; *Norfolk & W. R. Co.* v. *Reeves,* 97 Va. 284, 33 S. E. 606.

[3] Wharton, Ev. §§ 673, 674.

§ 542. But not generally for other purposes.—Unless to charge a particular party with matter alleged to have been inserted by him in a newspaper; or to prove notoriety in the sense already stated; or to prove, by old newspapers, ancient facts not otherwise susceptible of proof,—newspapers cannot be received in evidence.[1] And when the object is to charge a particular advertisement on a particular person as its author, it is necessary to produce the original manuscript. It is only when the latter is nonproducible that the printed copy can be received.[2] So far as concerns ordinary events, a newspaper cannot be recognized as evidence.[3] Thus the identity or history of a person cannot, as to matters of recent occurrence, which can be otherwise established, be proved by a newspaper notice.[4]

§ 543. Knowledge of certain facts published in newspapers may be proved inferentially.—It has been held not enough, in order to bring home to a party knowledge of a newspaper notice, to show that the newspaper was circulated in the neighborhood of the party's residence.[1] But it will be enough, to enable the newspaper to go to the jury, to prove that it was taken by the party on whom it is sought to prove notice, [2] or that he attended habitually a reading room where it was on file, or was shown in some way to have been familiar with the paper.[3]

[1] See Wharton, Ev. § 674a.

[2] *Sweigart* v. *Lowmarter,* 14 Serg. & R. 200.

[3] See *Ring* v. *Huntington,* 1 Mill, Const. 162.

[4] *Fosgate* v. *Herkimer Mfg. & Hydraulic Co.* 9 Barb. 287.

[1] *Norwich & L. Navigation* v. *Theobald,* Moody & M. 153; *Kellogg* v. *French,* 15 Gray, 354.

[2] *Godfrey* v. *Macauley,* Peake, N. P. Cas. 155, note; *Jenkins* v. *Blizard,* 1 Starkie, 419, 18 Revised Rep. 792; *Hart* v. *Alexander,* 2 Mees. & W. 484, 6 L. J. Exch. N. S. 129; *Leeson* v. *Holt,* 1 Starkie, 186, 18 Revised Rep. 758.

[3] Wharton, Ev. § 675.

VII. Pictures and Photographs.

§ 544. Photographs as primary evidence.—We have considered photographs from the view point of a picture or diagram to explain the *locus in quo* of a crime, or to aid or illustrate the oral testimony of a witness.[1]

But photographs are also admissible as primary evidence of the identity of persons alive or dead,[2] and as evidence of the physical state or condition of a body or of an object,[3] and to illustrate wounds or physical injuries.[3a]

They are also admissible in questions of pedigree, or to show racial characteristics. Thus, in a prosecution for breach of promise of marriage, there was evidence tending to show that the plaintiff had negro blood in her veins, and that in

[1] Supra, § 438b.

For photographs as secondary evidence, see note in 35 L.R.A. 804.

[2] *Wilson* v. *United States,* 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; *Malachi* v. *State,* 89 Ala. 134, 8 So. 104; *State* v. *Windahl,* 95 Iowa, 470, 64 N. W. 420; *Com.* v. *Morgan,* 159 Mass. 375, 34 N. E. 458; *State* v. *Holden,* 42 Minn. 350, 44 N. W. 123; *Marion* v. *State,* 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911; *Ruloff* v. *People,* 45 N. Y. 213, 11 Abb. Pr. N. S. 245; *Cowley* v. *People,* 83 N. Y. 464, 38 Am. Rep. 464; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311; *Com.* v. *Connors,* 156 Pa. 147, 27 Atl. 366; *Considine* v. *United States,* 50 C. C. A. 272, 112 Fed. 342; *People* v. *Durrant,* 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; *Mow* v. *People,* 31 Colo. 351, 72 Pac. 1069; *Shaffer* v. *United States,* 24 App. D. C. 417; *State* v. *Hasty,* 121 Iowa, 507, 96 N. W. 1115; *State* v. *Fulkerson,* 97 Mo. App. 599, 71 S. W. 704; *State* v. *McCoy,* 15 Utah, 136, 49 Pac. 420.

[3] *Cowley* v. *People,* 8 Abb. N. C. 1; *People* v. *Webster,* 139 N. Y. 73, 34 N. E, 730; *State* v. *Ellwood,* 17 R. I. 763, 24 Atl. 782; *State* v. *Cook,* 75 Conn. 267, 53 Atl. 589; *Com.* v. *Best,* 180 Mass. 492, 62 N. E. 748; *Com.* v. *Keller,* 191 Pa. 122, 43 Atl. 198; *Monson* v. *State,* — Tex. Crim. Rep. —, 63 S. W. 647; *Young* v. *State,* 49 Tex. Crim. Rep. 207, 92 S. W. 841; *Paulson* v. *State,* 118 Wis. 89, 94 N. W. 771, 15 Am. Crim. Rep. 497.

[3a] *Franklin* v. *State,* 69 Ga. 36, 47 Am. Rep. 748; *People* v. *Fish,* 125 N. Y. 136, 26 N. E. 319; *State* v. *Powell,* 5 Penn. (Del.) 24, 61 Atl. 966; *State* v. *Roberts,* 28 Nev. 350. 82 Pac. 100; *Smith* v. *Territory,* 11 Okla. 669, 69 Pac. 805.

making statements to the defendant as to her parentage she had suppressed the fact, and it was admissible for her to introduce photographs of her family, which she testified were correct likenesses, and which had been shown by her to the defendant.[4]

Duly authenticated pictures, such as a portrait or a miniature painted from life, and proved to be an accurate likeness, are admissible upon questions of identity.[5]

Radiographs, or photographs taken by some form of radiation other than light (generally by X—or Roentgen ray process), are also admissible as evidence of the facts shown thereby, and are admitted upon the same principles and under the same circumstances as ordinary photographs.[6] These are also admissible to show the nature and extent of wounds upon a person.[7]

In the introduction of radiographs, testimony of expert wit-

[4] *Van Houten* v. *Morse,* 162 Mass. 414, 26 L.R.A. 430, 44 Am. St. Rep. 373, 38 N. E. 705.

[5] *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311.

[6] *Miller* v. *Mintun,* 73 Ark. 183, 83 S. W. 918; *Chicago & J. Electric R. Co.* v. *Spence,* 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; *Jameson* v. *Weld,* 93 Me. 345, 354, 45 Atl. 299; *Geneva* v. *Burnett,* 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275; *Mauch* v. *Hartford,* 112 Wis. 40, 87 N. W. 816; *Milier* v. *Dumon,* 24 Wash. 648, 64 Pac. 804; *State* v. *Matheson,* 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 A. & E. Ann. Cas. 430; *De Forge* v. *New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669; *Carlson* v. *Benton,* 66 Neb. 486, 92 N. W. 600, 1 A. & E. Ann. Cas. 159; *Bruce* v. *Beall,* 99 Tenn. 303, 41 S. W. 445.

[7] *State* v. *Powell,* 5 Penn. (Del.) 24, 61 Atl. 966; *Franklin* v. *State,* 69 Ga. 36, 47 Am. Rep. 748; *State* v. *Matheson,* 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 A. & E. Ann. Cas. 430; *State* v. *Roberts,* 28 Nev. 350, 82 Pac. 100; *People* v. *Fish,* 125 N. Y. 136, 26 N. E. 319; *Smith* v. *Territory,* 11 Okla. 669, 69 Pac. 805; *State* v. *Bailey,* 79 Conn. 589, 65 Atl. 951; *Young* v. *State,* 49 Tex. Crim. Rep. 207, 92 S. W. 841; *Com.* v. *Tucker,* 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127.

nesses, explanatory of the process, and showing the difference between them and ordinary photographs, is admissible.[8]

In all cases the genuineness and fairness of the photograph should be proved by testimony, as a prerequisite to admission,[9] and the negative from which photograph is printed, where possible, should always be produced.[10] Photographs may also be received of records which cannot be brought into court.[11]

But as to all forms of pictorial or photographic representation, whether the representation is genuine and reasonably correct must be determined by the trial court, before the same can be received in evidence, and the action of the court is not open to review, except in case of abuse of its discretion.[12]

§ 544a. Photographs as illustrating testimony.—Photographs are admitted in evidence so generally, and their use has been sanctioned for so long a time by the courts, that, relying upon the accuracy of the representation, the courts

[8] *De Forge* v. *New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669.

[9] *Marcy* v. *Barnes,* 16 Gray, 161, 77 Am. Dec. 405; *Hollenbeck* v. *Rowley,* 8 Allen, 473; *Com.* v. *Coe,* 115 Mass. 481; *Walker* v. *Curtis,* 116 Mass. 98; *Blair* v. *Pelham,* 118 Mass. 420; *Ruloff* v. *People,* 45 N. Y. 215; 3 Wharton & S. Med Jur. 4th ed. § 835; *Cowley* v. *People,* 83 N. Y. 464, 38 Am. Rep. 464, s. c. 21 Hun, 415; 3 Wharton & S. Med. Jur. 4th ed. §§ 670, et seq.

[10] Tidy, Med. Jur. 1883, pt. 1, 143; 3 Wharton & S. Med. Jur. 4th ed. § 943.

[11] See *Re Stephens,* L. R. 9 C. P 187, 22 Week. Rep. 615; *Daly* v. *Maguire,* 6 Blatchf. 137, Fed. Cas. No. 3,551; *Leathers* v. *Salvor Wrecking & Transp. Co.* 2 Woods, 682, Fed. Cas. No. 8,164; supra, § 175; *Luco* v. *United States,* 23 How. 515, 16 L. ed. 545; *Reddin* v. *Gates,* 52 Iowa, 210. 2 N. W. 1079.

[12] *Marcy* v. *Barnes,* 16 Gray, 161, 77 Am. Dec. 405; *Hollenbeck* v. *Rowley,* 8 Allen, 473; *Cozzens* v. *Higgins,* 1 Abb. App. Dec. 451; *Ruloff* v. *People,* 45 N. Y. 213; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311; *Church* v. *Milwaukee,* 31 Wis. 512; *Com.* v. *Coe,* 115 Mass. 481, 505; *Walker* v. *Curtis,* 116 Mass. 98; *Rumford Chemical Works* v. *Hecker,* 11 Blatchf. 552, Fed. Cas. No. 12,132; *Ortiz* v. *State,* 30 Fla. 256, 11 So. 611; *Com.* v. *Morgan,* 159 Mass. 375, 34 N. E. 458; *Chicago* v. *Vesey,* 105 Ill. App. 191.

not infrequently overlook the fact that a photograph is not evidence of itself, but is used to illustrate evidence.[1] If the fact to be shown by the photograph is not admissible, obviously the photographic representation is not admissible. In this view we are only concerned with the use of photographs as an aid to testimony. As preliminary to the use of such photograph, it must be properly authenticated and verified by a witness having personal knowledge of the facts.

Photographic reproductions of a scene, taken from such reproduction, and not from the original scene, are not admissible.[1a]

But, where properly authenticated, and where it appears that the conditions have not changed in the meantime, photographs are received for the purpose of identifying the *locus in quo* and illustrating the oral testimony.[2]

§ 545. Relevancy of documents and photographs.— While all such records and representations that fall within the meaning of the word "document," as shown in the text, are admissible, in evidence, under the conditions and limitations set forth in the preceding sections, it is essential to their admission that they should be shown, first, to be correct, and

[1] For a note on the subject of photographs as evidence, see 35 L.R.A. 802.

[1a] *Fore* v. *State*, 75 Miss. 727, 23 So. 710; *People* v. *Maughs*, 149 Cal. 253, 86 Pac. 187; post, § 544.

See *People* v. *Jackson*, 111 N. Y. 362, 19 N. E. 54; *Shaw* v. *State*, 83 Ga. 92, 9 S. E. 768, 8 Am. Crim. Rep. 426; *State* v. *O'Reilly*, 126 Mo. 597, 29 S. W. 577.

[2] *Gibson* v. *State*, 53 Tex. Crim. Rep. 349, 110 S. W. 41; *Ortiz* v. *State*, 30 Fla. 256, 11 So. 611; *People* v. *Buddensieck*, 4 N. Y. Crim. Rep. 230; *State* v. *Hersom*, 90 Me. 273, 38 Atl. 160; *Com.* v. *Chance*, 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551. The fact that a photograph was not taken by a professional photographer does not render it inadmissible. *Mow* v. *People*, 31 Colo. 351, 72 Pac. 1069; *Duffin* v. *People*, 107 Ill. 113, 47 Am. Rep. 431; *Russell* v. *State*, — Ala. —, 38 So. 291.

to faithfully represent the object portrayed;[1] second, that they should be relevant to establish or disprove the fact concerning which they are offered;[2] third, it should affirmatively appear that no material change has taken place in the conditions sought to be represented.[3]

VIII. Proof of the Execution of Documents.

§ 546. Character of proof necessary to show execution of document.—It is sometimes said that certain documents prove themselves, but this is an inaccurate statement, and apt to be misleading. It is equally as necessary to prove the due execution of a document as it is to qualify a witness to give oral testimony. The proof necessary to show the execution of a document obviously varies with the nature and kind of document.

A proper classification leads us, first, to speak of government and judicial documents. The Constitution provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof;"[1] and Congress had effectuated this provision by enacting "that the records and judicial proceedings of the courts of any state shall be proved and admitted in any other court within the United States by the attestation of the clerk and the seal of the court affixed, if there be a seal, to-

[1] *Mow* v. *People,* 31 Colo. 351, 72 Pac. 1069; *People* v. *Durrant,* 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; *Com.* v. *Switzer,* 134 Pa. 383, 19 Atl. 681; *Ming* v. *Foote,* 9 Mont. 201, 23 Pac. 515; *Stuart* v. *Binsse,* 10 Bosw. 436.

[2] *State* v. *Ellwood,* 17 R. I. 763, 771, 24 Atl. 782; *Com.* v. *Morgan,* 159 Mass. 375, 34 N. E. 458; *Com.* v. *Campbell,* 155 Mass. 537, 30 N. E. 72.

[3] *Cleveland, C. C. & St. L. R. Co.* v. *Monaghan,* 140 Ill. 474, 483, 30 N. E. 869.

[1] U. S. Const. art. 4, § 1.

gether with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence such records are, or shall be, taken."[2]

It has been held that such attestation must be in the form usually employed by the state attesting the document. Thus, if the court has a seal it must be affixed to the certificate of the clerk; if it has none, such fact must appear on the certificate.[3] Such certificate must also show that the clerk who attested is the clerk, and that his attestation is in due form.[4] However, it has been held that, as the statute refers to the clerk, the seal, the judge, chief justice, or presiding magistrate, courts not of record are not included, and the records of such courts must be attested according to the law of the state in the courts of which such records are to be used.[4a]

[2] Act of May 26, 1790, 1 Stat. at L. 122, chap. 11, U. S. Comp. Stat. 1901, p. 677.

[3] *Hall* v. *Mackay,* 78 Tex. 248, 14 S. W. 615; *Rand* v. *Hanson,* 154 Mass. 87, 12 L.R.A. 574, 26 Am. St. Rep. 210, 28 N. E. 6; *Suesenbach* v. *Wagner,* 41 Minn. 108, 42 N. W. 925; *Rea* v. *Scully,* 76 Iowa, 343, 41 N. W. 36; *Mehlin* v. *Ice,* 5 C. C. A. 403, 12 U. S. App. 305, 56 Fed. 12; *Van Storch* v. *Griffin,* 71 Pa. 240; *Craig* v. *Brown,* Pet. C. C. 352, Fed. Cas. No. 3,328; *Drummond* v. *Magruder,* 9 Cranch, 122, 3 L. ed. 677; *Shown* v. *Barr,* 33 N. C. (11 Ired. L.) 296; *Ferguson* v. *Harwood,* 7 Cranch, 408, 3 L. ed. 386; *Bean* v. *Loryea,* 81 Cal. 151, 22 Pac. 513; *Melius* v. *Houston,* 41 Miss. 59; *State* v. *Hunter,* 94 N. C. 829; *Turnbull* v. *Payson,* 95 U. S. 418, 24 L. ed. 437.

[4] *Settle* v. *Alison,* 8 Ga. 201, 52 Am. Dec. 393; *Stephenson* v. *Bannister,* 3 Bibb, 369; *Pratt* v. *King,* 1 Or. 49; *Central Bank* v. *Veasey,* 14 Ark. 671.

[4a] See *People* v. *Smith,* 121 N. Y. 578, 24 N. E. 852; also as to authentication of documents from sister states the following cases: *Bright* v. *Smitten,* 10 Pa. Co. Ct. 647; *Carpenter* v. *Strange,* 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *First Nat. Bank* v. *Cunningham,* 48 Fed. 515; *Huntington* v. *Attrill,* 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Hovey* v. *Elliott,* 21 N. Y. Supp. 108;

It is further provided that "copies of any books, records, papers, or documents, in any of the executive departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof."[5]

The statutes of the various states, under the head of Evidence, prescribe what is necessary to prove documents to be used in the courts of such states. Hence, where proof of the execution of all documents of a permanent character, or those common to the ordinary business transactions of life, is statutory controlled, in all such cases the statutory provision must be substantially complied with.[6]

There is, in addition to such documents, a large number of documents that cannot be classified under any general head, such as private memoranda, private writings, marks, brands, labels, abbreviations, symbols, and other *indicia* that frequently have an important bearing upon matters in litigation; and these must depend, for proof of their execution, upon testimony from some person qualified to testify to their execution and use for designated purposes.

As to this class of documents, the measure of proof must obviously be proof to the satisfaction of the trial judge. No valid objection can be urged against this measure of proof, because it is a degree of proof so satisfactory to the judge

Trebilcox v. *McAlpine*, 62 Hun, 317, 17 N. Y. Supp. 221.

But see contra, *Ambler* v. *Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841; *Chapman* v. *Chapman*, 48 Kan. 636, 29 Pac. 1071; *Fitzsimmons* v. *Johnson*, 90 Tenn. 416, 17 S. W. 100.

[5] United States Rev. Stat. § 882, U. S. Comp. Stat. 1901, p. 669; *Ballew* v. *United States*, 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263; *Murphy* v. *Cady*, 145 Mich. 33, 108 N. W. 493; *Lamar* v. *State*, 49 Tex. Crim. Rep. 563, 95 S. W. 509.

See *Bell* v. *Kendrick*, 25 Fla. 778, 6 So. 868; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *United States*, v. *Amedy*, 11 Wheat. 392, 6 L. ed. 502.

[6] *Settle* v. *Alison*, 8 Ga. 205, 52 Am. Dec. 393; *Stephenson* v. *Bannister*, 3 Bibb, 369; Wharton, Ev. § 740, and cases cited.

that he himself, under the circumstances, would be pursuaded to act upon it, and, under the rightful presumptions of judicial learning, fairness, and impartiality, when the judge had decided the measure or degree of proof to be satisfactory, the admission of such documents would not be error unless it is affirmatively shown that the trial court abused its discretion. This rule is sustained by the decisions where these matters have been presented to courts of final resort. The following decisions illustrate the apparently varying degree of proof required for the admission of the documents indicated, and there was doubtless a relevancy of circumstance, and conditions of coincidence and corroboration, that satisfied the trial judge of the execution of the document so admitted.[7]

[7] *Smith* v. *State,* 77 Ga. 705 (letter identified by a blot observed by party who delivered it to accused); *State* v. *Oeder,* 80 Iowa, 72, 45 N. W. 543 (in an action to recover from a druggist the statutory penalty for selling liquors to an habitual drunkard, written applications by such person to purchase liquors, taken from the files of the county auditor, shown to be in the handwriting of such person, sufficiently identified to be admissible in evidence); *State* v. *Batson,* 108 La. 479, 32 So. 478 (a writing signed by deceased, found in the vest pocket of accuseed, held properly admitted as circumstantial evidence, without proof of the handwriting); *Com.* v. *Burton,* 183 Mass. 461 (pay roll admitted, although witness producing same did not see accused sign it); *State* v. *Mahoney,* 24 Mont. 281, 61 Pac. 647 (unsigned note admitted, believed to be, by the witness, in the handwriting of accused); and *State* v. *Howard,* 30 Mont. 518, 77 Pac. 50; *State* v. *Capps,* 71 N. C. 93 (written orders, used as corroborating evidence by a witness for whose benefit they were drawn, admitted, without further proof); *State* v. *Dixon,* 131 N. C. 808, 42 S. E. 944; *State* v. *Waldrop,* 73 S. C. 60, 52 S. E. 793 (writing offered to prove collateral evidence need not be formally proved); *State* v. *Coleman,* 17 S. D. 594, 98 N. W. 175 (letter written by accused admitted on testimony of his sister that it was in accused's handwriting); *Powell* v. *State,* — Tex. Crim. Rep. —, 44 S. W. 504 (letter alleged to have been written by accused held properly proved by testimony of an accomplice that it was in accused's handwriting); *State* v. *Freshwater,* 30 Utah, 442, 116 Am. St. Rep. 853, 85 Pac. 447 (a series of unsigned typewritten letters admitted on testimony that one letter which was signed was in the handwritng of accused); *State* v. *Matthews,* 9

The degree of proof is not lessened because the document is informal or not within a recognized statutory class, but proof of the execution of such document must be duly made. Thus, a document purporting to be written by defendant is not admissible until it is shown to be in his handwriting;[8] an entry on a judge's docket, not shown to be in his own handwriting, is not admissible;[9] copy of a marriage register is not admissible where it does not appear that the person certify-

Port. (Ala.) 370 (on change of venue the identity of a record may be established by parol evidence); *Beggs* v. *State,* 55 Ala. 108 (within the state, certified copy of a marriage license admissible, although not under seal of the court); *Colbert* v. *State,* 125 Wis. 423, 104 N. W. 61 (in prosecution for arson, evidence proving the identity of anonymous letter concerning the fire, held sufficient to admit the letter in evidence); *Whaley* v. *State,* 11 Ga. 123 (pencil memorandum found in a book taken from accused upon his arrest, admitted, without other proof of its execution); *Barnes* v. *Alexander City,* 89 Ala. 602, 7 So. 437 (a book shown to be a record of the ordinances of a town, admissible to prove the existence of an ordinance, without further authentication). See *Com.* v. *Chase,* 6 Cush. 248; *Com.* v. *Downing,* 4 Gray, 29 (justice's record need not bear a seal); *Com.* v. *Hayden,* 163 Mass. 453, 28 L.R.A. 318, 47 Am. St. Rep. 468, 40 N. E. 846, 9 Am. Crim. Rep. 408 (record of marriage certified by assistant registrar, admissible); *State* v. *Lally,* 2 Marv. (Del.) 424, 43 Atl. 258 (bail bond may be proven by deputy clerk, in whose presence it was signed); See also *State* v. *Matlack,* 5 Penn. (Del.) 401, 64 Atl. 259; *Hilburn* v. *State,* 121 Ga. 344, 49 S. E. 318 (criminal warrant admissible, even if not accompanied by the affidavit on which it was issued).

See *Meador* v. *State,* 44 Tex. Crim. Rep. 468, 72 S. W. 186; *Morrison* v. *People,* 196 Ill. 454, 63 N. E. 989 (a certificate not issued on a competitive examination, sufficiently proved to sustain the prosecution, where the names signed to such certificate were shown to be those of the examining board, attested to a stamp similar to the one used in the office of such board); *Mosher* v. *State,* 14 Ind. 261 (papers taken from accused may be proved by the officers who took them from him); *Com.* v. *Hollis,* 170 Mass. 433, 49 N. E. 632 (age of prosecutrix sufficiently proven where her oral testimony corresponded with certificate of birth).

[8] *State* v. *Grant,* 74 Mo. 33; *Langford* v. *State,* 9 Tex. App. 283.

[9] *Smith* v. *State,* 62 Ala. 29.

ing to it was the custodian, and that his signature is genuine;[10] a paper purporting to be a marriage certificate from another state, but not authenticated in any manner, is not admissible, though such paper comes from the possession of the wife of the accused.[11] Thus, documents which are not evidential in their nature and quality cannot be made evidence simply by being authenticated.[12] It is error to admit testimony as to the contents of a letter seen by the witness, when the only evidence connecting it with defendant was that defendant's name was subscribed thereto, or unless such letters are shown to have been authorized by accused.[13] Where a sheriff testifies to his belief that the signature to a letter purporting to be that of defendant was the same writing as that signed to a bail bond, it was error to admit the same without further proof.[14] A conductor's ticket report, showing use of defendant's pass on a certain date, is not admissible without oral testimony as to the matters contained therein, where the conductor who made it was within the jurisdiction of the court.[15]

§ 547. Proof of ancient documents.—It is also said of ancient documents that they prove themselves,[1] but this is

[10] *State* v. *Dooris,* 40 Conn. 145.

[11] *Com.* v. *Morris,* 1 Cush. 391; *State* v. *Horn,* 43 Vt. 20. See *People* v. *Etter,* 81 Mich. 570, 45 N. W. 1109.

[12] *Snell* v. *United States,* 16 App. D. C. 501.

[13] *State* v. *McGinn,* 109 Iowa, 641, 80 N. W. 1068. See *State* v. *Blake,* 36 Utah, 605, 105 Pac. 910; *Duckworth* v. *State,* 42 Tex. Crim. Rep. 74, 57 S. W. 665.

See *Lane* v. *Com.* 134 Ky. 519, 121 S. W. 486.

[14] *Jordt* v. *State,* 50 Tex. Crim. Rep. 2, 99 S. W. 514.

[15] *People* v. *Lanterman,* 9 Cal. App. 674, 100 Pac. 720.

[1] *Beall* v. *Dearing* 7 Ala. 124; *King* v. *Watkins,* 98 Fed. 913; *Green* v. *Chelsea,* 24 Pick. 71; *Henthorn* v. *Doe,* 1 Blackf. 157; *Hamilton* v. *Smith,* 74 Conn. 374, 50 Atl. 884; *Phillips* v. *Watuppa Reservoir Co.* 184 Mass. 404, 68 N. E. 848; *McCreary* v. *Coggeshall,* 74 S. C. 42, 7 L.R.A.(N.S.) 433, 53 S. E. 978, 7 A. & E. Ann. Cas. 693; *Sims* v. *Sealy,* 53 Tex. Civ. App. 518, 116 S. W. 630.

not the rule; they must be shown to be genuine.[2] The period of thirty years is sufficient to constitute an "ancient document," [3] unless some statutory regulation prescribes a different period.[4] This period is to be reckoned backwards from the time that the ancient document is offered in evidence,[5] and forward from the date of execution. An important factor in an ancient document is the custody from which it comes.[6] This custody must be a natural custody. Thus, a letter found among papers written to the party to whom it is addressed,[7] documents found on file as exhibits in other actions,[8] and other places of deposit, where, in the ordinary course of things, such a document, if genuine, might reasonably be ex-

[2] *Willson* v. *Betts,* 4 Denio, 201; *Smith* v. *Rankin,* 20 Ill. 14; *Webb* v. *Ritter,* 60 W. Va. 193, 220, 54 S. E. 484.

[3] *Ely* v. *Stewart,* 2 Atk. 44, Barnard Ch. 170; *Rex* v. *Farringdon,* 2 T. R. 466; *Rex* v. *Ryton,* 5 T. R. 259; *Woldron* v. *Tuttle,* 4 N. H. 371. See *Boykin* v. *Wright,* 11 La. Ann. 531; *McGennis* v. *Allison,* 10 Serg. & R. 197.

[4] Minnesota Statutes 1901, chapter 116 (copy of deed recorded for twenty years is evidence of original deed); New Jersey General Statutes 1896, § 102 (deed recorded for twenty years elsewhere in the United States, certified copy may be used as original).

See also Statutes 1898, chapter 232, §§ 57, 58; Tenn. Code, 1896, § 3761; *Gratz* v. *Land & River Improv. Co.* 40 L.R.A. 393, 27 C. C. A. 305, 53 U. S. App. 499, 82 Fed. 381; Florida Statutes 1903. See *Campbell* v. *Skinner Mfg. Co.* 53 Fla. 632, 43 So. 875.

[5] *Man* v. *Ricketts,* 7 Beav. 93; *Gardner* v. *Granniss,* 57 Ga. 539; *Reuter* v. *Stuckart,* 181 Ill. 529, 54 N. E. 1014.

[6] *Chamberlain* v. *Showalter,* 5 Tex. Civ. App. 226, 23 S. W. 1017; *West* v. *Houston Oil Co.* — Tex. Civ. App. —, 120 S. W. 228.

[7] *Bell* v. *Brewster,* 44 Ohio St. 690, 10 N. E. 679; *McCreary* v. *Coggeshall,* 74 S. C. 42, 61, 7 L.R.A. (N.S.) 433, 53 S. E. 978, 9 A. & E. Ann. Cas. 693.

[8] *Applegate* v. *Lexington & C. C. Mining Co.* 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742; *Woodward* v. *Keck,* — Tex. Civ. App. —, 97 S. W. 852; *Rees* v. *Walters,* 3 Mees. & W. 527, 7 L. J. Exch. N. S. 138, 2 Jur. 378 (lease at lessee's disposal is proper custody); *Williams* v. *Conger,* 49 Tex. 582 (papers found with land commissioner); *Lewis* v. *Lewis,* 4 Watts & S. 378 (a receipt found in a desk issued by a person thirty years before).

pected to be found.[9] A further requirement is that its appearance must be genuine.[10] These preliminary matters are to be determined by the trial judge acting on the circumstances of each particular case.[11] It is true that the handwriting need not be proved,[12] even though the party writing the document is within the jurisdiction of the court.[13] Thus it will be seen that ancient documents, like all other testimony, are subject to reasonable testimonial requirements as a basis for their admission as evidence. The burden of establishing the ancient character and the genuineness of an ancient document is upon the party offering the document,[14] but the court, in its discretion, may admit it on less proof than would be required of other documents.[15] Where nothing appears to contradict the preliminary showing, it seems that the court may instruct the jury that the document is genuine,[16] but where there is any question, the genuineness of the document is for the jury, under proper instructions of the court, and, as in all other

[9] *Doe ex dem. Wildgoose* v. *Pearce,* 2 Moody & R. 240; *Croughton* v. *Blake,* 12 Mees. & W. 205, 13 L. J. Exch. N. S. 78, 8 Jur. 275; *Doe ex dem. Farmer* v. *Eslava,* 11 Ala. 1028; *Gibson* v. *Poor,* 21 N. H. 440, 53 Am. Dec. 216; *McGuire* v. *Blount,* 199 U. S. 142, 50 L. ed. 125, 26 Sup. Ct. Rep. 1.

[10] *Hill* v. *Nisbit,* 58 Ga. 586.

See *Beverley* v. *Craven,* 2 Moody & R. 140; *Harlan* v. *Howard,* 79 Ky. 373; *Campbell* v. *Bates,* 143 Ala. 338, 39 So. 144.

[11] *Doe ex dem. Shrewsbury* v. *Keeling,* 11 Q. B. 884, 17 L. J. Q. B. N. S. 190, 12 Jur. 433.

See *Campbell* v. *Bates,* 143 Ala. 338, 39 So. 144.

[12] See supra, § 190.

[13] *Jackson ex dem. Bowman* v. *Christman,* 4 Wend. 277; *Lunn* v. *Scarborough,* 6 Tex. Civ. App. 15, 24 S. W. 846; *White* v. *Farris,* 124 Ala. 461, 27 So. 259; *Cunningham* v. *Davis,* 175 Mass. 213, 56 N. E. 2; *McConnell Bros.* v. *Slappey,* 134 Ga. 87, 67 S. E. 440.

See *Murphy* v. *Cady,* 145 Mich. 33, 108 N. W. 493.

[14] *Beaumont Pasture Co.* v. *Preston,* 65 Tex. 448; *Stooksberry* v. *Swan,* — Tex. Civ. App. —, 21 S. W. 694; *Chatman* v. *Hodnett,* 127 Ga. 360, 56 S. E. 439; *Bentley* v. *McCall,* 119 Ga. 530, 46 S. E. 645.

[15] *Pendleton* v. *Robertson,* — Tex. Civ. App. —, 32 S. W. 442; *Burgin* v. *Chenault,* 9 B. Mon. 285.

[16] See *Pendleton* v. *Robertson,* — Tex. Civ. App. —, 32 S. W. 442.

testimony, the weight and credibility of the testimony is a question for determination of the jury.[17]

§ 548. Ancient document may be verified by expert.—Where, for the purposes of verification, it is important to go back beyond thirty years, a person who is familiar (from having had occasion to examine old deeds and other papers indisputably traceable to the party whose signature is contested) with the handwriting in question may be permitted to testify as to the genuineness of a document.[1]

IX. PROOF OF HANDWRITING.[1]

§ 549. Handwriting established by the writer himself or his admissions.—Though the testimony of the alleged writer is of much value in determining the genuineness of a writing imputed to him,[1a] it is not necessarily, even supposing him to be free from bias, the strongest producible.[2] I may remember having written or signed a particular document, and this recollection, taken in connection with my recognition of my own signature, forms strong evidence. But it by no means follows that I am the person most able to distinguish

[17] *Pridgen* v. *Green,* 80 Ga. 737, 7 S. E. 97; *Harlan* v. *Howard,* 79 Ky. 373; *Stooksberry* v. *Swan,* — Tex. Civ. App. —, 21 S. W. 694; *Holt* v. *Maverick,* 86 Tex. 457, 25 S. W. 607; *Albright* v. *Jones,* 106 Ga. 302, 31 S. E. 761.

[1] *Fitzwalter Peerage Case,* 10 Clark & F. 193; *Jackson ex dem. Bradt* v. *Brooks,* 8 Wend. 426; *Sweigart* v. *Richards,* 8 Pa. 436; *Cantey* v. *Platt,* 2 M'Cord, L. 260; *Smith* v. *Rankin,* 20 Ill. 14.

See post, § 847.

As to competency of witness to ancient writings, see also note in 63 L.R.A. 984.

[1] See also as to proof of handwriting, §§ 424, et seq., supra, in chapter IX., "Witnesses."

[1a] See *Com.* v. *Taylor,* 5 Cush. 605; *State* v. *Hooper,* 2 Bail. L. 37. See, generally, supra, §§ 160, 360; 1 Crim. L. Mag. 38 et seq.; post, § 845.

[2] Wills, Circumstantial Ev. 112. See post, §§ 844, et seq.

my own writing from a skilful forgery. Those who are experts in respect to handwriting are able to observe delicate shades which may be imperceptible to me, and to apply tests of which I may be ignorant. So, a rude penman may be unable to frame his signature in such a way as to present to him any positive *differentia.* At the same time, the belief of persons accustomed to use their pens with ordinary frequency, as to the genuineness of their signature, is entitled to great consideration;[3] and it is one of the benefits of the late statutes making parties witnesses, that the testimony of parties to their own signature can now be obtained by the ordinary common-law processes.[4] Much less weight, however, belongs to the casual, extrajudicial admission of a person that a certain writing is his. To make such admission receivable, it must appear that the writing was shown to him; and even then he may show that his admission was founded on mistake. But, in any view, such admission is prima facie evidence,[5] and on indictments for libel is admissible to prove complicity of the defendant in a libelous publication.[6]

§ 550. Specimens prepared during the trial.—In England, by statute, a person whose handwriting is in dispute may be called upon by the judge to write in his presence, and such writing may be compared with the writing in litigation.[1] In this country similar statutes have been adopted, and in some criminal cases the accused has been compelled by the court

[3] *Bank Prosecutions,* Russ. & R. C. C. 378; *Rex* v. *Newland,* 2 East, P. C. 1001, 1002, 1 Leach, C. L. 311.

[4] See post, § 550.

[5] Wharton, Ev. § 725; post, §§ 630. 684. See *Hammond* v. *Varian,* 54 N. Y. 400.

[6] See Wharton, Crim. Law, 8th ed. § 1623.

[1] See *Doe ex dem. Devine* v. *Wilson,* 10 Moore, P. C. C. 502; *Cobbett* v. *Kilminster,* 4 Fost. & F. 490.

to prepare specimens of his handwriting for submission to the jury.[2] To such evidence, however, it may be objected that a person who is called upon to write, in a courthouse, a piece for judicial inspection, may have strong motives to modify his usual style of writing, and in any view, such writing would be likely to be more formal and regular than a current business hand, and to perplex rather than convince experts.[3] Nor should it be forgotten that nervousness, at such a moment, may subdue in the writing its usual characteristics. At the same time, on cross-examination of a witness who has denied his signature, such a practice is proper and efficient, though it could not be compelled when the witness sets up his privilege in respect to self-crimination.[4] Neither should a party be permitted to manufacture evidence for himself by writing his name as a basis for a comparison of hands by a jury.[5] And hence, in Massachusetts, in 1869, where the trial court refused to admit a paper written by the defendant, for the purpose of comparing it with other writing imputed to him, it was held to be within the province of the trial court "to refuse to permit such a signature to be written, when the cir-

[2] Supra, § 424h; *Layer's Trial*, 16 How. St. Tr. 192; *Bradford* v. *People*, 22 Colo. 157, 43 Pac. 1013; *Smith* v. *King*, 62 Conn. 515, 26 Atl. 1059; *Chandler* v. *Le Barron*, 45 Me. 534; *Huff* v. *Nims*, 11 Neb. 365, 9 N. W. 548; *United States* v. *Mullaney*, 32 Fed. 370; *Sanderson* v. *Osgood*, 52 Vt. 312.

[3] See *Com.* v. *Allen*, 128 Mass. 46, 35 Am. Rep. 356; *Williams* v. *State*, 61 Ala. 33.

See also note in 62 L.R.A. 684, on question of comparison with writings made in court.

[4] *Gilbert* v. *Simpson*, 6 Daly, 30; *First Nat. Bank* v. *Robert*, 41 Mich. 709, 3 N. W. 199; *Doe ex dem. Devine* v. *Wilson*, 10 Moore, P. C. C. 502, 530; *Chandler* v. *Le Barron*, 45 Me. 534; *King* v. *Donahue*, 110 Mass. 155, 14 Am. Rep. 589.

[5] *King* v. *Donahue*, 110 Mass. 155, 14 Am. Rep. 589.

See *Hammond's Case*, 2 Me. 33, 11 Am. Dec. 39; *Keith* v. *Lothrop*, 10 Cush, 453; *Hynes* v. *McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; post, § 559; *Roe* v. *Roe*, 8 Jones. & S. 1.

cumstances are such that it does not appear to him to furnish a fair standard of comparison."[6]

Evidence of handwriting by another is in no sense secondary to evidence of such handwriting by the writer himself.[7]

§ 551. Qualifications of the witness who saw the writing made.—It does not follow that, because I have seen a person write, I am able subsequently to identify his writing on documents which I have never previously seen. I may see a person write several times without becoming by any means as familiar with his handwriting as I would be by maintaining with him a protracted correspondence. I may watch him listlessly, or at a distance, as one clerk may do another in a countingroom, without mastering the peculiarities of his penmanship. Still, with all these qualifications, the "presumption *ex visu scriptionis*," as Mr. Bentham calls it,[1] not only lends to such testimony much weight, but makes it technically primary.[2] It has, however, been said that such knowledge of

[6] *Com.* v. *Allen,* 128 Mass. 46, 35 Am. Rep. 356.

[7] *Rex* v. *Hazy,* 2 Car. & P. 458; *Reg.* v. *Hurley,* 2 Moody & R. 473; *Rex* v. *Benson,* 2 Campb. 508; *Smith* v. *Prescott,* 17 Me. 277; *Ainsworth* v. *Greenlee,* 8 N. C. (1 Hawks) 190; *McCaskle* v. *Amarine,* 12 Ala. 17; supra, §§ 160, 360, 424.

[1] 3 Bentham, Judicial Ev. 598.

[2] *Rex* v. *Tooke,* 25 How. St. Tr. 71; *Rex* v. *Hensey,* 2 Ld. Kenyon, 366, 1 Burr. 642; *United States* v. *Prout,* 4 Cranch, C. C. 301, Fed. Cas. No. 16,094; *Hartung* v. *People,* 4 Park. Crim. Rep. 319; *Com.* v. *Smith,* 6 Serg. & R. 568; *Hess* v. *State,* 5 Ohio, 7, 22 Am. Dec. 767; *State* v. *Stalmaker,* 2 Brev. 1; *State* v. *Anderson,* 2 Bail. L. 565; *Haynie* v. *State,* 2 Tex. App. 168.

See Wharton, Ev. § 707; post, § 846; *Donoghoe* v. *People,* 6 Park. Crim. Rep. 120; *McNair* v. *Com.* 26 Pa. 388; *Smith* v. *Walton,* 8 Gill, 77; *Cross* v. *People,* 47 Ill. 152, 95 Am. Dec. 474.

See *United States* v. *Crow,* 1 Bond, 51, Fed. Cas. No. 14,895; *Jackson ex dem. Van Dusen* v. *Van Dusen,* 5 Johns. 144, 4 Am. Dec. 330; *Carrier* v. *Hampton,* 33 N. C. (11 Ired. L.) 311; *Fogg* v. *Dennis,* 3 Humph. 47; *Strong* v. *Brewer,* 17 Ala. 710; *Shinkle* v. *Croock,* 17 Pa. 159.

See also note in 63 L.R.A. 968.

handwriting, in cases where forgery is charged, must be before the commencement of the suit; for it is argued that after a suit involving forgery has been instituted, a party is under too great a temptation to make evidence for himself to justify dependence on his samples of his penmanship. But this reasoning, as giving an absolute rule as to time, cannot now prevail in those states in which by statute interest is for the jury, and not for the court, and parties are admitted to testify on their own behalf. Nor, on principle, can it be admitted as an inflexible test that evidence which a party has the opportunity of moulding in his own interests is to be ruled out. If all such evidence is to be excluded, comparatively little evidence could be let in. At the same time, as has been well observed,[3] the knowledge must not have been communicated with a view to proof by a witness prejudiced by his employment for such purpose.[4] Thus, where, on an indictment for sending a threatening letter, the witness called to prove that the letter was in the handwriting of the accused was a policeman, who, after the letter had been received and suspicions aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write, his evidence was rejected by Maule, J., on the ground that "knowledge obtained for such a specific purpose and under such a bias is not such as to make a man admissible as a quasi expert witness."[5]

[3] Best, Ev. § 236.

[4] See the judgments of Patteson and Coleridge, JJ., in *Doe ex dem. Mudd* v. *Suckermore*, 5 Ad. & El. 703, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33; s. p. *Keith* v. *Lothrop*, 10 Cush. 453; supra, § 558.

See also *Doe ex dem. Perry* v. *Newton*, 5 Ad. & El. 514, 1 Nev. & P. 1, W. W. & D. 403, 6 L. J. Q. B. N. S. 1.

[5] *Reg.* v. *Crouch*, 4 Cox, C. C. 163.

But see contra, *Reid* v. *State*, 20 Ga. 681.

§ 552. Qualifications of witness by showing familiarity with the handwriting.—Not only, therefore, must we conclude that knowledge of handwriting obtained exclusively by correspondence is not secondary to knowledge obtained by seeing the party write, but we must hold that knowledge obtained of handwriting by long correspondence, or by continuous business association with a party (*e. g.*, as in the case of bank teller with depositor), is entitled, when the witness is experienced and reliable, to peculiar credit; and eminently is this the case when the witness has, in prior transactions, staked much on the knowledge which he is called on to attest, though he may never have seen the party write.[1] It is sufficeint to admit in such evidence that there is an acknowledgment, express or implied, by the party writing, of the writings from which the opinion of the witness is drawn.[2] If, for instance, W. writes to P. by post, to P.'s usual address, and an answer, purporting to come from P., is received by W. by post, this, if the correspondence continues, raises a presumption that P.'s letter is genuine, and thus enables W. to take it as the basis of his opinion as to P's handwriting.[3] To notice another illustration,—persons familiar with the signature of the officers of the bank to bank notes, such notes being proved to be treated by the bank as good, may be permitted to prove such sig-

[1] See supra, § 548; also note in 63 L.R.A. 971.

[2] *Rex* v. *Slaney,* 5 Car. & P. 213; *Doe ex dem. Mudd* v. *Suckermore,* 5 Ad. & El. 731, s. c. 2 Nev. & P. 46, W. W. & D. 405, 7 L. J. Q. B. N. S. 33; *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510; *Re 3109 Cases of Champagne,* 1 Ben. 241, Fed. Cas. No. 14,012; *Hammond's Case,* 2 Me. 33, 11 Am. Dec. 39; *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357; *Com.* v. *Peck,* 1 Met. 428; *Com.* v. *Carey,* 2 Pick. 47; *United States* v. *Simpson,* 3 Penr. & W. 437, 24 Am. Dec. 331; *Com.* v. *Smith,* 6 Serg. & R. 568; *State use of Medford* v. *Spence,* 2 Harr. (Del.) 348; *State* v. *Candler,* 10 N. C. (3 Hawks) 393; *May* v. *State,* 14 Ohio, 461, 45 Am. Dec. 548; *Johnson* v. *State,* 35 Ala. 370; supra, § 845.

[3] *Carey* v. *Pitt,* Peake, N. P. Add. Cas. 130, 4 Revised Rep. 895; *Gould* v. *Jones,* 1 W. Bl. 384; Wharton, Ev. § 708.

natures, although they were not personally acquainted with the writers.[4] On the other hand, the testimony of a person, not an expert, familiar with the writing of a person charged with forgery, that the defendant did not commit a particular forgery, has been held inadmissible,[5] though this ruling may be gravely questioned.[6]

It is a prerequisite to the admission of such proof that the writings from which the witness has drawn his knowledge should be genuine.[7] It will not be enough that the witness obtains his knowledge from letters whose genuineness is in dispute.[8] It may be added that this kind of testimony is not excluded, as has been already noticed, by the fact that the writer of the instrument is himself in court, and could be called.[9]

§ 553. Burden of proof as to genuineness of handwriting.—A witness called to testify as to handwriting, and

[4] *State* v. *Carr,* 5 N. H. 367; *Amherst Bank* v. *Root,* 2 Met. 522; *State* v. *Stalmaker,* 2 Brev. 1; *State* v. *Candler,* 10 N. C. (3 Hawks) 393; *Allen* v. *State,* 3 Humph. 367; *Willson* v. *Betts,* 4 Denio, 201; *Bank of the Commonwealth* v. *Mudgett,* 44 N. Y. 514; *Johnson* v. *Daverne,* 19 Johns. 134, 10 Am. Dec. 198; *Donoghoe* v. *People,* 6 Park. Crim. Rep. 120; *Hess* v. *State,* 5 Ohio, 5, 22 Am. Dec. 767; *Sill* v. *Reese,* 47 Cal. 294.

[5] *Burress* v. *Com.* 27 Gratt. 934; supra, § 562.

[6] Supra, § 559.

[7] *Doe ex dem. Mudd* v. *Suckermore,* 5 Ad. & El. 731, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33; *Cochran* v. *Butterfield,* 18 N. H. 115, 45 Am. Dec. 363; *McKeone* v. *Barnes,* 108 Mass. 344; *Com.* v. *Coe,* 115 Mass. 481; *Cunningham* v. *Hudson River Bank,* 21 Wend. 557; *Boyle* v. *Colman,* 13 Barb. 42; *Magie* v. *Osborn,* 1 Robt. 689.

[8] *National Union Bank* v. *Marsh,* 46 Vt. 443; *Goldsmith* v. *Bane,* 8 N. J. L. 87; *McKonkey* v. *Gaylord,* 46 N. C. (1 Jones, L.) 94.

See *Rex* v. *Bensen,* 2 Campb. 508; *Long* v. *State,* 10 Tex. App. 186.

[9] Supra, §§ 160, 360, 551; *Smith* v. *Prescott,* 17 Me. 277; *Ainsworth* v. *Greenlee,* 8 N. C. (1 Hawks) 190; *Pomeroy* v. *Golly,* Ga. Dec. pt. 1, p. 26; *McCaskle* v. *Amarine,* 12 Ala. 17.

who establishes a prima facie case of acquaintance with the handwriting of the person whose signature is in dispute, will be admitted by the court to testify,[1] though before his admission he may be cross-examined as to his opportunities, so that his qualifications may be tested by the court.[2] It is not necessary that the witness should swear to an actual belief in the genuineness of a writing. It is enough if he states his opinion as to such genuineness.[3] Lord Kenyon went so far as to hold that it was admissible for a witness to testify merely that the contested writing was like the handwriting of the party to whom it is charged;[4] and though this had been doubted by Lord Eldon[5] yet it is hard to say why the value of such testimony is not as much for the jury as for the court.[6]

§ 554. Testing the witness's qualifications on cross-examination.—A witness may, on cross-examination, be tested by putting to him other writings, not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation.[1] The tendency, also,

[1] *De la Motte's Case,* 21 How. St. Tr. 810; *Goodhue* v. *Bartlett,* 5 McLean, 186, Fed. Cas. No. 5,538; *Moody* v. *Rowell,* 17 Pick. 490, 28 Am. Dec. 317; *Whittier* v. *Gould,* 8 Watts, 485; *Barwick* v. *Wood,* 48 N. C. (3 Jones, L.) 306; *Henderson* v. *Bank at Montgomery,* 11 Ala. 855.

[2] See *Rogers* v. *Ritter,* 12 Wall. 317, 20 L. ed. 417; *Slaymaker* v. *Wilson,* 1 Penr. & W. 216.

[3] *Watson* v. *Brewster,* 1 Pa. St. 381; *Shitler* v. *Bremer,* 23 Pa. 413; *Clark* v. *Freeman,* 25 Pa. 133; *Fash* v. *Blake,* 38 Ill. 363; *Hopper* v. *Ashley,* 15 Ala. 463.

And see *Utica Ins. Co.* v. *Badger,* 3 Wend. 102; supra, § 462.

[4] *Garrells* v. *Alexander,* 4 Esp. 37, approved by Lord Wynford, at N. P.

See 2 Phillipps, Ev. 359, note 2; Wharton, Ev. §§ 531, et seq.

[5] *Eagleton* v. *Kingston,* 8 Ves. Jr. 476.

See also *Cruise* v. *Clancy,* 6 Ir. Eq. Rep. 552; *Taylor* v. *Sutherland,* 24 Pa. 333; Taylor, Ev. § 1666.

[6] See 3 Bentham, Judicial Ev. 599.

[1] See *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357.

The whole subject of examination of witnesses to handwriting is treated in a note in 65 L.R.A. 151.

is to hold that the test writings, if declared by the witness to be genuine, may be shown by the cross-examining party to be not genuine, and may be given to the jury for comparison.[2] But a witness when called to testify as to his own writing should have the whole paper before him in order to enable him to make up his judgment. Hence, on examination of a party as to whether a certain writing is his, he cannot be compelled to answer whether the signature is his unless he is permitted to examine the paper to which it is appended.[3]

§ 555. Proof by comparison not admitted at common law.—In England, in the common-law courts, comparison of hands as a mode of determining the genuineness of a writing or of handwriting was inadmissible,[1] but, as we have already seen, the common law has been so modified, both in England and in the United States, that comparison with any writing proved to be genuine is the rule by statute, except in the states of Louisiana and North Carolina, where no jury comparison is permitted.[2]

§ 556. Comparison with writings properly in evidence.—By the courts excluding comparison in hands a single exception is made,—when a writing proved to be that of the party whose signature is in litigation is already in evi-

[2] See *Griffiths* v. *Ivery*, 11 Ad. & El. 322, 3 Perry & D. 179, 9 L. J. Q. B. N. S. 49; *Young* v. *Honner*, 2 Moody & R. 537, 1 Car. & K. 51; supra, § 562.

[3] *North American F. Ins. Co.* v. *Throop*, 22 Mich. 146, 7 Am. Rep. 638.

[1] 2 *Garrells* v. *Alexander*, 4 Esp. 37; *Doe ex dem. Mudd* v. *Suckermore*, 5 Ad. & El. 703, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33; *Bromage* v. *Rice*, 7 Car. & P. 548; *Hughes* v. *Rogers*, 8 Mees. & W. 123, 10 L. J. Exch. N. S. 238.

See remarks of Sir S. Romilly in the *Duke of York's Case*, 1 Browne, St. Tr. 267.

[2] Supra, § 424e.

The question of comparison of handwriting is the subject of a note in 62 L.R.A. 818.

dence, having been put in for other purposes, then it is admissible to resort to this writing in order to determine the genuineness of the litigated instrument.[1]

§ 557. Writings admissible as a basis of comparison.—In some states[1] it is the practice to admit as a basis of comparison any papers, whether in themselves relevant to the issue or not, if they can be shown to the satisfaction of the court to be the writings of the party whose writing is disputed.[2] In Pennsylvania, however, it is said that at common

[1] *Solita* v. *Yarrow,* 1 Moody & R. 133; *Waddington* v. *Cousins,* 7 Car. & P. 595; *Doe ex dem. Perry* v. *Newton,* 1 Nev. & P. 1, 5 Ad. & El. 514, W. W. & D. 403, 6 L. J. K. B. N. S. 1; *Myers* v. *Toscan,* 3 N. H. 47; *State* v. *Carr,* 5 N. H. 367; *Van Wyck* v. *McIntosh,* 14 N. Y. 439; *Randolph* v. *Loughlin,* 48 N. Y. 456; *Goodyear* v. *Vosburgh,* 63 Barb. 154; *Williams* v. *Drexel,* 14 Md. 566; *Duncan* v. *Beard,* 2 Nott. & M'C. 401; *Yates* v. *Yates,* 76 N. C. 143; *Doe ex dem. Henderson* v. *Roe,* 16 Ga. 521; *Northern Bank* v. *Buford,* 1 Duv. 335; *Brobston* v. *Cahill,* 64 Ill. 358; *Van Sickle* v. *People,* 29 Mich. 61; *People* v. *Cline,* 44 Mich. 291, 6 N. W. 671; *State* v. *Miller,* 47 Wis. 530, 3 N. W. 31; *State* v. *Tompkins,* 71 Mo. 613; *Moore* v. *United States,* 91 U. S. 270, 23 L. ed. 346.

See *Medway* v. *United States,* 6 Ct. Cl. 421; *United States* v. *Chamberlain,* 12 Blatchf. 390, Fed. Cas. No. 14,778.

As denying this exception, see *Tome* v. *Parkersburg Branch R. Co.* 39 Md. 90, 17 Am. Rep. 540; *Outlaw* v. *Hurdle,* 46 N. C. (1 Jones, L.) 150; *Otey* v. *Hoyt,* 48 N. C. (3 Jones, L.) 407.

See also remarks of Davis, J., in *Rogers* v. *Ritter,* 12 Wall. 322, 20 L. ed. 419; *United States* v. *Jones,* 13 Rep. 165, 20 Blatchf. 235, 10 Fed. 469; *Baker* v. *Squier,* 1 Hun, 448, s. c. 3 Thomp. & C. 465; and note in 62 L.R.A. 862; *Bank of Commonwealth* v. *Mudgett,* 44 N. Y. 514; s. c. 45 Barb. 663; *Ellis* v. *People,* 21 How. Pr. 365; *People* v. *Spooner,* 1 Denio, 343, 43 Am. Dec. 672; *Pontius* v. *People,* 82 N. Y. 339; *Merritt* v. *Campbell,* 79 N. Y. 625; *Miles* v. *Loomis,* 75 N. Y. 288, 31 Am. Rep. 470; s. p. *Hynes* v. *McDermott,* 82 N. Y. 41, 37 Am. Rep. 538.

See post, § 569; supra, § 424e.

[1] See supra, § 424e.

The whole subject of competency of handwriting as standard for comparison is treated in a note in 63 L.R.A. 428.

[2] *Hammond's Case,* 2 Me. 33, 11 Am. Dec. 39; *Page* v. *Homans,* 14 Me. 478; *Woodman* v. *Dana,* 52

law the proof from comparison of hands must be viewed as supplementary, and cannot be relied on exclusively,[3] and that the comparison is to be made by the jury, not by experts.[4] To the admission of a test paper it is essential that it should

Me. 9; *Myers* v. *Toscan,* 3 N. H. 47; *State* v. *Hastings,* 53 N. H. 452; *Adams* v. *Field,* 21 Vt. 256; *State* v. *Ward,* 39 Vt. 225; *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357; *Homer* v. *Wallis,* 11 Mass. 309, 6 Am. Dec. 169; *McKeone* v. *Barnes,* 108 Mass. 344; *Com.* v. *Coe,* 115 Mass. 481; *Demerritt* v. *Randall,* 116 Mass. 331; *Moody* v. *Rowell,* 17 Pick, 490, 28 Am. Dec. 317; *Richardson* v. *Newcomb,* 21 Pick. 315; *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec 596; *Keith* v. *Lothrop,* 10 Cush. 453; *Martin* v. *Maguire,* 7 Gray, 177; *Com.* v. *Williams,* 105 Mass. 62; *Com.* v. *Whitman,* 121 Mass. 361; *Lyon* v. *Lyman,* 9 Conn. 55; *State* v. *Nettleton,* 1 Root, 308; *Tyler* v. *Todd,* 36 Conn. 218; *M'Corkle* v. *Binns,* 5 Binn. 340, 6 Am. Dec. 420; *Farmers' Bank* v. *Whitehill,* 10 Serg. & R. 110; *Baker* v. *Haines,* 6 Whart. 284, 36 Am. Dec. 224; *Travis* v. *Brown,* 43 Pa. 9, 82 Am. Dec. 540; *Haycock* v. *Greup,* 57 Pa. 438; *Bragg* v. *Colwell,* 19 Ohio St. 407; *Calkins* v. *State,* 14 Ohio St. 222; *Koons* v. *State,* 36 Ohio St. 198; *Robertson* v. *Miller,* 1 McMull. L. 120; *Whitney* v. *Bunnell,* 8 La. Ann. 429; *State* v. *Fritz,* 23 La. Ann. 55; *Garvin* v. *State,* 52 Miss. 209; *Macomber* v. *Scott,* 10 Kan. 340; *State* v. *Tompkins,* 71 Mo. 613; *State* v. *Owen,* 73 Mo. 440.

See *Baker* v. *Mygatt,* 14 Iowa, 131; *Singer Mfg. Co.* v. *McFarland,* 53 Iowa, 540, 5 N. W. 739.

[3] *Haycock* v. *Greup,* 57 Pa. 438.

[4] *Travis* v. *Brown,* 43 Pa. 9, 82 Am. Dec. 540; *Clayton* v. *Siebert,* 3 Brewst. (Pa.) 176.

See *State* v. *Scott,* 45 Mo. 302; *Huston* v. *Schindler,* 46 Ind. 38.

See 1 Brightly's Purdon, 631; *Sweigart* v. *Richards,* 8 Pa. 436; *McNair* v. *Com.* 26 Pa. 388.

See *Redford* v. *Peggy,* 6 Rand. (Va.), 316; *Power* v. *Frick,* 2 Grant, Cas. 306; s. p. *Aumick* v. *Mitchell,* 82 Pa. 211; *Van Sickle* v. *People,* 29 Mich. 61; *Re Foster,* 34 Mich. 21; *People* v. *Gale,* 50 Mich. 237, 15 N. W. 99; *Pate* v. *People,* 8 Ill. 644; *Brobston* v. *Cahill,* 64 Ill. 356; *State* v. *Miller,* 47 Wis. 530, 3 N. W. 31.

See *Hazleton* v. *Union Bank,* 32 Wis. 47; *State* v. *Clinton,* 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Crim. Rep. 132; *State* v. *Tompkins,* 71 Mo. 613; *Crist* v. *State,* 21 Ala. 137; *Mayo* v. *State,* 30 Ala. 32; *Kirksey* v. *Kirksey,* 41 Ala. 626; *Bestor* v. *Roberts,* 58 Ala. 331.

See post, § 849; *Bennett* v. *Mathewes,* 5 S. C. 478; *Boman* v. *Plunkett,* 2 M'Cord, L. 518; *Bird* v. *Miller,* 1 McMull. L. 125; *Boggus* v. *State,* 34 Ga. 278.

be either conceded by the writer to be genuine, or proved to be so to the entire satisfaction of the court.[5]

The mere finding of a diary on a party, with an admission by him that it belonged to him, is not a sufficient authentication of the writing to justify its use as a standard.[6] Press copies cannot be introduced as a basis of comparison, even where the original would be admissible;[7] nor can photographic copies.[8]

§ 558. Standards of comparison must be genuine.—A test paper, to be admitted for the purpose of forming a basis for comparison, should be free from any suspicion of concoction in order to affect the litigated issue.[1]

§ 559. Admissibility of expert testimony.—An expert, apart from the vexed question of comparison of hands, is admissible to determine whether a contested writing is feigned or natural;[1] though in absence of evidence on behalf of the

[5] *McKeone* v. *Barnes,* 108 Mass. 344; *Com.* v. *Coe,* 115 Mass. 503; *Heard* v. *State,* 9 Tex. App. 1; *Heacock* v. *State,* 13 Tex. App. 97.

See § 424c, supra.

[6] *Van Sickle* v. *People,* 29 Mich. 61.

[7] *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596.

See *Com.* v. *Jeffries,* 7 Allen, 561, 83 Am. Dec. 712; supra, § 177.

[8] Supra, § 544; *Tome* v. *Parkersburg Branch R. Co.* 39 Md. 90, 91–93, 17 Am. Rep. 540.

See § 424f, supra.

[1] Supra, §§ 551, 552; *King* v. *Donahue,* 110 Mass. 155, 14 Am. Rep. 589; *R.* v. *Castro,* Charge ii. 770, et seq.; *United States* v. *Chamberlain,* 12 Blatchf. 390, Fed. Cas. No. 14,778; *Com.* v. *Coe,* 115 Mass. 481.

As to what genuine documents are competent standards, see note in 63 L.R.A. 438.

[1] *Sweetser* v. *Lowell,* 33 Me. 448; *Withee* v. *Rowe,* 45 Me. 571; *Moody* v. *Rowell,* 17 Pick. 490, 28 Am. Dec. 317; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *Demerritt* v. *Randall,* 116 Mass. 331; *Lyon* v. *Lyman,* 9 Conn. 55; *Lansing* v. *Russell,* 3 Barb. Ch. 325; *Goodyear* v. *Vosburgh,* 63 Barb. 154; *Van Wyck* v. *McIntosh,* 14 N. Y. 439; *Dubois* v. *Baker,* 30 N. Y. 355; *Hynes* v. *McDermott,* 82 N. Y. 41, 37 Am. Rep. 538; *People* v. *Hewit,* 2 Park. Crim. Rep. 20; *Reese* v. *Reese,* 90 Pa. 89, 35 Am. Rep. 634; *Hubley* v. *Van-*

party charged that the signature is simulated, an expert will not be received to prove it was not simulated.[2] So experts are permitted to testify as to the period to which a writing may be assigned;[3] as to the nature of the ink or other material used;[4] whether a certain writing shows comparative ease and facility;[5] whether certain figures in a check have been changed;[6] what is the difference between the substance of an instrument and a forged addition;[7] whether certain words were written before a paper was folded;[8] what is the meaning of certain illegible marks or signs;[9] whether the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time;[10] whether a certain bank note is counterfeit,[11] and for this purpose business men, long fa-

horne, 7 Serg. & R. 185; *Calkins* v. *State,* 14 Ohio St. 222; *Jones* v. *Finch,* 37 Miss. 461, 75 Am. Dec. 73, 18 Am. L. Reg. N. S. 266.

As to competency of expert witness, see note in 63 L.R.A. 985.

[2] *Kowing* v. *Manly,* 49 N. Y. 193, 10 Am. Rep. 346; s. c. 57 Barb. 479, qualifying *People* v. *Hewit,* 2 Park. Crim. Rep. 20.

See also *Merchant's Will,* Tucker, 151; *People* v. *Spooner,* 1 Denio, 343, 43 Am. Dec. 672; *Burress* v. *Com.* 27 Gratt. 934; *Sayres* v. *State,* 30 Ala. 18.

See *Bank of Pennsylvania* v. *Haldeman,* 1 Penr. & W. 161; *Lodge* v. *Phipher,* 11 Serg. & R. 333.

See also review of *Robinson* v. *Mandell,* in 4 Am. L. J. 625; supra, § 9; post, § 847.

[3] *Doe ex dem. Mudd* v. *Suckermore,* 5 Ad. & El. 703, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33; *Reg.* v. *Williams,* 8 Car. & P. 434; *Tracy Peerage Case,* 10 Clark & F. 154; *Davis* v. *Mason,* 4 Pick. 156.

See *People* v. *Spooner,* 1 Denio, 343, 43 Am. Dec. 672.

[4] *Dubois* v. *Baker,* 30 N. Y. 355.

[5] *Demerritt* v. *Randall,* 116 Mass. 331.

[6] *Nelson* v. *Johnson,* 18 Ind. 329; *Pate* v. *People,* 8 Ill. 644.

[7] *Hawkins* v. *Grimes,* 13 B. Mon. 257.

See *Daniel* v. *Toney,* 2 Met. (Ky.) 523.

[8] *Bacon* v. *Williams,* 13 Gray, 525.

[9] *Stone* v. *Hubbard,* 7 Cush. 595; *Collender* v. *Dinsmore,* 55 N. Y. 200, 14 Am. Rep. 224.

[10] *Quinsigamond Bank* v. *Hobbs,* 11 Gray, 250; *Fulton* v. *Hood,* 34 Pa. 365, 75 Am. Dec 664.

See *Jewett* v. *Draper,* 6 Allen, 434; *Ballentine* v. *White,* 77 Pa. 25.

[11] *Jones* v. *Finch,* 37 Miss. 461, 75 Am. Dec. 73.

miliar with the notes, can be called;[12] whether certain words were written over others;[13] and as to the date and meaning of certain words upon an erasure.[14] It has, however, been held inadmissible to ask an expert as to a remote contingency, as to which no special professional experience is needed to speak;[15] nor can an expert be examined as to how far a person may improve his handwriting in a given time.[16]

§ 560. Comparison by expert; ancient writings.—When comparison of hands is permitted, an expert can be called to make such comparison.[1] It has, however, been said that an

[12] *State* v. *Cheek*, 35 N. C. (13 Ired. L.) 114.

[13] *Dubois* v. *Baker*, 30 N. Y. 355.

[14] *Dubois* v. *Baker*, 30 N. Y. 355; s. c. 40 Barb. 556; *Vinton* v. *Peck*, 14 Mich. 287.

See *Swan* v. *O'Fallon*, 7 Mo. 231.

[15] *Thayer* v. *Chesley*, 55 Me. 393.

[16] *McKeone* v. *Barnes*, 108 Mass. 344.

[1] 3 Bentham, Judicial Ev. 599; *United States* v. *Keene*, 1 McLean, 429, Fed. Cas. No. 15,510; *United States* v. *Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778; *Hammond's Case*, 2 Me. 33, 11 Am. Dec. 39; *Woodman* v. *Dana*, 52 Me. 9; *Furber* v. *Hilliard*, 2 N. H. 480; *State* v. *Carr*, 5 N. H. 371; *State* v. *Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *State* v. *Ravelin*, 1 D. Chip. (Vt.) 295; *State* v. *Ward*, 39 Vt. 225; *Moody* v. *Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Com.* v. *Riley*, Thatcher Crim. Cas. 67; *Amherst Bank* v. *Root*, 2 Met. 522; *Com.* v. *Williams*, 105 Mass. 62; *Lyon* v. *Lyman*, 9 Conn. 55; *People* v. *Caryl*, 12 Wend. 547; *Phœnix F. Ins. Co.* v. *Philip*, 13 Wend. 81; *Finch* v. *Gridley*, 25 Wend. 469; *Roe* v. *Roe*, 8 Jones & S. 1; *People* v. *Hewit*, 2 Park. Crim. Rep. 20; *Jackson ex dem. Kip* v. *Murray*, Anthon, N. P. 105; *West* v. *State*, 22 N. J. L. 212; *Com.* v. *Smith*, 6 Serg. & R. 568; *Hubley* v. *Vanhorne*, 7 Serg. & R. 185; *Lodge* v. *Phipher*, 11 Serg. & R. 333; *Power* v. *Frick*, 2 Grant, Cas. 306; *Sweigart* v. *Richards*, 8 Pa. 436; *Burkholder* v. *Plank*, 69 Pa. 225; *Ballentine* v. *White*, 77 Pa. 20; *Koons* v. *State*, 36 Ohio St. 195; *State* v. *Owen*, 73 Mo. 440.

Contra:

Titford v. *Knott*, 2 Johns. Cas. 211; *Bank of Pennsylvania* v. *Haldeman*, 1 Penr. & W. 161; *Niller* v. *Johnson*, 27 Md. 6; *Huston* v. *Schindler*, 46 Ind. 38; *State* v. *Harris*, 27 N. C. (5 Ired. L.) 287; *State* v. *Tutt*, 2 Bail. L. 44, 21 Am. Dec. 508; *Bird* v. *Miller*, 1 McMull. L. 125; *Bennett* v. *Mathewes*, 5 S. C. 478; *Johnson* v. *State*, 35 Ala. 370; *Moye* v. *Herndon*, 30 Miss. 110; *Jones* v. *Finch*, 37 Miss. 461, 75

expert cannot, as to an ancient writing, be admitted to give his conclusion from a comparison of hands,[2] though if no other proof is attainable such testimony should be received for what it is worth.[3]

§ 561. Photographers' testimony as to handwriting.—Photographers who have been accustomed to scrutinize handwriting in reference to forgeries, and have been in the habit of using photographic copies for this purpose, may be examined as experts in questions of forgery, even though their opinion is founded partly on photographic copies, which they have themselves made, and which have been put in evidence.[1] To enable, however, such photographic copies to be put in evidence, their accuracy and fairness must be proved.[2]

§ 562. Cross-examination of experts.—An expert is open to cross-examination as to his qualifications,[1] and he may be probed by test papers that may be presented to him.[2]

Am. Dec. 73; *Hanley* v. *Gandy*, 28 Tex. 211, 91 Am. Dec. 315; *Miles* v. *Loomis*, 75 N. Y. 288, 31 Am. Rep. 470.

See *Merritt* v. *Campbell*, cited supra, § 556; *Fulton* v. *Hood*, 34 Pa. 365, 75 Am. Dec. 664; *Travis* v. *Brown*, 43 Pa. 9, 82 Am. Dec. 540.

As to competency of expert witness for comparison, see note in 63 L.R.A. 937.

[2] *Fitzwalter Peerage Case*, 10 Clark & F. 193; supra, § 548.

[3] Supra, § 548.

[1] *Marcy* v. *Barnes*, 16 Gray, 161, 77 Am. Dec. 405.

See *Taylor's Will*, 10 Abb. Pr. N. S. 301; *Tyler* v *Todd*, 36 Conn. 218.

See supra, § 544; *Robinson* v. *Mandell*, cited supra, § 9, post, § 847.

Photographic copies for comparison of handwriting, see note in 35 L.R.A. 812.

[2] *Marcy* v. *Barnes*, 16 Gray, 161, 77 Am. Dec. 405.

See *Taylor's Will*, 10 Abb. Pr. N. S. 301; *Tyler* v. *Todd*, 36 Conn. 218; *Robinson* v. *Mandell*, cited supra, § 9, post, § 847; *Tome* v. *Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540.

See supra, § 544.

[1] See supra, §§ 407–420, 425.

[2] Supra, §§ 510, 554; *Demerritt* v. *Randall*, 116 Mass. 331; *Burress* v. *Com.* 27 Gratt. 934; *Goldstein* v. *Black*, 50 Cal. 462.

Unless it is shown that he is en' led to testify as an expert, he should not be received as such.[3]

§ 563. Considerations in weighing expert testimony.— Expert testimony should in all cases be closely scrutinized,[1] and there is peculiar reason why this scrutiny should be applied to questions of identity of handwritings. If the expert can produce in court the writings, and explain the grounds of his conclusions, the difficulties are much reduced; but it must be remembered that there are few branches of law on which interests so momentous (*e. g.*, devolution of large estates, convictions of forgery) depend upon tests so exquisitely delicate as those applied to handwriting. It is well known that in cases of peculiar difficulty, when the difference, if there be any, between the handwritings, is only noticeable by perceptions the most sensitive, experts, no matter how conscientious, often take unconsciously such a bias from the party employing them as to give to their judgment the almost infinitely slight impulse that turns the scale; nor is it strange that in an instrument so delicate, aberrations from its true course should be produced by attractions or repulsions otherwise unappreciable.

The personal factor in all expert testimony is far more evident than it is in the testimony of those witnesses that testify to facts that are matters of general knowledge and common observation. For this reason it is better for the court to instruct the jury that they shall accept the testimony of an expert as to handwriting, even when uncontradicted, as an argument, rather than as proof of the fact,[2] and make allow-

[3] *State* v. *Tompkins*, 71 Mo. 613; *Haun* v. *State*, 13 Tex. App. 383, 44 Am. Rep. 706; *Heacock* v. *State*, 13 Tex. App. 97.

[1] Supra, § 420; *Koons* v. *State*, 36 Ohio St. 195.

[2] Wharton, Ev. § 722, citing *Tracy Peerage Case*, 10 Clark & F.

ance for those personal factors which, to an extent at least, may influence the judgment of the expert.[3]

X. Inspection of Documents by Order of Court.

§ 564. Production of documents; materiality.—The rule relating to the production of documents, either before or at the trial of a criminal case, does not differ from the rule applied in civil cases, except of course that no defendant can be compelled to produce a document that would incriminate him, and this exception extends also to the party holding a document the production of which might incriminate such party.[1] In cases not affected by this limitation, the accused is entitled to a rule for the inspection of such documents in the hands of the opposite party as are essential to his defense. Thus, a defendant is entitled to inspect certain letters material to the issue, in the hands of the prosecution.[2] Where such inspection is provided for by statute, the conditions of the statute must be complied with, but where the production is not statutory controlled, it is clearly within the inherent power of the court to cause such document to be produced, under such conditions as the court may prescribe.

The first esssential to such production is to show to the court that the document sought is relevant to the issue.[3] When

191; *Gurney* v. *Langlands*, 5 Barn. & Ald. 330, 24 Revised Rep. 396; *Reg.* v. *Crouch*, 4 Cox, C. C. 163; *Cowon* v. *Beall*, 1 MacArth. 270; *Borland* v. *Walrath*, 33 Iowa, 130.

See supra, § 420.

[3] See *Robinson* v. *Mandell*, cited supra, § 9.

Also note in 62 L.R.A. 871, as to weight of evidence as to comparison of handwriting.

[1] Post, § 566; *State* v. *Wallahan*, Tappan (Ohio) 48.

[2] *Reg.* v. *Coluci*, 3 Fost. & F. 103; *Rex* v. *Harrie*, 6 Car. & P. 105.

[3] *Livermore* v. *St. John*, 4 Robt. 12; *Bailey* v. *Williams Mfg. Co.* 9 N. Y. S. R. 518; *State ex rel. Boston & M. Consol. Copper & S. Min. Co.* v. *District Ct.* 30 Mont. 206, 76 Pac. 206.

See *Palmer* v. *United Press*, 67 App. Div. 64, 73 N. Y. Supp. 456; *United States* v. *Burr*, Fed. Cas. No. 14,694.

this essential requirement is complied with, the court, according to the circumstances of the case, will order the production of the document. However, in criminal cases, it is very evident that the accused cannot compel the prosecution to produce documents which he himself has made. Thus, he is not entitled to have incriminating letters, written by him, produced for his inspection;[4] nor to have produced a statement made and signed by accused, even on the ground that such statement is material to his defense.[5]

§ 564a. Inspection of minutes of grand jury.—The general rule is that an accused in a criminal case has no right to an inspection of the minutes of the grand jury returning the indictment against him, either before or during the trial,[1] but this is a matter resting in the discretion of the court, and, where some special reason exists, such as to enable the accused to properly move to set aside the indictment, he may be permitted to inspect the minutes of the proceedings.[2]

§ 565. Custody of documents.—Although when a document which appears to have been forged or stolen is produced

[4] *Morrison* v. *State*, 40 Tex. Crim. Rep. 473, 51 S. W. 358.

See *People* v. *Jackson*, 182 N. Y. 66, 74 N. E. 565.

[5] *State* v. *Fitzgerald*, 130 Mo. 407, 32 S. W. 1113.

[1] *Hofler* v. *State*, 16 Ark. 534; *Cannon* v. *People*, 141 Ill. 270, 30 N. E. 1027; *Howard* v. *Com.* 118 Ky. 1, 80 S. W. 211, 81 S. W. 704. See s. c. 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189; *People* v. *Proskey*, 32 Misc. 367, 15 N. Y. Crim. Rep. 144, 66 N. Y. Supp. 736; *State* v. *Rhoads*, 81 Ohio St. 397, 27 L.R.A.(N.S.) 558, 91 N. E. 186, 18 A. & E. Ann. Cas. 415; *United States* v. *Southmayd*, 6 Biss. 321, Fed. Cas. No. 16,361.

But see *People* v. *Foody*, 38 Misc. 357, 17 N. Y. Crim. Rep. 8, 77 N. Y. Supp. 943.

[2] *People* v. *Jaehne*, 4 N. Y. Crim. Rep. 161; *People* v. *Richmond*, 5 N. Y. Crim. Rep. 97 (under code provision); *People* v. *Naughton*, 38 How. Pr. 430; *People* v. *Coney Island Jockey Club*, 68 Misc. 302, 123 N. Y. Supp. 669; *People* v. *Gresser*, 124 N. Y. Supp. 581.

See also note in 27 L.R.A.(N.S.) 558, on right of indicted person to inspect minutes of grand jury.

in court, the court may order it to be impounded,[1] the court will not, under a mere order for inspection, compel the impounding of papers, or their deposit with an officer of the court or any third party. The owner of the document is allowed to keep it in possession. The order simply permits its inspection, while in the hands of the owner or his attorney, by the opposing party or by witnesses.[2] But, where documents are admitted in evidence on behalf of the prosecution, in a criminal cause, where they are not of that kind that are required by law to be kept in the custody of a particular person, they should be left with the clerk of the court during the trial.[3]

§ 566. Production of criminatory documents will not be compelled.—We have just stated that the court will not compel the production of documents by a holder who alleges that their production will criminate him. This limitation has been frequently applied.[1] The risk, however, to which the custodian is exposed, must be that of a real, and not that of a nominally, penal prosecution.[2] Neither a quo warranto[3] nor a mandamus [4] is a criminal proceeding in the above sense.

[1] Post, § 566.

[2] *Thomas* v. *Dunn,* 6 Mann. & G. 274, 6 Scott, N. R. 834, 1 Dowl. & L. 535; *Rogers* v. *Turner,* 21 L. J. Exch. N. S. 9; Wharton, Ev. § 752.

[3] *Bass* v. *United States,* 20 App. D. C. 232.

[1] *Rex.* v. *Purnell,* 1 W. Bl. 37, s. c. 1 Wils. 239; *Rex* v. *Heydon.* 1 W. Bl. 351; *Rex* v. *Buckingham,* 8 Barn. & C. 375, 2 Mann. & R. 412, 6 L. J. K. B. 346; *Rex* v. *Cornelius,* 2 Strange, 1210; s. c. 1 Wils. 142; *Montague* v. *Dudman,* 2 Ves. Sr. 397; *Glynn* v. *Houston,* 1 Keen, 329; *Byass* v. *Sullivan,* 21 How. Pr. 50; Wigram, Discovery, § 130; Taylor, Ev. § 1351.

See *Bradshaw* v. *Murphy,* 7 Car. & P. 612; supra, §§ 120, 463–465.

As to admissibility in evidence of documents or other things taken from accused, see note in 59 L.R.A. 465.

[2] *Rex* v. *Cadogan,* 5 Barn. & Ald. 902, 1 Dowl. & R. 559, 24 Revised Rep. 612.

[3] *Rex* v. *Shelley,* 3 T. R. 141, 1 Revised Rep. 673; *Rex* v. *Purnell,* 1 W. Bl. 45, 1 Wils. 239.

[4] *Reg.* v. *Ambergate R. Co.* 17 Q. B. 957, 16 Jur. 777.

At the same time, inspection may be ordered when the applicant has reason to believe that the document in question was forged; and the court, when required by public justice, will impound the document for the purposes of a criminal prosecution.[5]

§ 567. Documents may be examined by interpreters and experts.—In proper cases, in order to determine as to the meaning or genuineness of a writing, the court will authorize an inspection by experts or others having peculiar opportunities of identifying or distinguishing the document.[1] And the same right has been extended to cases where a defendant desires to obtain an inspection of the remains of a deceased person in the custody of the police.[2]

§ 568. Evidentiary effect of documentary evidence.—The effect of documentary evidence, except where the document is given a particular evidentiary value by statute, is to afford general prima facie proof of the fact sought to be established. Thus, a mittimus is prima facie evidence of the legality of a commitment to jail;[1] on a prosecution of a sheriff for an escape, the record of a judgment is only prima facie evidence of its recitals, and may be disproved;[2] where, by

[5] *Thomas* v. *Dunn,* 6 Mann. & G. 274, 6 Scott, N. R. 834, 1 Dowl. & R. 535; *Woolmer* v. *Devereux,* 2 Mann. & G. 758, s. c. 3 Scott, N. R. 224, 9 Dowl. P. C. 672, 10 L. J. C. P. 207; *Richey* v. *Ellis,* Alcock & N. 111; *Rogers* v. *Turner,* 21 L. J. Exch. N. S. 9; *Boyd* v. *Petrie,* L. R. 3 Ch. 818, overruling s. c. L. R. 5 Eq. 290.

[1] *Swansea Vale R. Co.* v. *Budd,* L. R. 2 Eq. 274, 35 L. J. Ch. N. S. 631, 12 Jur. N. S. 561, 14 Week. Rep. 663; *Boyd* v. *Petrie,* L. R. 3 Ch. 818, qualifying s. c. L. R. 5 Eq. 290.

See *Atty. Gen.* v. *Whitwood Local Board,* 40 L. J. Ch. N. S. 592, 19 Week. Rep. 1107.

[2] *Reg.* v. *Spry,* 3 Cox, C. C. 221. See supra, § 312.

[1] *State* v. *Malloy,* 54 Vt. 96.

[2] *Griffin* v. *State,* 37 Ark. 437.

See *People* v. *Rodawald,* 177 N. Y. 408, 70 N. E. 1.

statute, a copy of the result of an election is made prima facie evidence, it is also evidence that the canvass was held at the time prescribed by law;[3] a printed copy of an ordinance published by authority is prima facie evidence of its legal existence and contents, to the extent that the burden is on the accused to overcome the showing.[4] The record of a court of general jurisdiction imports absolute verity.[5]

§ 569. Supplementing documents with parol testimony.—The introduction of documentary evidence is not exclusive of parol testimony tending to establish the same fact. Thus, on the trial of an indictment, parol testimony of a magistrate and his clerk was admissible to show that depositions were taken in accordance with the statute requiring witnesses to be examined in the presence of the accused, and to show that it had been read over to the witness, corrected by him, and subscribed and attested by the officer;[1] on a prosecution for resisting arrest on the part of an accused allowed to go at large, on certain conditions, it was proper to introduce parol evidence of the promise, although it was not contained in the record of conviction;[2] where deceased made an affidavit which was sought to be used as a dying declaration, but excluded, parol evidence of the dying declaration was admissible;[3] where answers of accused to certain questions were entered on the record, such record did not preclude parol testimony of the facts stated;[4] documentary evidence does

[3] *Brass* v. *State,* 45 Fla. 1, 34 So. 307.

[4] *Heno* v. *Fayetteville,* 90 Ark 292, 119 S. W. 287.

[5] *State* v. *Shaw,* 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51.

See *Pryor* v. *Com.* 2 Va. Dec. 479, 26 S. E. 864.

[1] *State* v. *Depoister,* 21 Nev. 107, 25 Pac. 1000.

[2] *Corporate Authorities of Scottsboro* v. *Johnston,* 121 Ala. 397, 25 So. 809.

[3] *State* v. *Viaux,* 8 La. Ann. 514; *Allen* v. *Com.* 134 Ky. 110, 119 S. W. 795, 20 A. & E. Ann. Cas. 884.

[4] *Com.* v. *Walker,* 163 Mass. 226, 39 N. E. 1014; *State* v. *Young,* 105 Mo. 634, 16 S. W. 408; *Howser* v. *Com.* 51 Pa. 332.

not exclude parol testimony of the same fact, where the witness testifying has knowledge of the fact, nor in those cases where it is necessary to explain the meaning and contents of the document.[5] While parol testimony may be used to supplement documentary evidence, or to correct and show what the document actually contained, it cannot be used to show statements not contained in such document, or contradicting the document.[6] Evidence of the real names of the

[5] *Kearney* v. *State,* 101 Ga. 803, 65 Am. St. Rep. 344, 29 S. E. 127; *Douglass* v. *State,* 18 Ind. App. 289, 48 N. E. 9; *Woodruff* v. *State,* 61 Ark. 157, 32 S. W. 102; *Com.* v. *Warner,* 173 Mass. 541, 54 N. E. 353; *Kelley* v. *State,* 43 Tex. Crim. Rep. 40, 62 S. W. 915.

See *Earl* v. *State,* 44 Tex. Crim. Rep. 493, 72 S. W. 376; *State* v. *White,* 70 Vt. 225, 39 Atl. 1085; *State* v. *Marsh,* 70 Vt. 288, 40 Atl. 836; *State ex rel. Mundt* v. *Meier,* 140 Iowa, 540, 118 N. W. 792.

See *People* v. *Andre,* 157 Mich. 362, 122 N. W. 98; *State* v. *Germain,* 54 Or. 395, 103 Pac. 521.

See *Roselle* v. *Com.* 110 Va. 235, 65 S. E. 526; *State* v. *Fagan,* — Del. —, 74 Atl. 692; *State* v. *Emblen,* 66 W. Va. 360, 66 S. E. 499; *Thompson* v. *State,* 120 Ga. 132, 47 S. E. 566.

See *People* v. *Walker,* 178 N. Y. 563, 70 N. E. 1105; *State* v. *Franks,* 51 S. C. 259, 28 S. E. 908; *Garrett* v. *State,* 42 Tex. Crim. Rep. 521, 61 S. W. 129; *Mathins* v. *State,* — Tex. Crim. Rep. —, 62 S. W. 911; *Stephens* v. *State,* 49 Tex. Crim. Rep. 489, 93 S. W. 545.

See *State* v. *Vest,* 21 W. Va. 796; *State* v. *Simien,* 30 La. Ann. 296; *Dunlap* v. *State,* 9 Tex. App. 179, 35 Am. Rep. 736; *State* v. *Hall,* 49 Me. 412; *Lamb* v. *State,* 66 Md. 285, 7 Atl. 399; *State* v. *Hall,* 79 Me. 501, 11 Atl. 181; *State* v. *Linthicum,* 68 Mo. 66; *State* v. *Devlin,* 7 Mo. App. 32; *State* v. *Hockaday,* 98 Mo. 590, 12 S. W. 246; *Jones* v. *State,* 35 Tex. Crim. Rep. 565, 34 S. W. 631; *Harrison* v. *State,* 15 Lea, 720; *State* v. *Daggett,* 2 Aik. (Vt.) 148; *Griffith* v. *State,* 37 Ark. 324.

[6] *Irving* v. *State,* 9 Tex. App. 66; *State* v. *Branham,* 13 S. C. 389; *O'Connell* v. *State,* 10 Tex. App. 567; *Matthews* v. *State,* 96 Ala. 62, 11 So. 203; *Oliver* v. *State,* 94 Ga. 83, 21 S. E. 125; *Peoples* v. *State,* — Miss —, 33 So. 289; *Kneeland* v. *State,* 63 Ga. 641; *State* v. *McAlpin,* 26 N. C. (4 Ired. L.) 140.

See *Valentine* v. *State,* 6 Tex. App. 439; *Clough* v. *State,* 7 Neb. 320; *State* v. *Allen,* 1 Ala. 442; *State* v. *Little,* 42 Iowa, 51; *State* v. *Miller,* 95 Iowa, 368, 64 N. W. 288; *Com.* v. *Lane,* 151 Mass. 356, 24 N. E. 48; *Com.* v. *O'Brien,* 152 Mass. 495, 25 N. E. 834; *People* v. *Restell,* 3 Hill, 289; *People* v. *Powers,* 7 Barb. 462; *Eastman* v. *Waterman,* 26 Vt. 494.

parties may be given in the prosecution for adultery, even though it contradicts the marriage certificate, the officiating clergyman not being required to guarantee that the persons were married to each other under their true names;[7] and where a document has been altered, parol testimony is admissible to show that the alteration was improper, but not to falsify the document by showing that the alteration whereby a document was corrected was improperly made.[8]

[7] *People* v. *Stokes*, 71 Cal. 263, 12 Pac. 71, 8 Am. Crim. Rep. 14; *Goddard* v. *State*, 78 Ark. 226, 95 S. W. 476; *Re Welty*, 123 Fed. 122.

[8] *Shirmer* v. *People*, 33 Ill. 276.

CHAPTER XII.

JUDGMENTS AND JUDICIAL RECORDS.

I. Binding Effect of Judgments.

§ 570. Evidentiary character of judgments; general considerations.—Upon the maxims of the law, that no man shall be twice vexed for the same cause, and that it is for the public interest that there shall be an end to litigation,[1] a judgment in a civil proceeding is generally held conclusive of all facts determined thereby, and that could have been properly determined in the proceeding on which the judgment is based. It is essential, however, to the binding effect of such judgment, that it should be entered by a court having jurisdiction both of the parties and the subject-matter of the action; that the concluded parties should have a direct interest in the subject-matter of the action, with the right and the opportunity to exercise that right in presenting their defense; with the right to be heard by themselves and their witnesses; with the right to cross-examine opposing witnesses, and to have such control of the action that, as injured or aggrieved parties, they could appeal from any judgment rendered against them.

A judgment in a criminal proceeding has a different object, and hence a different result, arising through a different procedure from that upon which the judgment in the civil proceeding is based.

[1] *Wisconsin* v. *Torinus*, 28 Minn. 175, 9 N. W. 725; *Faires* v. *McLellan*, — Tex. Civ. App. —, 24 S. W. 365; *Smith* v. *Auld*, 31 Kan. 262, 1 Pac. 626; *Duchess of Kingston's Case* (De Grey, L. Ch. J.) 20 How. St. Tr. 355, 11 Harg. St. Tr. 261, Hardw. 474, 2 Smith, Lead. Cas. 735.

In the civil proceeding the judgment is based upon a preponderance of evidence, but in a criminal proceeding the fact of guilt must be established beyond a reasonable doubt; in the civil proceeding the parties attend by accord, while in the criminal proceeding the accused attends by compulsion; in the civil proceeding there is no presumption as to either party, while in the criminal proceeding the presumption of innocence attends the accused throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt; in the civil proceeding the act complained of is the essential element, while in the criminal proceeding the intent with which the act was committed is the essential element.

These material differences are considered as valid and subsisting reasons for the rule that a judgment in a criminal proceeding cannot be given in evidence in a civil action, to establish the truth of the facts upon which it is rendered.[2] However, it must be noted that these differences are preliminary matters. When a judgment is finally entered, either in a civil or criminal proceeding, it is on the assumption that the preliminary matters have all been established according to the degree of proof required in either proceeding, so that the judgment in the civil proceeding and the judgment in the criminal proceeding, *per se,* must be accorded the same conclusive and binding character before the law. As between the parties and their privies in all issues, and as against all persons, the judgment is admissible to prove the fact of its rendition.[3]

[2] *United States* v. *Schneider,* 35 Fed. 107; *State* v. *Adams,* 72 Vt. 253, 82 Am. St. Rep. 937, 47 Atl. 779; Wharton, Ev. § 777; Black, Judgm. § 529.

[3] 1 Starkie, Ev. 278; Black, Judgm. § 529; Greenl. Ev. § 537; *Albrecht* v. *State,* 62 Miss. 516; *Doyle* v. *Gore,* 15 Mont. 212, 38 Pac. 939; *Wilson* v. *Manhattan R. Co.* 2 Misc. 127, 20 N. Y. Supp. 852, affirmed in 144 N. Y. 632, 39 N. E. 495.

But these material differences become of a substantive and controlling character when a judgment in a civil proceeding is offered as evidence of a fact in a pending criminal proceeding, or where a judgment in a criminal proceeding is offered to establish a fact in a pending civil proceeding. In such case, judgments are only prima facie evidence of the facts, which the opposing party is entitled to controvert.[4]

It is therefore the purpose of this chapter to define the relations and their exceptions with reference to the evidential character of judgments.

§ 570a. Double aspects of criminal offenses; acquittal as a bar.—It is obvious that all criminal offenses have two aspects. First, there is the violation of a public law, injurious to the general welfare of the state, which must be punished by a state prosecution for the crime; second, there is the trespass against the personal rights of the individual, and the law gives him his remedy against the accused by way of damages.

This does not give to the judgment rendered at the instance of the state prosecution, nor that entered through the assertion of the plaintiff's remedy against the accused, a double aspect. The judgment is single, but the offense possesses the double aspect.

Hence, where the offense has but a single aspect, as in the case of a wrong suffered by the public generally, and not arising out of a violation of private rights, the final judgment rendered, as a result of the state prosecution, is conclusive of that particular charge.[1] Thus, a judgment of acquittal in a criminal prosecution for obstructing a navigable stream is

[4] *Maybee* v. *Avery*, 18 Johns. 352; *Meade* v. *Boston*, 3 Cush. 404; *Johnson* v. *Gordwood*, 7 Misc. 651, 28 N. Y. Supp. 151, 143 N. Y. 660, 39 N. E. 21; *Thompson* v. *Whitman*, 18 Wall. 469, 21 L. ed. 901.

[1] *Leavenworth* v. *Tomlinson*, 1 Root, 436.

See *Coffey* v. *United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437.

a bar to a suit brought by the same authority against the accused to compel a removal of the obstruction;[2] an acquittal in a criminal prosecution for transporting falsely labeled packages is a bar to an action by the same authority to forfeit the property and recover a penalty for the violation of the act;[3] a judgment of not guilty, entered on a criminal prosecution for maintaining a nuisance by maintaining a dam without a fishway, is a bar to a suit by the prosecuting authorities to abate the nuisance, where a part of the penalty imposed would have been its abatement on conviction;[4] a verdict acquitting of murder, because of insanity, is *res judicata* between the people and the accused on the question of insanity at the time, that he did not know the nature of the act, and that he did not know it was wrong;[5] and where the accused has been convicted of arson, he may plead that judgment in bar to an indictment for murder committed in the same burning, by the burning to death of a person in the building.[6]

As a general rule the judgment in a criminal proceeding is conclusive in a civil proceeding where the parties and the subject-matter are the same.[7]

[2] *United States* v. *Donaldson-Shulz Co.* 142 Fed. 300 (see 148 Fed. 581).

[3] *United States* v. *Seattle Brewing & Malting Co.* 135 Fed. 597.

See *United States* v. *Rosenthal,* 98 C. C. A. 406, 174 Fed. 652.

[4] *State ex rel. Remley* v. *Meek,* 112 Iowa, 338, 51 L.R.A. 414, 84 Am. St. Rep. 342, 84 N. W. 3.

[5] *People* v. *Lamb,* 118 N. Y. Supp. 389.

[6] *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490.

See *Holcomb* v. *Cornish,* 8 Conn. 375; *Boyle* v. *Boyle,* 3 Mod. 164 (conviction of bigamy conclusive proof of marriage); *Anderson* v. *Anderson,* 4 Me. 100, 16 Am. Dec. 237 (judgment for divorce on the ground of adultery, sufficient proof of marriage). See *Randall* v. *Randall,* 4 Me. 326.

[7] *Coffey* v. *United States,* 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; *United States* v. *Lot of Precious Stones,* 68 C. C. A. 1, 134 Fed. 63; *State* v. *Cobb,* 123 Iowa, 628, 99 N. W. 300; *People* v. *Albers,* 137 Mich. 685, 100 N. W. 910.

See 103 Am. St. Rep. 21, 26, note; *The Gaad Templar,* 97 Fed. 653; *Cooper* v. *Com.* 106 Ky. 911, 45 L.R.A. 216, 90 Am. St. Rep. 276, 51 S. W. 790, 59 S. W. 524, 11 Am. Crim. Rep. 625; *State ex rel.*

§ 570b. Double aspects of criminal offenses continued; acquittal, when not a bar.—Where the offense has a double aspect, as in the case of a wrong not only to the public generally, but to the rights of an individual as well, and also not only committed in one jurisdiction, but in another as well, the acquittal of one aspect of the offense is not as a general rule a bar to a prosecution on the other aspect of the offense;[1] nor, as will presently be seen, does a civil suit in the name of the party injured bar a subsequent prosecution by the sovereign.[2] Nor is the fact that an issue was determined in another trial between the defendant and a private suitor, or between the sovereign and another defendant, conclusive as to persons not parties to such issue. Thus, when parties are indicted for procuring a fraudulent divorce, the prosecution may go behind the record, and inquire into the merits;[3] and on an indictment for conspiring falsely to accuse an innocent man of crime, the prosecution can go behind the record of conviction, and show that the conviction was the result of fraud.[4] It is true that in a case decided in 1880, in Massachusetts, it was held that an indictment for obtaining money by false pretenses will not lie for receiving money upon a judgment obtained upon a false representation and false evidence of an injury.[5] "To hold that the statute," said Colt, J., "which punishes criminally the obtaining of property by false pretenses, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretenses were used to obtain a judgment

Wright v. *Savage*, 64 Neb. 700, 90 N. W. 901, 91 N. W. 557; *Burt* v. *Union Cent. L. Ins. Co.* 59 L.R.A. 393, 44 C. C. A. 548, 105 Fed. 424.

[1] See Wharton, Crim. Pl. & Pr. §§ 441, 442.

[2] Post, § 575.

[3] See Wharton, Crim. Law, 8th ed. § 1362.

[4] *Com.* v. *McLean*, 2 Pars. Sel. Eq. Cas. 367.

[5] *Com.* v. *Harkins*, 128 Mass. 79, Gray, Ch. J., Soule, J., and Ames, J., dissent.

as one step towards obtaining the money, would practically make all civil actions for the recovery of damages liable in such cases to revision in the criminal court, and subject the judgment creditor or prosecution generally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property." But it is as much an indictable offense to cheat by fraudulently obtaining a judgment as it is to cheat by obtaining a bond. It is true, it may be well argued, that a party to such a judgment must apply to the court entering it to have it opened, and until this is done he cannot resort to criminal proceedings against his adversary. But the commonwealth of Massachusetts in the case before us was not a party to the judgment alleged to have been fraudulent, and could not have been heard on a motion to open it.

But this decision cannot be regarded as in any way impairing the well-established rule that a judgment rendered in a criminal action, when offered to establish the facts upon which it was rendered, is not admissible as evidence of such facts. The decisions are in harmony with the general rule as illustrated by the case law in all of the jurisdictions.[6]

[6] *Bly* v. *United States,* 4 Dill. 464, Fed. Cas. No. 1,581, and *Stone* v. *United States,* 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778 (criminal prosecution for cutting timber on public land, no bar to a suit to recover the value of the timber); *Rosenburg* v. *Salvatore,* 16 N. Y. S. R. 801, 1 N. Y. Supp. 326, and *Towle* v. *Blake,* 48 N. H. 92 (prosecution for assault and battery, no bar to action for damages); *People ex rel. McGrath* v. *Excise Comrs.* 64 Hun, 634, 46 N. Y. S. R. 167, 18 N. Y. Supp. 884 (quashing indictment for not keeping an inn closed on Sunday does not bar proceeding to revoke license for same offense); *Johnson* v. *Girdwood,* 143 N. Y. 660, 39 N. E. 21 (wrongful conviction of a crime does not bar civil action against party maliciously procuring the conviction); *Wilkes* v. *Dinsman,* 7 How. 89, 12 L. ed. 618 (judgment of acquittal of assault and battery and false imprisonment not admissible as evidence in civil suit for damages for the same acts); *United States* v. *Jaedicke,* 73 Fed. 100 (the acquittal of an official on indictment for an offense does not bar action on his official bond for amount due the government on adjustment of his accounts); *Cottingham* v. *Weeks,* 54

Even where a judgment is entered in a criminal prosecution on a plea of guilty, such judgment is not conclusive of the truth of the criminal charge when used in a civil case,[7] and

Ga. 275 (acquittal of homicide is not evidence in civil suit to recover damages brought by widow for the death of her husband); *Van Hoffman* v. *Kendall,* 63 Hun, 628, 44 N. Y. S. R. 484, 17 N. Y. Supp. 713, and *Tumlin* v. *Parrot,* 82 Ga. 732, 9 S. E. 718 (acquittal of charge of malicious mischief, no bar to an action for damages for the same loss). See *Beausoliel* v. *Brown,* 15 La. Ann. 543, and *Re Smith,* 10 Wend. 449, and *Re Campbell,* 197 Pa. 581, 47 Atl. 860 (acquittal of physician on charge of violating medical practice act does not bar proceedings to deprive him of his license founded on same charge); *Rohm* v. *Borland,* 4 Sadler (Pa.) 319, 7 Atl. 171 (acquittal of charge of knowingly receiving stolen goods does not bar action for possession); *Dyer County* v. *Chesapeake, S. & S. W. R. Co.* 87 Tenn. 712, 11 S. W. 943 (acquittal of railway company on indictment for failing to repair bridge, no bar to a suit requiring the company to maintain the bridge and to repay the county the expense of rebuilding it).

The general rule is further illustrated by the following cases: *Seaboard Air Line R. Co.* v. *O'Quin,* 124 Ga. 357, 2 L.R.A.(N.S.) 472, 52 S. E. 427; *Powell* v. *Wiley,* 125 Ga. 823, 54 S. E. 732; *Small* v. *Harrington,* 10 Idaho, 499, 79 Pac. 461; *McDonald* v. *Stark,* 176 Ill. 456, 52 N. E. 37; *Miles* v. *Craig,* 6 La. Ann. 753; *Sutfin* v. *People,* 43 Mich. 37, 4 N. W. 509; *Barnett* v. *Farmers' Mut. F. Ins. Co.* 115 Mich. 247, 73 N. W. 372; *State* v. *Corron,* 73 N. H. 434, 62 Atl. 1044, 6 A. & E. Ann. Cas. 486; *Canton* v. *McDaniel,* 188 Mo. 207, 86 S. W. 1092; *People* v. *Snyder,* 90 App. Div. 422, 86 N. Y. Supp. 415; *Frierson* v. *Jenkins,* 72 S. C. 341, 110 Am. St. Rep. 608, 51 S. E. 862, 5 A. & E. Ann. Cas. 77; *Chamberlain* v. *Pierson,* 31 C. C. A. 157, 59 U. S. App. 55, 87 Fed. 420; *Halliday* v. *Smith,* 67 Ark. 310, 54 S. W. 970; *State* v. *Bradnack,* 69 Conn. 212, 43 L.R.A. 620, 37 Atl. 492; *Micks* v. *Mason,* 145 Mich. 212, 11 L.R.A.(N.S.) 653, 108 N. W. 707, 9 A. & E. Ann. Cas. 291; *Vadney* v. *Albany R. Co.* 47 App. Div. 207, 62 N. Y. Supp. 140; *Dunagain* v. *State,* 38 Tex. Crim. Rep. 614, 44 S. W. 148. See *State* v. *Adams,* 72 Vt. 253, 82 Am. St. Rep. 937, 47 Atl. 779; *Boyd* v. *Alabama,* 94 U. S. 645, 24 L. ed. 302; *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *State* v. *Lawson,* 123 N. C. 740, 68 Am. St. Rep. 844, 31 S. E. 667; *Corbley* v. *Wilson,* 71 Ill. 209, 22 Am. Rep. 98; *People* v. *Kenyon,* 93 Mich. 19, 52 N. W. 1033 (assault and battery); *State* v. *Hogard,* 12 Minn. 293, Gil. 191; *Com.* v. *Hurd,* 177 Pa. 481, 35 Atl. 682.

[7] *Crawford* v. *Bergen,* 91 Iowa, 675, 60 N. W. 205; *Clark* v. *Irvin,* 9 Ohio, 131.

the defendant, upon the trial of the civil action, may show that he was not guilty of any offense,[8] although judgment on a plea of guilty may be put in evidence against the party entering it, in any subsequent proceedings to which it may be relevant.[9]

§ 570c. When judgment in criminal action is the basis of the civil suit.—When the judgment in a criminal action is the basis of the civil suit, under the double aspect of the offense, there necessarily arises an exception to the general rule just discussed, that judgments in criminal cases are not evidence in civil actions. Thus, an accused was convicted of keeping a gambling house in violation of the law, and condemned to pay a fine to a charity hospital. In a contest between the hospital and the parish, as to which was entitled to the fine, the judgment of conviction was evidence of that fact;[1] where suit was brought to recover the reward offered for conviction of accused, the judgment was evidence of identity;[2] again, where plaintiffs sought to recover, as heirs, upon a policy issued to the ancestor, who was convicted and executed for a crime, the court gave conclusive evidentiary character to the judgment of conviction, because the criminal judgment was the foundation of the suit, although the complaint alleged that the insured was in fact innocent of the crime; and, on appeal the judgment of the lower court was upheld, upon the ground that the civil action was necessarily founded upon the judgment in the criminal action, and could not be main-

[8] See note 7 above; *Adams* v. *Sigman*, 89 Miss. 844, 43 So. 877. But see *People* v. *Goldstein*, 32 Cal. 432.

[9] *Reg.* v. *Fontaine Moreau*, 11 Q. B. 1035, 17 L. J. Q. B. N. S. 187, 12 Jur. 626; *Bradley* v. *Bradley*, 11 Me. 367; *Green* v. *Bedell*, 48 N. H. 546. See *Consolidated Ice Co.* v. *Medford*, 18 Pa. Dist. R. 293.

[1] *Orleans Parish* v. *Morgan*, 6 Mart. N. S. 3.

[2] *York* v. *Forscht*, 23 Pa. 391; *Mead* v. *Boston*, 3 Cush. 404. See *Roberts* v. *State*, 160 N. Y. 217, 54 N. E. 678, 15 Am. Crim. Rep. 561.

tained except as the result of the criminal action.[3] A further exception to the rule that the judgment in a criminal prosecution is not admissible to establish the truth of the facts on which it was rendered arises where a judgment in a criminal action is introduced in a civil action as an admission or confession.[4]

A further exception to the general rule is found in actions for malicious prosecution. Such actions are generally brought as the result of the judgment in the criminal case. Here a judgment of acquittal is generally conclusive of a want of probable cause, while a judgment of conviction conclusively establishes the existence of a probable cause. Hence, the judgment in the criminal action is binding upon the substantive issues in the civil action.[5]

§ 570d. Evidentiary effect of criminal judgment in civil action.—A criminal judgment is admissible in a civil action, as we have seen, to prove the fact of its rendition, but such judgment is merely prima facie evidence, and never conclusive; nor does it estop the respective parties from controverting the fact of guilt or innocence.[1] It is a general rule of

[3] *Burt* v. *Union Cent. L. Ins. Co.* 59 L.R.A. 393, 44 C. C. A. 548, 105 Fed. 419, 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139.

[4] Post, § 613.

[5] *Fisher* v. *Bristow,* 1 Dougl. K. B. 215; *Herman* v. *Brookerhoff,* 8 Watts, 240; *Whitney* v. *Peckham,* 15 Mass. 243; *Griffis* v. *Sellars,* 19 N. C. (2 Dev. & B. L.) 492, 31 Am. Dec. 422; *Parker* v. *Farley,* 10 Cush. 279; *Dennehey* v. *Woodsum,* 100 Mass. 197; *Parker* v. *Huntington,* 7 Gray, 36, 66 Am. Dec. 455; *Cloon* v. *Gerry,* 13 Gray, 203, following *Whitney* v. *Peckham,* 15 Mass. 243; *Womack* v. *Circle,* 29 Gratt. 192; *Goodrich* v. *Warner,* 21 Conn. 432; *Bailey* v. *Warden,* 4 Maule & S. 400, 16 Revised Rep. 502; *Skidmore* v. *Bricker,* 77 Ill. 164; *White* v. *Rey,* 8 Pick. 467.

[1] *Sims* v. *Sims,* 75 N. Y. 471 (judgment of foreign court not conclusive of fact of guilt); *Maybee* v. *Avery,* 18 Johns. 352 (in action for slander charging that the plaintiff was a thief, the record of plaintiff's conviction for stealing is not conclusive of guilt, but may be controverted); *Mead* v. *Boston,* 3 Cush. 404 (record of

law that where a conviction is secured on the testimony of a party who afterwards seeks to use such conviction as evidence in another action, it is inadmissible generally on the ground that a party is not allowed to make evidence for himself, but more particularly upon the ground of want of mutuality in the parties.[2]

conviction not conclusive of arson; *Johnson* v. *Gordwood*, 7 Misc. 651, 28 N. Y. Supp. 151, 143 N. Y. 660, 39 N. E. 21 (in an action for damages for false arrest, judgment of conviction not conclusive of plaintiff's guilt); *Justice* v. *Gosling*, 12 C. B. 39, 21 L. J. C. P. N. S. 94, 16 Jur. 429 (judgment of conviction not conclusive in tort action); *Thompson* v. *Whitman*, 18 Wall. 469, 21 L. ed. 901 (in an action against a sheriff in trespass, for seizing a vessel, the record of conviction of the owner of violating the law, by which the vessel became forfeit, is not conclusive of the facts stated). See *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 39 L. J. C. P. N. S. 350, 23 L. T. N. S. 48, 19 Week. Rep. 1, 5 Eng. Rul. Cas. 899; *Roberts* v. *State*, 160 N. Y. 217, 54 N. E. 678, 15 Am. Crim. Rep. 561 (conviction of guilt conclusive, under statute allowing compensation only in case imprisonment is unjustifiable); *Sibley* v. *St. Paul F. & M. Ins. Co.* 9 Biss, 31, Fed. Cas. No. 12, 830 (acquittal, on charge of arson, not conclusive as to guilt, in action brought to recover on policy of insurance); *Alexander* v. *Galloway*, Abb. Adm. 261, Fed. Cas. No. 167 (acquittal of theft not conclusive in action brought for wages, in which the larceny is set up as an act involving forfeiture); *Mathison* v. *Daily*, 2 Haw. 702 (technical acquittal not conclusive). See *Helsham* v. *Blackwood*, 11 C. B. 111, 20 L. J. C. P. N. S. 187, 15 Jur. 861; *Moses* v. *Bradley*, 3 Whart. 272 (probative force in action for damages for assault); *Porter* v. *Seiler*, 23 Pa. 424, 62 Am. Dec. 341 (evidence of assault and battery where offered by defendant, and not objected to); *Smith* v. *Brown*, 2 Mich. 161 (conviction inadmissible to discredit witness in chancery action. But see *Gardner* v. *Bartholomew*, 40 Barb. 325, and *Sims* v. *Sims*, 75 N. Y. 474).

[2] 2 Phillipps, Ev. 4th Am. ed. 443; *Reg.* v. *Fontaine Moreau* 11 Q. B. 1033, 17 L. J. Q. B. N. S. 187, 12 Jur. 626; *Gibson* v. *M'Carty* Cas. t. Hardw. 311; *Lewis* v. *Petayvin*, 4 Mart. N. S. 5; *Robinson* v. *Wilson*, 22 Vt. 35, 52 Am. Dec. 77; *Smith* v. *Rummens*, 1 Campb. 9; *Hathaway* v. *Barrow*, 1 Campb. 151. See *Blakemore* v. *Glamorganshire Canal Co.* 2 Cromp. M. & R. 139, 1 Gale, 78, 5 Tyrw. 603; *Burdon* v. *Browning*, 1 Taunt. 522; *Bartlett* v. *Pickersgill*, 4 East, 577, note, 1 Eden, 515, 1 Cox. Ch. Cas. 5, 1 Revised Rep. 1; *Woodruff* v. *Woodruff*, 11 Me. 475; *Quinn* v. *Quinn*, 16 Vt. 426; *Maybee* v. *Avery*, 18

§ 571. Jurisdiction and regularity of proceedings prerequisite to admissibility of judgment.—To enable the proceedings in a prior prosecution to bar a subsequent prosecution, it is necessary that in the prior prosecution the court should have had jurisdiction of the offense, and the proceedings should be regular.[1] When two courts have concurrent jurisdiction of an entire and undivisible crime, the court first assuming such jurisdiction over a particular person or thing acquires exclusive control, and its judgments are a bar to subsequent proceedings in the ancillary tribunal.[2]

There must be the prosecution of the person[3] and of the subject-matter,[4] for, where either is lacking, the judgment rendered cannot be used as evidence as a bar to further litigation.[5]

Johns, 352; *Bennett* v. *Fulner*, 49 Pa. 155.

[1] Post, § 594; Archbold, Crim. Pl. 92; 1 Leach, C. L. 135; 2 Hawk. P. C. chap. 35; *Rex* v. *Bowman*, 6 Car. & P. 337; *Stevens* v. *Fassett*, 27 Me. 266; *Marston* v. *Jenness*, 11 N. H. 156; *State* v. *Hodgkins*, 42 N. H. 475; *Com.* v. *Alderman*, 4 Mass. 477; *Com.* v. *Cunningham*, 13 Mass. 245; *Com.* v. *Peters*, 12 Met. 387; *Com* v. *Bosworth*, 113 Mass. 200, 18 Am. Rep. 467; *State* v. *Brown*, 16 Conn. 54; *State* v. *Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *Com.* v. *Myers*, 1 Va. Cas. 188; *Bailey's Case*, 1 Va. Cas. 258; *Wortham* v. *Com.* 5 Rand. (Va.) 669; *State* v. *Odell*, 4 Blackf. 156; *O'Brian* v. *State*, 12 Ind. 369; *State* v. *Payne*, 4 Mo. 376; *Norton* v. *State*, 14 Tex. 387; *Dunn* v. *State*, 2 Ark. 229, 35 Am. Dec. 54.

[2] Wharton, Confl. L. § 933; *United States* v. *Furlong*, 5 Wheat. 184, 5 L. ed. 64; *Ex parte Robinson*, 6 *McLean*, 355, Fed. Cas. No. 11,935; *Com.* v. *Goddard*, 13 Mass. 455; *State* v. *Davis*, 4 N. J. L. 311; *Trittipo* v. *State*, 10 Ind. 345; *Mize* v. *State*, 49 Ga. 375; *State* v. *Simonds*, 3 Mo. 415; *Burdett* v. *State*, 9 Tex. 43. Though see *State* v. *Tisdale*, 19 N. C. (2 Dev. & B. L.) 159; *Com.* v. *Bright*, 78 Ky. 238. See Wharton Crim. Pl. & Pr. § 443; Wharton Crim. Law, 8th ed. §§ 354 et seq.

[3] *State ex rel. Kolb* v. *Ennis*, 74 Ind. 17; *People* v. *Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *Hays* v. *Bostick*, — Miss. —, 51 So. 462.

[4] *Diblee* v. *Davison*, 25 Ill. 486; *Holderman* v. *Pond*, 45 Kan. 410, 11 L.R.A. 542, 23 Am. St. Rep. 734, 25 Pac. 872.

[5] *Arthur* v. *Israel*, 15 Colo. 147, 10 L.R.A. 693, 22 Am. St. Rep.

And where a crime is partly consummated in each of several jurisdictions, so that the courts each have jurisdiction of the offense, a prosecution cannot be instituted in one jurisdiction, and then dismissed at the pleasure of the prosecution, and commenced in another, and so harass the accused in every place in which prosecution can be obtained.[6]

§ 572. Discharge on preliminary proceedings not conclusive.—A discharge of a defendant on proceedings preliminary to a trial is usually no bar.[1] Thus, he is not protected from a subsequent prosecution by an ignoramus from a grand jury,[2] nor by a discharge on habeas corpus.[3]

§ 573. Discharge on nolle prosequi is not a bar.—Ordinarily the entry of a *nolle prosequi* is not a bar to subsequent proceedings on the same charge;[1] nor, in Massachusetts, is

381, 25 Pac. 81; *Michigan Trust Co.* v. *Ferry,* 99 C. C. A. 221, 175 Fed. 667; *Field* v. *Field,* 215 Ill. 496, 74 N. E. 443; *Re Phillips,* 158 Mich. 155, 122 N. W. 554; *White* v. *Palmer,* 110 Va. 490, 66 S. E. 44.

[6] *Coleman* v. *State,* 83 Miss. 290, 64 L.R.A. 807, 35 So. 937, 1 A. & E. Ann. Cas. 406; *Ex parte Baldwin,* 69 Iowa, 502, 29 N. W. 428.

[1] See *Wolverton* v. *Com.* 75 Va. 909.

[2] 2 Hale, P. C. 243-246; 2 Hawk. P. C. chap. 35, § 6; *Reg.* v. *Newton,* 2 Moody & R. 503; *Com.* v. *Miller,* 2 Ashm. (Pa.) 61. See *Christmas* v. *State,* 53 Ga. 81; *State* v. *Harris,* 91 N. C. 656; *Ex parte Clarke,* 54 Cal. 412; *Ex parte Job,* 17 Nev. 184, 38 Pac. 699.

[3] See, under South Carolina statute, *State* v. *Fley,* 2 Brev. 338, 4 Am. Dec. 583; *People ex rel. Lawrence* v. *Brady,* 56 N. Y. 182; *Walker* v. *Martin,* 43 Ill. 508; *Ex parte Mitchell,* 1 La. Ann. 413. See *People ex rel. Eldridge* v. *Fancher,* 3 Thomp. & C. 189; *People ex rel. Eldridge* v. *Fancher,* 1 Hun, 27. But see *Ex parte Jilz,* 64 Mo. 205, 27 Am. Rep. 218, 2 Am. Crim. Rep. 217.

[1] Wharton Crim. Pl. & Pr. § 447; *United States* v. *Stowell,* 2 Curt. C. C. 170, Fed. Cas. No. 16,409; *Com.* v. *Wheeler,* 2 Mass. 172; *Com.* v. *Tuck,* 20 Pick. 356; *Bacon* v. *Towne,* 4 Cush. 234; *State* v. *Main,* 31 Conn. 572; *Wortham* v. *Com.* 5 Rand. (Va.) 669; *State* v. *McNeill,* 10 N. C. (3 Hawks) 183; *State* v. *M'Kee,* 1 Bail. L. 651, 21 Am. Dec. 499; *State* v. *Haskett,* 3 Hill, (L.) 95; *State* v. *Blackwell,* 9 Ala. 79; *Aaron* v. *State,* 39 Ala. 75; *Ex parte Wins-*

a dismissal by the trial court a bar.[2] But, where the *nolle prosequi* is entered after the jury is impaneled, and the case is committed to them finally, and then without the consent of the defendant and without an order of the court, or the authority of some statutory power, such an entry is conclusive of all subsequent proceedings; and this is true even if the trial court approves the entry, if the defendant was in jeopardy under the Constitution;[3] but where the *nolle prosequi*

ton, 52 Ala. 419; *Clarke* v. *State,* 23 Miss. 261; *Ex parte Donaldson,* 44 Mo. 149. See *R.* v. *Roper,* 1 Craw. & D. C. C. (Ir.) 93; *Com.* v. *Drew,* 3 Cush. 279; *People* v. *Von Horne,* 8 Barb. 160; *Gardner* v. *People,* 6 Park. Crim. Rep. 155; *State* v. *Tisdale,* 19 N. C. (2 Dev. & B. L.) 159; *State* v. *Thornton,* 35 N. C. (13 Ired. L.) 256; *State* v. *Colvin,* 11 Humph. 599, 54 Am. Dec. 58; *State* v. *Patterson,* 73 Mo. 695; Wharton, Crim. Pl. & Pr. § 449; *O'Brien* v. *State,* 91 Ala. 25, 8 So. 560; *State* v. *Child,* 44 Kan. 420, 24 Pac. 952; *Com.* v. *Galligan,* 156 Mass. 270, 30 N. E. 1142; *State* v. *Ruffin,* 117 La. 357, 41 So. 647; *State* v. *Smith,* 129 N. C. 546, 40 S. E. 1; *State* v. *Munroe,* 26 R. I. 38, 57 Atl. 1057; *Jackson* v. *State,* 37 Tex. Crim. Rep. 128, 38 S. W. 1002; *Guinn* v. *State,* — Tex. Crim. Rep. —, 65 S. W. 376; *State* v. *Armstrong,* 29 Wash. 57, 69 Pac. 392; *State* v. *Campbell,* 40 Wash. 480, 82 Pac. 752; *Jones* v. *State,* 115 Ga. 814, 42 S. E. 271; *Lascelles* v. *State,* 90 Ga. 347, 372, 35 Am. St. Rep. 216, 16 S. E. 945.

[2] *Com* v. *Gould,* 12 Gray, 171; *Com.* v. *Bressant,* 126 Mass. 246.

[3] *United States* v. *Shoemaker,* 2 McLean, 114, Fed. Cas. No. 16,279; *State* v. *Smith,* 49 N. H. 155, 6 Am. Rep. 480; *State* v. *Roe,* 12 Vt. 94; *Com.* v. *Tuck,* 20 Pick. 356; *Com.* v. *Kimball,* 7 Gray, 328; *People* v. *Barrett,* 2 Caines, 304, 2 Am. Dec. 239; *People* v. *Van Horne,* 8 Barb. 158; *McFadden* v. *Com.* 23 Pa. 12, 62 Am. Dec. 308; *Mount* v. *State,* 14 Ohio, 295, 45 Am. Dec. 542; *Baker* v. *State,* 12 Ohio St. 214; *Reynolds* v. *State,* 3 Ga. 53; *Weinzorpflin* v. *State,* 7 Blackf. 186; *Harker* v. *State,* 8 Blackf. 540; *Wright* v. *State,* 5 Ind. 290, 61 Am. Dec. 90; *State* v. *M'Kee,* 1 Bail. L. 651, 21 Am. Dec. 499; *Jones* v. *State,* 55 Ga. 625, 1 Am. Crim. Rep. 510; *State* v. *Kreps,* 8 Ala. 951; *Cobia* v. *State,* 16 Ala. 781; *Grogan* v. *State,* 44 Ala. 9; *Barnett* v. *State,* 54 Ala. 579; *Ward* v. *State,* 1 Humph. 253; *State* v. *Connor,* 5 Coldw. 311. See *Reg.* v. *Oulaghan,* Jebb. C. C. 270; *United States* v. *Farring,* 4 Cranch, C. C. 465, Fed. Cas. No. 15,075; *Franklin* v. *State,* 85 Ga. 570, 11 S. E. 876, 8 Am. Crim. Rep. 291; *State* v. *Patterson,* 116 Mo. 505, 22 S. W. 696; *Com.* v. *Cawley,* 7 Kulp, 539.

is entered with the permission of the court, it is not generally a bar, even though the case is open to the jury.[4] After a verdict, a *nolle prosequi* may operate as a pardon.[5]

§ 574. Verdict of acquittal operates as a bar.—Where a verdict of acquittal has been rendered and entered, it is not necessary that a judgment should have been entered on such verdict, to enable the accused to plead the acquittal as a bar to a second prosecution for the same offense.[1] So an outstanding verdict of guilty, where the proceedings upon which it was rendered remain uncanceled, will operate as a bar, even where judgment has not been formally entered.[2] The same observations apply to a plea of guilty, where the same has been accepted and entered.[3]

[4] *United States* v. *Morris,* 1 Curt. C. C. 23, Fed. Cas. No. 15,815; *State* v. *Morgan,* 33 Md. 44. See *Walton* v. *State,* 3 Sneed, 687; *State* v. *Connor,* 5 Coldw. 311; *Burnett* v. *State,* 76 Ark. 295, 113 Am. St. Rep. 94, 88 S. W. 956; *State* v. *Brackin,* 113 La. 879, 37 So. 863; *State* v. *Holton,* 88 Minn. 171, 92 N. W. 541.

[5] *State* v. *Whittier,* 21 Me. 341, 38 Am. Dec. 272; *State* v. *Burke,* 38 Me. 574; *State* v. *Roe,* 12 Vt. 93; *Com.* v. *Briggs,* 7 Pick. 177; *Com.* v. *Tuck,* 20 Pick. 356; *Com.* v. *Jenks,* 1 Gray, 490; *People* v. *Van Horne,* 8 Barb. 158; *State* v. *Fleming,* 7 Humph. 152, 46 Am. Dec. 73. See, generally, as to *nolle prosequi* Wharton Crim. Pl. & Pr. §§ 383, 447.

[1] *West* v. *State,* 22 N. J. L. 212; post, § 609; *Reg.* v. *Reid,* 1 Eng. L. & Eq. Rep. 595; *State* v. *Elden,* 41 Me. 165. See 2 Russell, Crimes, 4th ed. 64, note; *State* v. *Risley,* 72 Mo. 609; *People* v. *Horn,* 70 Cal. 17, 11 Pac. 470; post, § 785; *Hines* v. *State,* 24 Ohio St. 134; *O'Brian* v. *Com.* 9 Bush, 333, 15 Am. Rep. 715, 1 Am. Crim. Rep. 520; *People* v. *Goldstein,* 32 Cal. 432; Wharton, Crim. Pl. & Pr. 9th ed. § 490; *Smith* v. *Hess,* 91 Ind. 424; *Thurman* v. *State,* 54 Ark. 120, 15 S. W. 84.

[2] *State* v. *Parish,* 43 Wis. 395; Wharton, Crim. Pl. & Pr. § 435; *United States* v. *Herbert,* 5 Cranch, C. C. 87, Fed. Cas. No. 15,354; *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510; *State* v. *Elden,* 41 Me. 165; *Ratzky* v. *People,* 29 N. Y. 124; *Shepherd* v. *People,* 25 N. Y. 407; *West* v. *State,* 22 N. J. L. 212; *Preston* v. *State,* 25 Miss. 383; *State* v. *Spear,* 6 Mo. 644; *Lewis* v. *State,* 1 Tex. App. 323.

[3] *People* v. *Goldstein,* 32 Cal.

The obvious reasons why verdicts and pleas duly entered and accepted should have a binding effect, where there is no formal entry of judgment, appear in the fact that in this view the entry of the judgment is only a confirmation of the actual proceedings, and relates back to the date of the entry of the verdict or plea, the verdict or plea operating as the actual evidence of conviction. Thus, where a verdict was rendered on Sunday, judgment may be entered on the following day,[4] or may be pronounced at a term subsequent to that at which the verdict was rendered.[5]

It is not necessary that the information or the indictment on which the accused was convicted should be at hand, to enable the court to pronounce judgment.[6] To operate as a bar to another proceeding, such verdict or plea must be final in its character, and nothing remain to be done except to enter judgment on the same. Thus, where the prosecuting officer, after conviction, concedes that the indictment would not sustain the judgment, and proceeds to trial upon a second indictment,[7] or where the accused has filed a motion for a new trial pending the entry of the judgment, or where the judgment has been arrested.[8] such verdict of plea would not operate as a bar.

§ 575. Criminal prosecution not barred by pendency of civil action; mitigation.—Prosecution to convict of the offense, and proceedings to recover civil damages, may pro-

432. See *State* v. *Lang*, 63 Me. 220; post, § 577.

[4] *Chamblee* v. *State*, 78 Ala. 466.

[5] *Clanton* v. *State*, 96 Ala. 111, 11 So. 299; *People* v. *Felix*, 45 Cal. 163. But see *People ex rel. Boenert* v. *Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23.

[6] *Klein* v. *State*, 157 Ind. 146, 60 N. E. 1036; *Mount* v. *State*, 14 Ohio, 295, 45 Am. Dec. 542. But see *Pate* v. *State*, 21 Tex. App. 191, 17 S. W. 461.

[7] *Com.* v. *Huffman*, Addison, Pa. 140.

[8] *R.* v. *Houston*, 2 Craw. & D. C. C. (Ir.) 310; *Joy* v. *State*, 14 Ind. 139; *Com.* v. *Purchase*, 2 Pick. 521, 13 Am. Dec. 452. See Wharton, Crim. Pl. & Pr. § 507, note 8.

ceed concurrently or independently of each other.[1] The rule is that proceedings in a criminal prosecution will not be barred by the fact that a prior civil suit has been instituted for the same cause of action, as in such cases the parties to the action are not the same.

The view prevailed in England that a person injured by a felony could not proceed in a civil suit to recover damages, if he failed to prosecute the criminal action.[2] This was modified by a later ruling,[3] but even in England the rule never applied to misdemeanors.[4] The reason for the English rule is that the duty of prosecuting in felonies fell on the party injured, but in this country the responsibility devolves on the state.[5] In England, where the injured party receives a part of the fine imposed, it is admissible to introduce the judgment in the criminal proceeding in mitigation of the damages;[6] and it has been held in one case that in a civil action for assault and battery the jury may consider that the defendant had been fined in the criminal prosecution, in assessing the damages in the civil action;[7] but the general rule is that the judgment in the criminal proceeding is entirely distinct, and one should not interfere with the course of the other, and that the punishment of the defendant is not to be regarded in the civil suit,[8]

[1] *Jones* v. *Clay*, 1 Bos. & P. 191; *Benjamin* v. *Storr*, L. R. 9 C. P. 400, 43 L. J. C. P. N. S. 162, 30 L. T. N. S. 362, 22 Week. Rep. 631, 19 Eng. Rul. Cas. 263; *United States* v. *New Bedford Bridge*, 1 Woodb. & M. 401, Fed. Cas. No. 15,867; *Portland* v. *Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Francis* v. *Schoellkopf*, 53 N. Y. 152; *Abbott* v. *Mills*, 3 Vt. 521, 23 Am. Dec. 222.

[2] *Crosby* v. *Leng*, 12 East, 409, 413, 11 Revised Rep. 437, 1 Eng. Rul. Cas. 559.

[3] *Wellock* v. *Constantine*, 2 Hurlst. & C. 146, 32 L. J. Exch. N. S. 285, 9 Jur. N. S. 232, 7 L. T. N. S. 751. See London L. T. April 12, 1879.

[4] See note 2, above; *Fissington* v. *Hutchinson*, 15 L. T. N. S. 390.

[5] *Nowlan* v. *Griffin*, 68 Me. 235, 28 Am. Rep. 45; *Quimby* v. *Blackey*, 63 N. H. 77; *Short* v. *Barker*, 22 Ind. 148; *Cannon* v. *Burris*, 1 Hill, (L.) 372; *Mitchell* v. *Mims*, 8 Tex. 8.

[6] *Jacks* v. *Bell*, 3 Car. & P. 316.

[7] *Cherry* v. *McCall*, 23 Ga. 193.

[8] *Wheatley* v. *Thorn*, 23 Miss. 62; *Towle* v. *Blake*, 48 N. H. 92; *Jarvis* v. *Manlove*, 5 Harr. (Del.) 452;

but, if admissible at all, it is only by way of mitigation of exemplary damages, where the fine has been paid or the punishment suffered by the accused in the criminal case.[9] Where the English rule prevails, that the civil proceeding could not be instituted until after the conviction, or where there was a doubt as to the actions being concurrent, it seems that the court took into consideration the civil procedure in adjusting sentence on the criminal, and so molded the proceedings that no injustice was done.[10]

§ 576. Judgments of military, consular, and miners' courts.—To give a binding effect to a judgment, it is not necessary that the judgment should be that of a court of common-law jurisdiction. Military courts exist by the same authority as the civil courts of the United States, and have the same plenary jurisdiction of offenses under the military law as civil courts have in controversies justiciable in them. Therefore the judgment of a military court or court-martial, properly constituted, establishes *res judicata,* and its proceedings are not open to review in any other court.[1]

The extent of the jurisdiction of a military court is necessarily determined by the character of the order establishing it. Thus, if the order establishing such a court suspended

Cook v. *Ellis,* 6 Hill, 466, 41 Am. Dec. 757.

[9] *Flanagan* v. *Womack,* 54 Tex. 46; *Shook* v. *Peters,* 59 Tex. 393.

[10] See *Rex* v. *Rhodes,* 2 Strange, 703; *State* v. *Frost,* 1 Brev. 385; *Buckner* v. *Beck,* Dud. L. 168; *State* v. *Blennerhasset,* Walk. (Miss.) 7.

[1] *Dynes* v. *Hoover,* 20 How. 65, 15 L. ed. 838; *Ex parte Reed,* 100 U. S. 13, 25 L. ed. 538; *Swaim* v. *United States,* 165 U. S. 553, 41 L. ed. 823, 17 Sup. Ct. Rep. 448; *Re White,* 9 Sawy. 49, 17 Fed. 723; *Re Davison* (C. C.) 21 Fed. 618; *Re McVey* (D. C.) 23 Fed. 878; *Re Zimmerman* (C. C.) 30 Fed. 176; *Vanderheyden* v. *Young,* 11 Johns. 150; *Mills* v. *Martin,* 19 Johns. 7; *Duffield* v. *Smith,* 3 Serg. & R. 590; *Brown* v. *Wadsworth,* 15 Vt. 170, 40 Am. Dec. 674; *Chesterfield* v. *Perkins,* 58 N. H. 573; *Wooley* v. *United States,* 20 Law Rep. 631.

or superseded the civil laws in the district, its jurisdiction would be exclusive, and a judgment rendered by it would be conclusive on the civil courts as to the same offense. But if the civil laws were not suspended or superseded, the civil courts would continue to exercise their ordinary jurisdiction; [2] and the civil courts might inquire into the jurisdiction of the court-martial, and, if the person condemned was not subject to military jurisdiction, might discharge him from sentence.[3] It has also been held, entirely in accord with the doctrines of international law, that the judgment of a military court erected by the commandant of the forces occupying a district of conquered territory, for the general administration of justice therein, is binding and conclusive upon the parties in all other courts.[4] But this clear and tenable position was afterwards receded from, on the ground that while the commandant might establish such a court for the trial of military offenses, it could not act as a civil commission to try civil actions.[5] But ordinarily an offense against a state is not barred by the action of a Federal court-martial,[6] nor is a court-martial barred by a state prosecution for the same offense in its state aspects.[7] Where, however, a court-martial

[2] *Coleman* v. *Tennessee,* 97 U. S. 509, 24 L. ed. 1118; *Tennessee* v. *Hibdom,* 23 Fed. 796; *Re Ezeta,* 62 Fed. 1004. See *United States* v. *Barnhart,* 10 Sawy. 491, 22 Fed. 289; *Tucker* v. *Alexandroff,* 183 U. S. 458, 46 L. ed. 278, 22 Sup. Ct. Rep. 195; *Motherwell* v. *United States,* 48 C. C. A. 97, 107 Fed. 448; *Carter* v. *McClaughry,* 183 U. S. 383, 46 L. ed. 246, 22 Sup. Ct. Rep. 181.

[3] *Re Grimley,* 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54; *Wales* v. *Whitney,* 114 U. S. 564, 29 L. ed. 277, 5 Sup. Ct. Rep. 1050; *Johnson* v. *Sayre,* 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773; *Barrett* v. *Hopkins,* 2 McCrary, 129, 7 Fed. 312; *Re Esmond,* 5 Mackey, 64.

[4] *Hefferman* v. *Porter,* 6 Coldw. 391, 98 Am. Dec. 459.

[5] *Walt* v. *Thomasson,* 10 Heisk. 151. But see 3 Ops. of Atty. Gen. 466. See *United States* v. *Cashiel,* 1 Hughes, 552, Fed. Cas. No. 14,744.

[6] *State* v. *Rankin,* 4 Coldw. 145.

[7] See 3 Ops. Atty. Gen. 750; supra, § 571; *United States* v. *Cashiel,* 1 Hughes, 552, Fed. Cas. No. 14,744.

has by law exclusive jurisdiction to try an offense, then its judgment, as already observed, is a bar to the proceedings of other courts.[8]

The same principles apply to other courts established by provisional governments. Thus, where a consular court has jurisdiction to make a preliminary examination, with a view to holding the accused for trial in a higher court, a plea in bar was introduced that such court had dismissed the charges against accused, and served upon him new charges; and such ruling was consistent with the conclusion that the court did not determine the question of guilt or innocence, but merely held the accused to answer before the court having jurisdiction to determine that question.[9]

And in the case of miners' courts established in that part of the territory of Kansas now embraced within the state of Colorado, the general assembly of the state confirmed and legalized the judgments of such provisional courts, and gave to them probative force.[10]

Ia. Jeopardy.

§ 576a. Jurisdiction of court.—It is essential, to sustain a plea of former jeopardy, that the judgment plead in bar should have been entered by a court having jurisdiction of the accused and of the offense.[1] Not only must such court have had jurisdiction, but it must have had final jurisdiction.[2] Thus, a conviction in the circuit court of the United States for a crime of which that court had no jurisdiction does not

[8] Supra, note 2.

[9] *Price* v. *United States*, 15 L.R.A. (N.S.) 1272, 85 C. C. A. 247, 156 Fed. 950, 13 A. & E. Ann. Cas. 483.

[10] Mills's Anno. Stats. (Colo.) §§ 2586–2589.

[1] *Com.* v. *Roby*, 12 Pick. 496; *Com.* v. *Peters*, 12 Met. 387; *State* v. *Cross*, 44 W. Va. 315, 29 S. E. 527; *Peterson* v. *State*, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306.

[2] *Com.* v. *Goddard*, 13 Mass. 455.

bar a prosecution for the same offense by a state court.[3] A conviction of homicide before a court not having jurisdiction to try the accused for that crime will not sustain a plea of once in jeopardy.[4] A conviction before a justice of the peace not having jurisdiction of the offense is not a bar to a subsequent prosecution for the same offense in a court which has jurisdiction.[5] It is also essential that the proceedings before the court shall be at a proper term of the court, on one of the regular juridical days, and that the judge hearing the cause shall be competent to try the charge. Thus, where a person is tried at an unauthorized special term of the court,[6] or at a time to which the court had been unlawfully adjourned;[7] or where the presiding judge was incompetent, and the proceedings were irregular and void,[8] the accused cannot plead former jeopardy upon a subsequent prosecution for the same offense. But in the case of concurrent jurisdiction in different courts, the first court rightfully exercising its jurisdiction acquires control of the offense, to the exclusion of the others, and such judgment is a bar to a prosecution for the same offense in any other court having concurrent jurisdiction thereof.[9]

[3] *Blyew* v. *Com.* 91 Ky. 200, 15 S. W. 356; *Com.* v. *Peters,* 12 Met. 387; *Montross* v. *State,* 61 Miss. 429; *Canter* v. *People,* 38 How. Pr. 91.

[4] *Packer* v. *People,* 8 Colo. 361, 8 Pac. 564.

[5] *State* v. *Phillips,* 104 N. C. 786, 10 S. E. 463; *Hodges* v. *State,* 5 Coldw. 7; *O'Brian* v. *State,* 12 Ind. 369; *State* v. *Payne,* 4 Mo. 376; *Alford* v. *State,* 25 Fla. 852, 6 So. 857; *State* v. *Odell,* 4 Blackf. 156; *Siebert* v. *State,* 95 Ind. 471; *State* v. *Hodgkins,* 42 N. H. 474; *Flournoy* v. *State,* 16 Tex. 30. See *State* v. *Bruce,* 68 Vt. 183, 34 Atl. 701; *Brown* v. *State,* 120 Ala. 378, 25 So. 203; *Crowder* v. *State,* 69 Ark. 330, 63 S. W. 669; *Huffman* v. *State,* 84 Miss. 479, 36 So. 395; *Gibson* v. *State,* 47 Tex. Crim. Rep. 489, 83 S. W. 1119; *Murphy* v. *Com.* 23 Gratt. 960; *State* v. *Fox,* 83 Conn. 286, 76 Atl. 302, 19 A. & E. Ann. Cas. 682.

[6] *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54.

[7] *Re McClaskey,* 2 Okla. 568, 37 Pac. 855.

[8] *Glasgow* v. *State,* 9 Baxt. 485.

[9] *Burdett* v. *State,* 9 Tex. 43; *State* v. *Bowers,* 94 N. C. 910; *State*

§ 577. Conclusiveness of a judgment on a plea of nolo contendere.—The legal effect of a plea of *nolo contendere* is the same as that of a plea of guilty, as regards all the proceedings on the indictment,[1] and it justifies the court in imposing a sentence.[2] Such a plea being equivalent to a plea of guilty, a judgment found thereon is conclusive as against a subsequent criminal prosecution for the same offense.[3] But where such plea is accompanied by a protestation of innocence, it is not conclusive upon the accused in a civil action, nor will it prevent him from controverting the fact of guilt.[4] Judgment may be arrested on a plea of *nolo contendere* where the indictment is defective.[5]

§ 578. Identity of offenses as constituting a bar.—As an illustration of the rule that the offenses must be identical in order to enable an acquittal or conviction on a former trial to be received in evidence to bar proceedings on a second trial, it may be here mentioned that an acquittal on ground of misnomer of third parties or of things is no bar to a second indictment for the same offense, accurately describing the third parties or things;[1] nor is an acquittal on account of a wrong

v. *Tisdale,* 19 N. C. (2 Dev. & B. L.) 159; *State* v. *Roberts,* 98 N. C. 756, 3 S. E. 682; *Hadley* v. *State,* 16 Tex. App. 444. See *People* v. *Connor,* 142 N. Y. 130, 36 N. E. 807.

[1] *United States* v. *Hartwell,* 3 Cliff. 221, Fed. Cas. No. 15,318. See *Com.* v. *Adams,* 6 Gray, 359; *Com.* v. *Ingersoll,* 145 Mass. 381, 14 N. E. 449.

[2] *Com.* v. *Holstine,* 132 Pa. 357, 19 Atl. 273.

[3] *State* v. *Lang,* 63 Me. 220. See *Buck* v. *Com.* 107 Pa. 486.

[4] *Com.* v. *Horton,* 9 Pick. 206; *United States* v. *Hartwell,* 3 Cliff. 221, Fed. Cas. No. 15,318; *Com.* v. *Tilton,* 8 Met. 232. See *Birchard* v. *Booth,* 4 Wis. 67; *Barker* v. *Almy,* 20 R. I. 367, 39 Atl. 185; *Doughty* v. *Deamoreel,* 22 R. I. 158, 46 Atl. 838.

[5] *Com.* v. *Northampton,* 2 Mass. 166; *Com.* v. *Grey,* 2 Grey, 501, 61 Am. Dec. 476.

[1] 2 Hale, P. C. 247; *Rex.* v. *Coogan,* 1 Leach, C. L. 448; *Reg.* v. *Green,* Dears, & B. C. C. 113, 26 L. J. Mag. Cas. N. S. 17, 2 Jur. N. S. 1146, 5 Week. Rep. 52, 7 Cox, C. C. 186; *Rex* v. *Champneys,* 2 Moody & R. 26; *State* v. *Sias,* 17 N.

venue a bar to an indictment in which the right venue is laid;[2] nor is an acquittal on ground of a false allegation of time, in cases where time is essential, a bar to a subsequent indictment giving the time correctly.[3]

Nor is the conviction of a sale to one person of oil below the statutory test a bar to a prosecution for subsequent sales to different persons;[4] nor is an acquittal of homicide committed by shooting, a bar to an indictment for homicide committed by beating upon the head with a gun, as the two offenses are distinct as regards jeopardy;[5] nor is an acquittal of larceny a bar to prosecution for perjury committed on the trial for larceny;[6] nor is an acquittal for the larceny of certain bonds a bar to a conviction for a conversion of the same bonds;[7] nor is an acquittal on charge of having counterfeit money in possession, with intention of passing it, a bar to an indictment for a like offense based upon an entirely different transaction, though on the first trial, for the purpose of showing a guilty knowledge, proof of the same kind is produced as on the second trial;[8] and these distinctions are further illustrated by the following cases:[9]

H. 558; *Com.* v. *Wade,* 17 Pick. 395; *Com.* v. *Sutherland,* 109 Mass. 342; *Com.* v. *Trimmer,* 84 Pa. 68; *Burres* v. *Com.* 27 Gratt. 934, 39 Am. Dec. 407; *Durham* v. *People,* 5 Ill. 172; *State* v. *Risher,* 1 Rich. L. 219; *Davis* v. *State,* 58 Ga. 173; *Martha* v. *State,* 26 Ala. 72; *State* v. *McGraw,* Walk. (Miss.) 208; *Hite* v. *State,* 9 Yerg. 357; supra, §§ 91, et seq.

[2] *Vaux's Case,* 4 Coke, 44a, 45 b; *Methard* v. *State,* 19 Ohio St. 363; supra, § 107.

[3] *Rex* v. *Taylor,* 3 Barn. & C. 502; supra, § 106.

[4] *Downing* v. *State,* 66 Ga. 160.

[5] *Guedel* v. *People,* 43 Ill. 226.

[6] *State* v. *Caywood,* 96 Iowa, 367, 65 N. W. 385.

[7] *Com.* v. *Tenney,* 97 Mass. 50. For note on question whether acquittal of larceny is bar to prosecution for forgery in the same transaction, see 4 L.R.A.(N.S.) 402.

[8] *Re Van Houton,* 2 N. Y. City Hall Rec. 73.

[9] *Com.* v. *Fredericks,* 155 Mass. 455, 29 N. E. 622; *State* v. *Howe,* 27 Or. 138, 44 Pac. 672; *State* v. *Taylor,* 2 Bail. L. 49; *Hite* v. *State,* 9 Yerg. 357; *State* v. *Ellison,* 4 Lea, 229; *Swindel* v. *State,* 32 Tex. 102; *Boggess* v. *State,* 43 Tex. 347;

The general rule as to proving the identity of the offenses so as to support a plea of former jeopardy upon that ground is that the offenses must be shown by the accused to be one and the same; that the offense for which he is on trial was described in the first indictment, or so necessarily connected with it that judgment could have been rendered upon the offense upon conviction of the accused.[10] The test to determine the identity of the second offense is whether or not the evidence necessary to convict in the second case was admissible

Sims v. *State,* 21 Tex. App. 649, 1 S. W. 465, 6 Am. Crim. Rep. 253; *Burks* v. *State,* 24 Tex. App. 326, 6 S. W. 300; *People* v. *Kerm,* 8 Utah, 268, 30 Pac. 988; *Com.* v. *Somerville,* 1 Va. Cas. 164, 5 Am. Dec. 514; *Page* v. *Com.* 27 Gratt. 954; *State* v. *Day,* 5 Penn. (Del.) 101, 50 Atl. 946; *State* v. *Morgan,* 95 N. C. 641; *Methard* v. *State,* 19 Ohio St. 363; *State* v. *McMinn,* 34 Ark. 160; *United States* v. *Three Copper Stills,* 47 Fed. 495; *United States* v. *Butler,* 38 Fed. 498; *United States* v. *Randenbush,* 8 Pet. 288, 8 L. ed. 948; *Fews* v. *State,* 1 Ga. App. 122, 58 S. E. 64; *Moody* v. *State,* 1 Ga. App. 772, 58 S. E. 262; *Price* v. *United States,* 15 L.R.A. (N. S.) 1272, 85 C. C. A. 247, 156 Fed. 951, 13 A. & E. Ann. Cas. 483.

See *Thomas* v. *United States,* 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897; *People* v. *Boos,* 155 Mich. 407, 120 N. W. 11; *Re Mallon,* 16 Idaho, 737, 22 L.R.A.(N.S.) 1123, 102 Pac. 374; *Grayson* v. *State,* 92 Ark. 413, 123 S. W. 388, 19 A. & E. Ann. Cas. 929; *State* v. *Hussey,* 145 Mo. App. 671, 123 S. W. 485; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *Riffe* v. *Com.* 21 Ky. L. Rep. 1331, 56 S. W. 265; *Carter* v. *Com.* 25 Ky. L. Rep. 688, 76 S. W. 337.

But see *State* v. *Wiseback,* 139 Mo. 214, 40 S. W. 946; *Davidson* v. *State,* 40 Tex. Crim. Rep. 285, 49 S. W. 372, 50 S. W. 365; *White* v. *Ray,* 8 Pick. 467; *Com.* v. *Roby,* 12 Pick. 496; *State* v. *Pianfetti,* 79 Vt. 236, 65 Atl. 84, 9 A. & E. Ann. Cas. 127.

[10] *Com.* v. *Goodenough,* Thacher Crim. Cas. 132; *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490; *People* v. *Saunders,* 4 Park. Crim. Rep. 196. See *Marshall* v. *State,* 8 Ind. 498; *State* v. *Gapen,* 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; *Miller* v. *State,* 33 Ind. App. 509, 71 N. E. 248; *State* v. *Shafer,* 20 Kan. 226; *State* v. *Virgo,* 14 N. D. 293, 103 N. W. 610; *Com.* v. *Shoener,* 216 Pa. 71, 64 Atl. 890; *Clement* v. *State,* — Tex. Crim. Rep. —, 86 S. W. 1016; *O'Donnell* v. *People,* 110 Ill. App. 250; *Gallagher* v. *People,* 211 Ill. 158, 71 N. E. 842; *Williams* v. *State,* 58 Tex. Crim. Rep. 193, 125 S. W. 42.

under the first charge, that it related to the same charge, and warranted a conviction on the first charge.[11] It should be observed, however, that where the same offense is averred merely as of a different date, or where the offenses correspond in all respects except as to the name of the person, or the names are *idem sonans,* or there is an abbreviation of, or an omission of the first name, the offenses are generally held to be identical, so as to support the plea of former jeopardy.[12]

§ 579. Acquittal on a defective indictment is no bar; exception.—In criminal prosecutions, when the evidence necessary to support the second indictment would have been sufficient to sustain a legal conviction on the first, then the first procedure is a bar to a second indictment for the same offense.[1] The general rule is that an acquittal on a defective

[11] *Warren* v. *State,* 79 Neb. 526, 113 N. W. 143; *State* v. *Dewees,* 76 S. C. 72, 56 S. E. 674, 11 A. & E. Ann. Cas. 991; *Grafton* v. *United States,* 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640; *Alexander* v. *State,* 53 Tex. Crim. Rep. 553, 110 S. W. 918; *State* v. *Van Buren,* 86 S. C. 297, 68 S. E. 568.

[12] *Goode* v. *State,* 70 Ga. 752; *Knight* v. *State,* 73 Ga. 803; *Knox* v. *State,* 89 Ga. 259, 15 S. E. 308; *Durham* v. *People,* 5 Ill. 172, 39 Am. Dec. 407; *Rocco* v. *State,* 37 Miss. 357; *People* v. *Allen,* 1 Park. Crim. Rep. 445; *State* v. *Hendrick,* 179 Mo. 300, 78 S. W. 630; *State* v. *Switzer,* 65 S. C. 187, 43 S. E. 513.

[1] See *Goode* v. *State,* 70 Ga. 752; *Hirshfield* v. *State,* 11 Tex. App. 207; *State* v. *Stewart,* 11 Or. 52, 4 Pac. 128; *Rex* v. *Vandercomb,* 2 Leach, C. L. 708, 2 East. P. C. 519; *Rex* v. *Sheen,* 2 Car. & P. 634; *Rex* v. *Clark,* 1 Brod. & B. 473; *Rex* v. *Emden,* 9 East, 437; *Com.* v. *Clair,* 7 Allen, 525; *Heikes* v. *Com.* 26 Pa. 513; *Com.* v. *Trimmer,* 84 Pa. 65; *Mitchell* v. *State,* 42 Ohio St. 383; Jervis's Archbold, Crim. Pr. & Pl. 82; Keeler, 58; 1 Leach, C. L. 448; *Reg.* v. *O'Brien,* 46 L. J. N. S. 177, 15 Cox, C. C. 129; *Com.* v. *Cunningham,* 13 Mass. 245; *Com.* v. *Wade,* 17 Pick. 395; *Com.* v. *Tenney,* 97 Mass. 50; *Com.* v. *Hoffman,* 121 Mass. 369; *State* v. *Reed,* 12 Md. 263; *Price* v. *State,* 19 Ohio 423; *Gerard* v. *People,* 4 Ill. 363; *Guedel* v. *People,* 43 Ill. 226; *State* v. *Gleason,* 56 Iowa, 203, 9 N. W. 126; *State* v. *Moon,* 41 Wis. 684, 2 Am. Crim. Rep. 64; *State* v. *Ellison,* 4 Lea, 229; *State* v. *Ray,* Rice L. 1, 33 Am. Dec. 90; *State* v. *Risher,* 1 Rich. L. 219; *State* v.

or an insufficient indictment is not a bar to a second prosecution.[2] This general rule is subject to two exceptions; first, where the accused is convicted on a defective indictment and has served the sentence, such conviction can always be pleaded in bar to a subsequent prosecution for the same offense;[3] second, where there is a verdict of acquittal or an insufficient indictment which is not objected to before the verdict is entered, such acquittal is a bar to the second indictment for the same offense, even though such verdict is not followed by any judgment.[4] But where the accused obtains a reversal of a judgment on the ground of an insufficient indictment, he cannot afterwards plead such conviction as a bar to a second indictment.[5]

In conformity with what has been stated, after a judgment has been arrested or reversed on a defective indictment, or after an indictment has been quashed, or after a judgment

Birmingham, 44 N. C. (Busbee, L.) 120; *State* v. *Shirer*, 20 S. C. 392; *State* v. *Kuhuke*, 30 Kan. 462, 2 Pac. 689; *Holt* v. *State*, 38 Ga. 187; *Murray* v. *State*, 21 Tex. App. 621, 57 Am. Rep. 623, 2 S. W. 757.

[2] *Vaux's Case*, 4 Coke, 45a; *Com.* v. *Clair*, 7 Allen, 525; *People* v. *Barrett*, 1 Johns. 66; *Com.* v. *Somerville*, 1 Va. Cas. 164, 5 Am. Dec. 514; *Price* v. *State*, 19 Ohio, 423; *Mount* v. *Com.* 2 Duv. 93; *Black* v. *State*, 36 Ga. 447, 91 Am. Dec. 772; *Whitley* v. *State*, 38 Ga. 50; *Waller* v. *State*, 40 Ala. 325; *State* v. *McGraw*, Walk. (Miss.) 208; *Munford* v. *State*, 39 Miss. 558; *State* v. *Horneman*, 16 Kan. 452, 2 Am. Crim. Rep. 427; *State* v. *Brown*, 110 La. 591, 34 So. 698, 15 Am. Crim. Rep. 286.

[3] *Com.* v. *Loud*, 3 Met. 328, 37 Am. Dec. 139; *Com.* v. *Keith*, 8 Met. 531; *Fritz* v. *State*, 40 Ind. 18.

[4] *United States* v. *Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192. See *State* v. *Hall*, 141 Mo. App. 701, 125 S. W. 229; *State* v. *Polk*, 144 Mo. App. 326, 127 S. W. 933.

[5] *United States* v. *Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192. See *Murphy* v. *Massachusetts*, 177 U. S. 158, 44 L. ed. 714, 20 Sup. Ct. Rep. 639; *Ogle* v. *State*, 43 Tex. Crim. Rep. 219, 228, 96 Am. St. Rep. 860, 63 S. W. 1009, 15 Am. Crim. Rep. 321; *Kepner* v. *United States*, 195 U. S. 129, 49 L. ed. 124, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655; *United States* v. *Owens*, 2 Alaska, 480; *Trono* v. *United States*, 199 U. S. 533, 50 L. ed. 297, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773.

has been entered for the accused on a demurrer, a second indictment can be found, correcting the defects of the first, and the proceedings under the first indictment will not bar proceedings under the second indictment.[6]

Also, an erroneous acquittal is conclusive, so that the defendant cannot be retried for any offense of which he could have been convicted under the indictment, on which he was acquitted.[7]

But where the acquittal has been brought about by fraud or collusion, it cannot be pleaded in bar to another indictment or information for the same offense.[8]

[6] *Withipole's Case,* Cro. Car. 147; *Reg.* v. *Drury,* 3 Cox, C. C. 544, 3 Car. & K. 193, 18 L. J. Mag. Cas. N. S. 189; *Rex* v. *Houston,* 3 Craw. & D. C. C. (Ir.) 310; *Rex* v. *Wildey,* 1 Maule & S. 183; *Com.* v. *Gould,* 12 Gray, 171; *People* v. *Casborus,* 13 Johns. 351; *Com.* v. *Zepp,* 3 Clark (Pa.) 311; *Cochrane* v. *State,* 6 Md. 400; *Com.* v. *Hatton,* 3 Gratt. 623; *State* v. *Ray,* Rice, L. 1, 33 Am. Dec. 90; *State* v. *Phil,* 1 Stew. (Ala.) 31; *Turner* v. *State,* 40 Ala. 21; *Jeffries* v. *State,* 40 Ala. 381; post, § 582; Wharton, Crim. Pl. & Pr. § 547; *Croft* v. *People,* 15 Hun, 484; *Mixon* v. *State,* 35 Tex. Crim. Rep. 458, 34 S. W. 290; *Ford* v. *State,* 7 Ind. App. 567, 35 N. E. 34; *Huff* v. *Com.* 19 Ky. L. Rep. 1064, 42 S. W. 907; See *Shoemaker* v. *State,* — Tex. Crim. Rep. —, 126 S. W. 887.

[7] 2 Co. Inst. 318; 2 Hale, P. C. 274; *Rex* v. *Sutton,* 5 Barn. & Ad. 52, 2 Nev. & M. 57, 2 L. J. Mag. Cas. N. S. 75; *Rex* v. *Praed,* 4 Burr. 2257; *Rex* v. *Mann,* 4 Maule & S. 337; *State* v. *Kittle,* 2 Tyler (Vt.) 471; *State* v. *Brown,* 16 Conn. 54; *People* v. *Mather,* 4 Wend. 229, 21 Am. Dec. 122; *State* v. *Taylor,* 8 N. C. (1 Hawks) 462; *Black* v. *State,* 36 Ga. 447, 91 Am. Dec. 772; *State* v. *Dark,* 8 Blackf. 526; *State* v. *Norvell,* 2 Yerg. 24, 24 Am. Dec. 458; *Slaughter* v. *State,* 6 Humph. 410; *People* v. *Roberts,* 114 Cal. 67, 45 Pac. 1016; *People* v. *Terrill,* 132 Cal. 497, 64 Pac. 894; *Roland* v. *People,* 23 Colo. 283, 47 Pac. 269; *Nordlinger* v. *United States,* 24 App. D. C. 406, 70 L.R.A. 227; *Tufts* v. *State,* 41 Fla. 663, 27 So. 218. See *Newlin* v. *People,* 221 Ill. 166, 77 N. E. 529; *Dunn* v. *State,* 70 Ind. 47; *State* v. *Newkirk,* 80 Ind. 131; *Brown* v. *United States,* 2 Ind. Terr. 582, 52 S. W. 56; *State* v. *Dewey,* 73 Kan. 735, 85 Pac. 795, 88 Pac. 881; *State* v. *Taylor,* — Miss. —, 23 So. 34; *State* v. *Wear,* 145 Mo. 162, 46 S. W. 1099; *George* v. *State,* 59 Neb. 163, 80 N. W. 480; *Carano* v. *State,* 24 Ohio C. C. 93; *Burress* v. *Com.* 27 Gratt. 934.

[8] *State* v. *Little,* 1 N. H. 257; *Com.* v. *Jackson,* 2 Va. Cas. 501;

§ 580. Conviction on one criminal aspect of an offense is a bar to conviction on the other.—Wherever an unlawful act has two criminal aspects, under either of which it is indictable, and the evidence of either of which would sustain an indictment for the other, then an indictment for one aspect absorbs the case, and there can be no further prosecution for the act. In other words, when the evidence necessary to support the second indictment would have supported the first, the second is barred by a conviction or acquittal on the first.[1] Thus, where a riot consists of a series of tumultuous assaults, the defendant, after being convicted of the riot, cannot be put on trial for the constituent assaults;[2] nor, when a riot consists

Bradley v. *State*, 32 Ark. 722; *Bulson* v. *People*, 31 Ill. 409; *Watkins* v. *State*, 68 Ind. 427, 34 Am. Rep. 273; *Halloran* v. *State*, 80 Ind. 586; *State* v. *Green*, 16 Iowa, 239; *Com.* v. *Alderman*, 4 Mass. 477; *Com.* v. *Dascom*, 111 Mass. 404; *State* v. *Simpson*, 28 Minn. 66, 41 Am. Rep. 269, 9 N. W. 78; *State* v. *Cole*, 48 Mo. 70; *State* v. *Swepson*, 79 N. C. 632; *State* v. *Atkinson*, 9 Humph. 677. See *State* v. *Wakefield*, 60 Vt. 618, 15 Atl. 181; *Thomas* v. *State*, 114 Ala. 31, 21 So. 784; *State* v. *Caldwell*, 70 Ark. 74, 66 S. W. 150; *De Bord* v. *People*, 27 Colo. 377, 83 Am. St. Rep. 89, 61 Pac. 599; *Peters* v. *Koepke*, 156 Ind. 35, 59 N. E. 33; *State* v. *Smith*, 57 Kan. 673, 47 Pac. 541; *State* v. *Moore*, 136 N. C. 581, 48 S. E. 573; *State* v. *Reed*, 26 Conn. 202 (but it seems that the collusion and fraud necessary to avoid an acquittal must be by the procurement of the accused himself). See *State* v. *George*, 53 Ind. 434; *State* v. *Moore*, 136 N. C. 581, 48 S. E. 573.

[1] Jervis's Archbold, Crim. Pr. & Pl. 82; *Rex* v. *Coogan*, 1 Leach, C. L. 448; *Rex* v. *Emden*, 9 East, 437; *Com.* v. *Cunningham*, 13 Mass. 245; *Com.* v. *Bakeman*, 105 Mass. 53; *Com.* v. *Wade*, 17 Pick. 395; *Com.* v. *Tenney*, 97 Mass. 50; *People* v. *Barrett*, 1 Johns. 66; *Canter* v. *People*, 38 How. Pr. 91; *State* v. *Reed*, 12 Md. 263; *Price* v. *State*, 19 Ohio, 423; *Gerard* v. *People*, 4 Ill. 363; *Durham* v. *People*, 5 Ill. 172, 39 Am. Dec. 407; *Guedel* v. *People*, 43 Ill. 226; *State* v. *Egglesht*, 41 Iowa, 574, 20 Am. Rep. 612; *State* v. *Murray*, 55 Iowa, 530, 8 N. W. 350; *State* v. *Gleason*, 56 Iowa, 203, 9 N. W. 126; *State* v. *Ray*, Rice, L. 1, 33 Am. Dec. 90; *State* v. *Risher*, 1 Rich. L. 219; *State* v. *Revels*, 44 N. C. (Busbee, L.) 200; *Holt* v. *State*, 38 Ga. 187; *Hite* v. *State*, 9 Yerg. 357; *State* v. *Keogh*, 13 La. Ann. 243. See, to same effect, 2 N. Y. Rev. Stat. 1856; Wharton, Crim. Pl. & Pr. § 471.

[2] *Rex* v. *Champneys*, 2 Moody & R. 26; *Com.* v. *Kinney*, 2 Va. Cas.

in breaking up a religious meeting, can the defendant be prosecuted for the two offenses successively;[3] nor, after a conviction for holding forged papers, under an indictment for holding and uttering such paper, can there be a conviction for uttering the paper.[4] But a conviction of larceny on an indictment for larceny does not bar a prosecution for the burglary with intent to steal, to which the larceny was an incident;[5] nor does an acquittal of larceny bar a prosecution for obtaining the same goods by false pretenses or by conspiracy;[6] nor, at common law, for being an accessory to the stealing.[7] In some instances courts have undertaken to say that when a prosecution elects to prosecute a particular phase of an offense (*e. g.*, larceny in a case of robbery,[8] or arson in a case where the burning caused killing,[9] or one of a series

139; *Smith* v. *Com.* 7 Gratt. 593; *Price* v. *People,* 9 Ill. App. 36; *State* v. *Stanly,* 49 N. C. (4 Jones, L.) 290; *State* v. *Fife,* 1 Bail. L. 1; *State* v. *Standifer,* 5 Port. (Ala.) 523. See *Com.* v. *Hawkins,* 11 Bush, 603, 1 Am. Crim. Rep. 65. Though see *Scott* v. *United States,* Morris (Iowa) 142; *State* v. *Ross,* 4 Lea. 442; Wharton, Crim. Pl. & Pr. § 471.

[3] *State* v. *Townsend,* 2 Harr. (Del.) 543. See *Skidmore* v. *Bricker,* 77 Ill. 164.

[4] *State* v. *Benham,* 7 Conn. 414; *People* v. *Van Keutren,* 5 Park. Crim. Rep. 66. See *People* v. *Allen,* 1 Park. Crim. Rep. 445; *State* v. *Egglesht,* 41 Iowa, 574, 20 Am. Rep. 612; *Foster* v. *State,* 39 Ala. 229; *Harrison* v. *State,* 36 Ala. 248; *Hirshfield* v. *State,* 11 Tex. App. 207; *People* v. *Ward,* 15 Wend. 231; Wharton, Crim. Pr. & Pl. §§ 465 et seq.

[5] See *Wilson* v. *State,* 24 Conn. 57; *State* v. *Warner,* 14 Ind. 572. But see *State* v. *Lewis,* 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741; *Roberts* v. *State,* 14 Ga. 8, 58 Am. Dec. 528; *State* v. *De Graffenreid,* 9 Baxt. 287.

[6] *Reg.* v. *Henderson,* Car. & M. 328; *State* v. *Sias,* 17 N. H. 558; *Dominick* v. *State,* 40 Ala. 680, 91 Am. Dec. 496.

As to whether acquittal of larceny bars prosecution for forgery in same transaction, see note in 4 L.R.A.(N.S.) 402.

[7] *State* v. *Larkin,* 49 N. H. 36, 6 Am. Rep. 456; *Foster* v. *State,* 39 Ala. 229. See Wharton, Crim Pl. & Pr. § 471.

[8] *State* v. *Lewis,* 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741. See *Roberts* v. *State,* 14 Ga. 8, 58 Am. Dec. 528.

[9] *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490; *People* v. *Smith,*

of municipal negligences occurring on the same day),[10] this is an adequate determination and satisfaction, and the case, on the particular evidence, ought to be pushed no further. But whether public justice demands a second prosecution in such cases is a question for the executive, who may properly step in and prevent an undue accumulation of prosecutions. For the court, the test is whether, on the first trial, there could have been a conviction of the offense prosecuted in the second.[11] If not, then the rule *ne bis idem* does not apply.[12]

Upon the doctrines above stated, an interesting qualification has been proposed. Suppose the prosecution could, if it chose, have presented the two offenses in a single count (*e. g.*, assault, with assault with intent to wound), but did not do so; thereby, as has just been said, virtually, with the whole case before it, entering a *nolle prosequi* on the higher grade. Can a second indictment be maintained for such higher grade? The answer must be in the negative,[13] since the prosecution cannot take advantage of its own negligence in the imperfect pleading of its case, and since such voluntary withdrawal of the aggravated grade, sanctioned by a verdict, operates as an acquittal of the higher grade. Another reason is the annoyance which a contrary rule would capriciously inflict. "The state cannot

3 N. Y. Week. Dig. 162. See 14 Moak, Eng. Rep. 659, 660, note.

[10] *State* v. *Fayetteville*, 6 N. C. (2 Murph.) 371. See *Fiddler* v. *State*, 7 Humph. 508; *Walter* v. *Com.* 88 Pa. 137, 32 Am. Rep. 429.

[11] *Wilcox* v. *State*, 6 Lea, 571, 40 Am. Rep. 53.

[12] See Wharton, Crim. Pl. & Pr. §§ 465 et seq.

[13] *Reg.* v. *Elrington*, 9 Cox, C. C. 86, 1 Best & S. 689, 10 Week. Rep. 13, 31 L. J. Mag. Cas. N. S. 14, 8 Jur. N. S. 97, 5 L. T. N. S. 284, citing *Reg.* v. *Stanton*, 5 Cox, C. C. 324; *Re Thompson*, 9 Week. Rep. 203; *United State* v. *Harmison*, 3 Sawy. 556, Fed. Cas. No. 15,308; *State* v. *Smith*, 43 Vt. 324; *Com.* v. *Miller*, 5 Dana, 320; *State* v. *Chaffin*, 2 Swan, 493; *State* v. *Stanly*, 49 N. C. (4 Jones, L.) 290; *Moore* v. *State*, 71 Ala. 307. Though see *People* v. *Warren*, 1 Park. Crim. Rep. 338; *Smith* v. *Com.* 7 Gratt. 593; *State* v. *Foster*, 33 Iowa, 525; *Prine* v. *State*, 41 Tex. 300. See *Grisham* v. *State*, 19 Tex. App. 504; supra, § 464.

split up a crime and prosecute it in parts. A prosecution for any part of a single crime" (supposing that at the time the entire crime could be prosecuted) "bars any further prosecution based upon the whole or a part of the same crime." [14]

Should the defendant be acquitted on the first trial, the whole case of the second prosecution being before the jury, then, as he has been acquitted of the essential ingredients of the second case, the second case cannot proceed.[15]

§ 581. Successive prosecutions under liquor laws.—Prosecutions under the liquor laws afford us several illustrations to the same effect. A conviction, for instance, of the offense of keeping a tippling-house, or of being a common seller, does not bar a prosecution for individual sales; [1] and a conviction for nuisance will not bar a prosecution for keeping intoxicating liquor.[2] But a prosecution for a particular sale bars a subsequent prosecution for the same sale, though the indictments in the two cases are under distinct statutes or sections of statutes.[3]

§ 582. Acquittal on plea in abatement.—In criminal pleading, a dilatory plea, such as a plea in abatement, binds the party making it to the allegations it contains. If he has judgment on the plea, in his favor, it is a discharge or an ac-

[14] *Jackson* v. *State*, 14 Ind. 327, 328; *Drake* v. *State*, 60 Ala. 42.

[15] Wharton Crim. Pl. & Pr. § 466. (See cases on question whether a conviction of burglary with intent to steal bars larceny.)

[1] Wharton, Crim. Pl. & Pr. § 472; *State* v. *Coombs*, 32 Me. 527; *State* v. *Maher*, 35 Me. 225; *State* v. *Inness*, 53 Me. 536; *Com.* v. *Cutler*, 9 Allen, 486; *Com.* v. *Kennedy*, 97 Mass. 224; *State* v. *Johnson*, 3 R. I. 94; *Heikes* v. *Com.* 26 Pa. 513; *Roberts* v. *State*, 14 Ga. 8, 58 Am. Dec. 528; *Morman* v. *State*, 24 Miss. 54. See contra, *State* v. *Nutt*, 28 Vt. 598; *Miller* v. *State*, 3 Ohio St. 475.

[2] *Com.* v. *McCauley*, 105 Mass. 69. See *State* v. *Inness*, 53 Me. 536; *Com.* v. *Hardiman*, 9 Allen, 487; *State* v. *Williams*, 30 N. J. L. 102.

[3] *State* v. *Nutt*, 28 Vt. 598; *Miller* v. *State*, 3 Ohio St. 475; Wharton, Crim. Pl. & Pr. § 472.

quittal on a preliminary matter only, and such an acquittal is inadmissible as a bar to a prosecution for the same offense, since, on that trial, the defendant could not have been convicted on the evidence adduced on the second trial.[1]

§ 582a. On plea of guilty.—Jeopardy frequently attaches as an effectual bar to a subsequent prosecution for the same offense, upon proceedings preliminary to a trial, and is equally effective as where the trial has been had on the indictment. Hence, where a defendant is arraigned before a court having competent jurisdiction to hear and determine the charge, to adjudge the punishment affixed to the offense, and the accused enters a plea of guilty, so that nothing further remains to be done but to enter the plea and adjudge the punishment, the accused has been put in jeopardy.[1]

§ 582b. Discharge of jury without verdict.—The general rule is that the accused is placed in jeopardy whenever, on a valid indictment in a court of competent jurisdiction, and before a jury legally impaneled and duly sworn, his trial has been fairly entered upon. If, thereafter, the jury is illegally, improperly, or unnecessarily discharged by the court, it operates as an acquittal, so that the accused cannot again be tried for the same offense, and can plead it in bar of a subsequent prosecution.[1]

[1] 2 Hale, P. C. 176; *State* v. *Dresser*, 54 Me. 569; *Com.* v. *Gale*, 11 Gray, 320; *Lewis* v. *State*, 1 Head, 329.

[1] *Boswell* v. *State*, 111 Ind. 47, 11 N. E. 788; *People* v. *Goldstein*, 32 Cal. 432; *Com.* v. *Goddard*, 13 Mass. 455. But see *People* v. *Cignarale*, 110 N. Y. 23, 17 N. E. 135.

[1] *Teat* v. *State*, 53 Miss. 439, 24 Am Rep. 708; *Ex parte Maxwell*, 11 Nev. 428; *Grant* v. *People*, 4 Park. Crim. Rep. 527; *King* v. *People*, 5 Hun, 297; *Schrieber* v. *Clapp*, 13 Okla. 215, 74 Pac. 316; *Gillespie* v. *State*, 168 Ind. 298, 80 N. E. 829. See *State* v. *Kinghorn*, 56 Wash. 131, 27 L.R.A.(N.S.) 136, 105 Pac. 234; *Jones* v. *State*, 97 Ala. 77, 38 Am. St. Rep. 150, 12 So. 274; *Com.* v. *Fitzpatrick*, 121 Pa. 109, 1 L.R.A. 451, 6 Am. St. Rep. 757, 15 Atl.

This general rule is subject to the qualifications, first, that where the discharge is made with the consent or through the fault of the accused, who, although present, does not object to the discharge, a discharge under these conditions is not an acquittal;[2] but it seems that the consent of the accused must be shown by the record,[3] and that silence cannot be construed as a consent;[4] second, where there is a manifest necessity for the discharge of the jury before a verdict, such as the illness or death of the judge or a juror,[5] or expiration of the term[6] or other necessity, a discharge under these conditions does not operate as a bar; but if the discharge is unnecessary or erroneous, or the jury unnecessarily separates, the accused is in jeopardy, and the discharge of the jury in such cases is

466, 7 Am. Crim. Rep. 199. See also notes in 44 L.R.A. 694, and 14 L.R.A.(N.S.) 551.

[2] *Hughes* v. *State,* 35 Ala. 351; *State* v. *Coleman,* 54 S. C. 282, 32 S. E. 406; *Bell* v. *State,* 103 Ga. 397, 68 Am. St. Rep. 102, 30 S. E. 294; *Ex parte Winston,* 52 Ala. 419; *State* v. *Falconer,* 70 Iowa, 416, 30 N. W. 655; *Com.* v. *Sholes,* 95 Mass. 554; *People* v. *Gardner,* 62 Mich. 307, 29 N. W. 19. See *People* v. *White,* 68 Mich. 648, 37 N. W. 34; *State* v. *Davis,* 80 N. C. 384; *Stewart* v. *State,* 15 Ohio St 155; *McFadden* v. *Com.* 23 Pa. 12, 62 Am. Dec. 308; *Oliveros* v. *State,* 120 Ga. 237, 47 S. E. 627, 1 A. & E. Ann. Cas. 114; *Ingram* v. *State,* 124 Ga. 448, 52 S. E. 759. But see *Com.* v. *Roby,* 12 Pick. 496; *Sacra* v. *Com.* 123 Ky. 578, 96 S. W. 858; *State* v. *McKinney,* 76 Kan. 419, 91 Pac. 1068; *Oborn* v. *State,* 143 Wis. 249, 31 L.R.A.(N.S.) 966, 126 N. W. 737.

[3] *United States* v. *Watson,* 3 Ben. 1, Fed. Cas. No. 16,651.

[4] *Ex parte Glenn,* 111 Fed. 257; *Allen* v. *State,* 52 Fla. 1, 120 Am. St. Rep. 188, 41 So. 593, 10 A. & E. Ann. Cas. 1085; *People ex rel. Stabile* v. *Warden,* 139 App. Div. 488, 124 N. Y. Supp. 341.

[5] *Re Scrafford,* 21 Kan. 735; *Nugent* v. *State,* 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; *Lee* v. *State,* 26 Ark. 260, 7 Am. Rep. 611; *People* v. *Ross,* 85 Cal. 383, 24 Pac. 789; *Ellis* v. *State,* 25 Fla. 702, 6 So. 768; *Rulo* v. *State,* 19 Ind. 298; *Doles* v. *State,* 97 Ind. 555; *State* v. *Tatman,* 59 Iowa, 471, 13 N. W. 632. See *State* v. *Reed,* 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174 (where evidence concerning sickness of a juror was not preserved in the record, the appellate court could not determine either that there was not a good cause for the discharge, or that the discharge should operate as an acquittal);

equivalent to an acquittal;[7] third, the discharge of the jury for failure to agree upon a verdict;[8] fourth, the discharge of the jury where the indictment or information is so defective that a judgment of conviction must be set aside;[9] fifth, a dis-

State v. *Ulrich,* 110 Mo. 350, 19 S. W. 656; *State* v. *Emery,* 59 Vt. 84, 7 Atl. 129, 7 Am. Crim. Rep. 202.

[6] *Gardes* v. *United States,* 30 C. C. A. 596, 58 U. S. App. 219, 87 Fed. 172; *United States* v. *Watson,* 3 Ben. 1, Fed. Cas. No. 16,651 (there must be such an affirmative showing of the circumstances creating a plain and manifest necessity for discharge of the jury, or, in the absence thereof, the discharge will be considered equivalent to an acquittal); *Armor* v. *State,* 125 Ga. 3, 53 S. E. 815.

[7] *State* v. *Tyson,* 138 N. C. 627, 50 S. E. 456; *People* v. *Smith,* 172 N. Y. 210, 64 N. E. 814; *DeBerry* v. *State,* 99 Tenn. 207, 42 S. W. 31; *State* v. *Varnado,* 124 La. 711, 50 So. 661; *Lore* v. *State,* 4 Ala. 173; *Com.* v. *Olds,* 5 Litt. (Ky.) 137; *State* v. *Jeffors,* 64 Mo. 376; *State* v. *Tilletson,* 52 N. C. (7 Jones, L.) 114, 75 Am. Dec. 456; *Com.* v. *Thompson,* 1 Va. Cas. 319. But see contra, *Re Spier,* 12 N. C. (1 Dev. L.) 491; *State* v. *McGimsey,* 80 N. C. 377, 30 Am. Rep. 90, and *Wright* v. *State,* 5 Ind. 290, 61 Am. Dec. 90; *Re Ascher,* 130 Mich. 540, 57 L.R.A. 806, 90 N. W. 418; *Davis* v. *State,* 51 Neb. 301, 70 N. W. 984 (insanity of juror).

[8] *State* v. *Leunig,* 42 Ind. 541; *State* v. *Spayde,* 110 Iowa, 726, 80 N. W. 1058; *State* v. *Allen,* 59 Kan. 758, 54 Pac. 1060; *Upchurch* v. *State,* 36 Tex. Crim. Rep. 624, 44 L.R.A. 694, 38 S. W. 206; *People* v. *Parker,* 145 Mich. 488, 108 N. W. 999; *Hopkins* v. *State,* 6 Ga. App. 403, 65 S. E. 57; *Maden* v. *Emmons,* 83 Ind. 331. But see *State* v. *Hall,* 9 N. J. L. 256.

[9] *People* v. *Shotwell,* 27 Cal. 394; *People* v. *Cage,* 48 Cal. 323, 17 Am. Rep. 436; *Re Allison,* 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820; *Thompson* v. *Com.* 15 Ky. L. Rep. 838, 25 S. W. 1059; *State* v. *Washington,* 90 N. C. 664; *State* v. *M'Lemore,* 2 Hill, L. 680; *State* v. *Waterhouse,* Mart. & Y. 278; *Dreyer* v. *People,* 188 Ill. 40, 58 L.R.A. 869, 58 N. E. 620, 59 N. E. 424, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; *United States* v. *Jim Lee,* 123 Fed. 741; *Smith* v. *State,* 40 Fla. 203, 23 So. 854; *State* v. *Hager,* 61 Kan. 504, 48 L.R.A. 254, 59 Pac. 1080, 15 Am. Crim. Rep. 309. But see *State* v. *Klauer,* 70 Kan. 384, 78 Pac. 802 (the discharge for failure to agree should appear of record. Otherwise the legal effect of the discharge of the jury is the acquittal of the accused); *People* v. *Harding,* 53 Mich. 481, 51 Am. Rep. 95, 19 N. W. 155; *State* v. *Keerl,* 33 Mont. 501, 85 Pac. 862, 213 U. S. 135, 53 L. ed. 734, 29 Sup. Ct. Rep. 469; *State* v. *Trueman,* 34 Mont. 249, 85 Pac. 1024; *State* v. *McMillen,* 69

charge upon grounds enumerated in the statute declaring that a discharge for such reasons should not be held as an acquittal.[10]

§ 582c. Acquittal on one of several counts of the indictment.—The law is well settled that a verdict of guilty on one count, with nothing said as to the other counts, is equivalent to a verdict of not guilty as to such other counts.[1] Upon principle, therefore, on one indictment against the accused, there can be but one judgment and sentence, and that at one time, for the offense of which he has been convicted; and a sentence, upon the counts of which he has been convicted by the jury, definitely and conclusively disposes of the whole indictment, and operates as an acquittal upon, or a discontinuance of, any count on which the jury had failed to agree, and makes any further proceeding against him on that count impossible.[2]

Ohio St. 247, 69 N. E. 433; *State* v. *Stephenson,* 54 S. C. 234, 32 S. E. 305. See *State* v. *Lewis,* 31 Wash. 515, 72 Pac. 121; *State* v. *Curry,* 74 Kan. 624, 87 Pac. 745; *State* v. *Huff,* 75 Kan. 585, 12 L.R.A.(N.S.) 1094, 90 Pac. 279; *Johnson* v. *State,* 54 Fla. 45, 44 So. 765; *People* v. *Disperati.* 11 Cal. App. 469, 105 Pac. 617; *People* v. *Ham Tong,* 155 Cal. 579, 24 L.R.A. (N.S.) 481, 132 Am. St. Rep. 110, 102 Pac. 263; *State* v. *Barnes,* 54 Wash. 493, 23 L.R.A.(N.S.) 932, 103 Pac. 792.

[10] See supra, § 579; *State* v. *Ward,* 48 Ark. 36, 3 Am. St. Rep. 213, 2 S. W. 191; *State* v. *Smith,* 88 Iowa, 178, 55 N. W. 198; *People* v. *Larson,* 68 Cal. 18, 8 Pac. 517; *State* v. *Priebnow,* 16 Neb. 131, 19 N. W. 628; *Re Johnson,* 5 N. Y. City Hall Rec. 103; *State* v. *England,* 78 N. C. 552.

[1] *Selvester* v. *United States,* 170 U. S. 265, 42 L. ed. 1031, 18 Sup. Ct. Rep. 580; *Hechter* v. *State,* 94 Md. 429, 56 L.R.A. 457, 50 Atl. 1041; *Dolan* v. *United States,* 69 C. C. A. 274, 133 Fed. 453; *Jolly* v. *United States,* 170 U. S. 402, 42 L. ed. 1085, 18 Sup. Ct. Rep. 624; *Parish* v. *State,* 130 Ala. 92, 30 So. 474; *Smith* v. *State,* 40 Fla. 203, 23 So. 854; *Lamphier* v. *State,* 70 Ind. 317; *State* v. *McAnally,* 105 Mo. App. 333, 79 S. W. 990; *Stuart* v. *Com.* 28 Gratt. 950; *Bigcraft* v. *People,* 30 Colo. 298, 70 Pac. 417; *Beaty* v. *State,* 82 Ind. 228; *Com.* v. *Hackett,* 170 Mass. 194, 48 N. E. 1087; Wharton, Crim. Pl. & Pr. § 740.

[2] *Selvester* v. *United States,* 170

§ 583. Acquittal by reason of variance no bar.—Wherever a description is material, and an acquittal follows from a variance in respect to such description, such acquittal, as we have seen, is not admissible on the trial of a second indictment in which the averments are correctly made; but where the defendant could have been convicted on the first trial on the evidence admissible on the second, proceedings on the second trial are concluded by acquittal or conviction on the first.[1]

The question of former jeopardy is here taken up and discussed as though nothing had been heretofore said about it, but, as a matter of fact, there is a good deal on various phases of the question of former jeopardy in preceding sections. § 576a is the first section entitled Jeopardy but many of the sections not so entitled involve that question. But there are other sections preceding § 583a specifically entitled Jeopardy. §§ 582a, 582b, 582c. The question of effect of discharge of jury referred to in § 583a (Note 6) is treated as § 582b. And the question of jeopardy is again taken up in §§ 582 et seq.

§ 583a. Definition.—"Jeopardy," in its common use, is exposure to death or injury, and is the equivalent of the word "danger:"[1] The word "jeopardy," as used in the Constitutions of the various states, providing that no person shall be twice in jeopardy for the same offense, is used in its defined, technical sense at common law, and is applied only to strictly criminal prosecutions initiated by indictment, information, and otherwise,[2] and it attaches the instant the accused is called up-

U. S. 267, 42 L. ed. 1031, 18 Sup. Ct. Rep. 580 (dissenting opinion of Justice Gray). See *Ballew* v. *United States*, 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263; *Putnam* v. *United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923; *Hechter* v. *State*, 94 Md. 429, 56 L.R.A. 457, 50 Atl. 1041; *Peters* v. *United States*, 36 C. C. A. 105, 94 Fed. 136.

[1] Supra, §§ 91 et seq., 578.

[1] *United States* v. *Mays*, 1 Idaho, 763; *State* v. *Connor*, 5 Coldw. 311; *Ex parte Glenn*, 111 Fed. 257; *United States* v. *Reeves*, 38 Fed. 404.

[2] *Re McClaskey*, 2 Okla. 568, 37 Pac. 854; *State ex rel. Scobey* v.

on to stand on his defense in a criminal prosecution.[3] Hence, neither a mere arraignment,[4] nor the bringing of an indictment,[5] nor the discharge of a jury, with the consent of the accused,[6] nor the illness of the judge or a juryman,[7] nor the inability of the jury to agree,[8] nor the dismissal of a prosecution on an indictment so defective that it could not sustain a judgment on the verdict,[9] nor the setting aside of the judgment on the motion of the accused,[10] is held to be jeopardy.

Stevens, 103 Ind. 55, 53 Am. Rep. 482, 2 N. E. 214; *Smith* v. *Bagwell*, 19 Fla. 117, 45 Am. Rep. 12.

[3] *Com.* v. *Clue*, 3 Rawle, 497; *State* v. *Nash*, 46 La. Ann. 194, 14 So. 607; *State* v. *Emery*, 59 Vt. 84, 7 Atl. 129, 7 Am. Crim. Rep. 202. See *State* v. *Rook*, 61 Kan. 382, 49 L.R.A. 186, 59 Pac. 653.

[4] *United States* v. *Riley*, 5 Blatchf. 204, Fed. Cas. No. 16,164.

[5] *State* v. *Nelson*, 26 Ind. 366; *Klein* v. *State*, 157 Ind. 146, 60 N. E. 1036.

[6] *People* v. *Travers*, 77 Cal. 176, 19 Pac. 268; *Mitchell* v. *State*, 42 Ohio St. 383; *Yerger* v. *State*, — Tex. Crim. Rep. —, 41 S. W. 621. See also notes in 44 L.R.A. 694, and 14 L.R.A.(N.S.) 551.

[7] *Lovett* v. *State*, 33 Fla. 389, 14 So. 837; *People* v. *Hunckeler*, 48 Cal. 331, 1 Am. Crim. Rep. 507. See *People* v. *Higgins*, 59 Cal. 357 (defendant absenting himself to make it impossible for the jury to render verdict); *Mixon* v. *State*, 55 Ala. 129, 28 Am. Rep. 695; *Doles* v. *State*, 97 Ind. 555; *Woodward* v. *State*, 42 Tex. Crim. Rep. 188, 58 S. W. 135 (illness of a child of a juror as creating a necessity).

[8] *Ex parte Maxwell*, 11 Nev. 428; *People* v. *Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272. But see contra *Com.* v. *Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465; *Williams* v. *Com.* 2 Gratt. 567, 44 Am. Dec. 403; *Com.* v. *Fitzpatrick*, 121 Pa. 109, 1 L.R.A. 451, 6 Am. St. Rep. 757, 15 Atl. 466, 7 Am. Crim. Rep. 199.

[9] *White* v. *State*, 49 Ala. 344; *Wilson* v. *Com.* 3 Bush, 105; *State* v. *Holton*, 88 Minn. 171, 92 N. W. 541; *State* v. *Ruffin*, 117 La. 357, 41 So. 647; *Jackson* v. *State*, 37 Tex. Crim. Rep. 128, 38 S. W. 1002; *Quinn* v. *State*, — Tex. Crim. Rep. —, 65 S. W. 376; *Randall* v. *Com.* 24 Gratt. 644; *United States* v. *Jones*, 31 Fed. 725; *Robinson* v. *State*, 52 Ala. 587; *Finley* v. *State*, 61 Ala. 201; *Harp* v. *State*, 59 Ark. 113, 26 S. W. 714; *People* v. *McNealy*, 17 Cal. 332; *People* v. *Schmidt*, 64 Cal. 260, 30 Pac. 814; *People* v. *Clark*, 67 Cal. 99, 7 Pac. 178; *United States* v. *Barber*, 21 D. C. 456; *Black* v. *State*, 36 Ga. 447, 91 Am. Dec. 772; *Conley* v. *State*, 85 Ga. 348, 11 S. E. 659; *Shepler* v. *State*, 114 Ind. 194, 16 N. E. 521; *Com.* v. *Olds*, 5 Litt. (Ky.) 137; *Mount* v. *Com.* 2 Duv. 93; *State* v. *Williams*,

Therefore, from the above decisions it is clear that the moment that an accused is placed on trial on his plea, before a jury duly impaneled and sworn in a competent tribunal, jeopardy at once attaches, and, except for some overwhelming emergency that interferes with the completion of the trial, it is such a jeopardy as can be successfully interposed on any other trial for the same offense.[11]

§ 583b. Essentials to sustain the plea.—To sustain a plea of former jeopardy, it must appear: first, that there was a former prosecution in the same state for the same offense;[1] second, that some person was in jeopardy on the first prosecu-

5 Md. 82; *Kearney* v. *State*, 48 Md. 16; *Com.* v. *Curtis*, Thatcher, Crim. Cas. 202; *State* v. *McGraw*, Walk. (Miss.) 208; *Kohlheimer* v. *State*, 39 Miss. 548, 77 Am. Dec. 689; *Munford* v. *State*, 39 Miss. 558; *State ex rel. Graves* v. *Primm*, 61 Mo. 166; *People* v. *Barrett*, 1 Johns. 66; *Com.* v. *Zepp*, 3 Clark (Pa.) 311; *Com.* v. *Bass*, 3 Lanc. L. Rev. 278; *Simco* v. *State*, 9 Tex. Crim. Rep. 338; *Timon* v. *State*, 34 Tex. Crim. Rep. 363, 30 S. W. 808; *Sims* v. *State*, 146 Ala. 109, 41 So. 413; *Jackson* v. *State*, 4 Kan. 150; *State* v. *Manning*, 168 Mo. 418, 68 S. W. 341; *Barber* v. *State*, 151 Ala. 56, 43 So. 808; *Roberts* v. *State*, 82 Neb. 651, 118 N. W. 574; *State* v. *Keating*, 223 Mo. 86, 122 S. W. 699; *People* v. *Rosenthal*, 197 N. Y. 394, — L.R.A.(N.S.) —, 90 N. E. 991. See *State* v. *Ellsworth*, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; *Scott* v. *State*, 110 Ala. 48, 20 So. 468 (dismissal, by reason of a mistake as to which of several cases against accused was being tried, held no jeopardy).

[10] *State* v. *Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *People* v. *Travers*, 77 Cal. 176, 19 Pac. 268.

[11] 1 Chitty, Crim. L. 452; *Rex* v. *Clark*, 1 Brod. & B. 473; 2 Hawk. P. C. chap. 36; *Reg.* v. *Drury*, 18 L. J. Mag. Cas. N. S. 189. 3 Car. & K. 193, 3 Cox, C. C. 546; *United States* v. *Aurandt*, 15 N. M. 292, 27 L.R.A.(N.S.) 1181, 107 Pac. 1064.

[1] *Reg.* v. *Bird*, 5 Cox, C. C. 20, Temple & M. 437, 2 Den. C. C. 94, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193; *State* v. *Waterman*, 87 Iowa, 255, 54 N. W. 359; *Com.* v. *Roby*, 12 Pick. 496; *O'Connor* v. *State*, 28 Tex. App. 288, 13 S. W. 14; *Harrison* v. *State*, 36 Ala. 248; *Steinkuhler* v. *State*, 77 Neb. 323, 109 N. W. 395; *Peterson* v. *State*, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306; *State* v. *Hankins*, 136 N. C. 621, 48 S. E. 593. See *Feagin* v. *State*, 139 Ala. 107, 36 So. 18; *Hall* v. *State*, — Tex. Crim. Rep. —, 86 S. W. 765.

tion; third, that the parties are identical in the two prosecutions;[2] fourth, that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar.[3] Proof of these facts must be affirmatively shown by the accused, to show former jeopardy;[4] and where

[2] *Emerson* v. *State*, 43 Ark. 372; *Peachee* v. *State*, 63 Ind. 399. See *Com.* v. *Roby*, 12 Pick. 496; *Decker* v. *State*, — Tex. Crim. Rep. —, 124 S. W. 912.

[3] *Reg.* v. *Bird*, 5 Cox, C. C. 11; *Reg.* v. *Bird*, 5 Cox, C. C. 20, Temple & M. 437, 2 Den. C. C. 94, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193; *Faulk* v. *State*, 52 Ala. 415; *Emerson* v. *State*, 43 Ark. 372; *Daniels* v. *State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Jenkins* v. *State*, 78 Ind. 133; *State* v. *Waterman*, 87 Iowa, 255, 54 N. W. 359; *Vowells* v. *Com.* 83 Ky. 193; *Rocco* v. *State*, 37 Miss. 357; *State* v. *Andrews*, 27 Mo. 267; *State* v. *Wister*, 62 Mo. 592; *People* v. *Cramer*, 5 Park. Crim. Rep. 171; *Price* v. *United States*, 15 L.R.A.(N.S.) 1272, 85 C. C. A. 247, 156 Fed. 950, 13 A. & E. Ann. Cas. 483; *State* v. *Day*, 5 Penn. (Del.) 101, 58 Atl. 946; *Fews* v. *State*, 1 Ga. App. 122, 58 S. E. 64; *State* v. *Gapen*, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; *State* v. *Reed*, 168 Ind. 588, 81 N. E. 571; *Tudor* v. *Com.* 134 Ky. 186, 119 S. W. 816; *State* v. *Hill*, 122 La. 711, 48 So. 160; *Watson* v. *State*, 105 Md. 650, 66 Atl. 635; *Warren* v. *State*, 79 Neb. 526, 113 N. W. 143; *State* v. *Rosa*, 72 N. J. L. 462, 62 Atl. 695 (same act); *State* v. *Hankins*, 136 N. C. 621, 48 S. E. 593; *State* v. *Virgo*, 14 N. D. 293, 103 N. W. 610; *Wallace* v. *State*, 57 Tex. Crim. Rep. 354, 123 S. W. 135; *Kellett* v. *State*, 51 Tex. Crim. Rep. 641, 103 S. W. 882; *Clement* v. *State*, — Tex. Crim. Rep. —, 86 S. W. 1016.

[4] *Rex* v. *Parry*, 7 Car. & P. 836; *Reg.* v. *Bird*, 5 Cox, C. C. 11; *Reg.* v. *Bird*, 5 Cox, C. C. 20, Temple & M. 437, 2 Den. C. C. 94, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193; *Oakley* v. *State*, 135 Ala. 29, 33 So. 693; *Emerson* v. *State*, 43 Ark. 372, *Cooper* v. *State*, 47 Ind. 61; *Vowells* v. *Com.* 83 Ky. 193; *Chesapeake & O. R. Co.* v. *Com.* 88 Ky. 368, 11 S. W. 87; *Com.* v. *Daley*, 4 Gray, 209; *Com.* v. *Wermouth*, 174 Mass. 74, 54 N. E. 352; *Rocco* v. *State*, 37 Miss. 357; *State* v. *Andrews*, 27 Mo. 267; Cobbey's Anno. Stat. (Neb.) 1903, § 2583; *State* v. *Ackerman*, 64 N. J. L. 99, 45 Atl. 27; *People* v. *Cramer*, 5 Park. Crim. Rep. 171; *State* v. *Ellsworth*, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; *Willis* v. *State*, 24 Tex. App. 586, 6 S. W. 857; *Barber* v. *State*, 151 Ala. 56, 43 So. 808; *Storm* v. *Territory*, 12 Ariz. 109, 99 Pac. 275; *Grayson* v. *State*, 92 Ark. 413, 123 S. W. 388, 19 A. & E. Ann. Cas. 929; *Mance* v. *State*, 5 Ga. App. 229, 62 S. E. 1053; *State* v. *Polk*, 144 Mo. App. 326, 127 S. W. 933; *Territory* v. *West*, 14 N. M. 546, 99 Pac. 343; *State* v. *White*, 146 N. C.

rebutted by the prosecution, an accused must establish his former jeopardy by a preponderance of evidence.[5] Where the prima facie showing is not rebutted, the presumption of former jeopardy becomes conclusive.[6] Where the record of the former prosecution exists, production of it, either by the original or a certified copy, is the proper evidence to sustain the plea;[7] and where the plea is interposed in the same cause and in the same court, the judge will take judicial notice of such record.[8] Where such record cannot be produced, the former

608, 60 S. E. 505; *Kilcoyne* v. *State*, — Tex. Crim. Rep. —, 92 S. W. 36; *Benton* v. *State*, 52 Tex. Crim. Rep. 422, 107 S. W. 837; *Clement* v. *State*, — Tex. Crim. Rep. —, 86 S. W. 1016; *State* v. *Williams*, 43 Wash. 505, 86 Pac. 847; *Dockstader* v. *People*, 43 Colo. 437, 97 Pac. 254.

[5] *State* v. *Ackerman*, 64 N. J. L. 99, 45 Atl. 27; *Willis* v. *State*, 24 Tex. App. 586, 6 S. W. 857; *Davidson* v. *State*, 40 Tex. Crim. Rep. 285, 49 S. W. 372, 50 S. W. 365; *State* v. *Scott*, 1 Kan. App. 748, 42 Pac. 264; *State* v. *Day*, 5 Penn. (Del.) 101, 58 Atl. 946. But compare *Walker* v. *State*, — Tex. Crim. Rep. —, 97 S. W. 1043; *Benton* v. *State*, 52 Tex. Crim. Rep. 422, 107 S. W. 837; *State* v. *Bevill*, 79 Kan. 524, 131 Am. St. Rep. 345, 100 Pac. 476, 17 A. & E. Ann. Cas. 753; *Dockstader* v. *People*, 43 Colo. 437, 97 Pac. 254.

[6] *State* v. *Nunnelly*, 43 Ark. 68.

[7] *Rex* v. *Bowman*, 6 Car. & P. 101. Contra, *Rex* v. *Parry*, 7 Car. & P. 836; *Moore* v. *State*, 51 Ark. 130, 10 S. W. 22; *State* v. *O'Connor*, 4 Ind. 299; *Marshall* v. *State*, 8 Ind. 498 (where transcript was used); *Cooper* v. *State*, 47 Ind. 61; *Farley* v. *State*, 57 Ind. 331; *Wilkinson* v. *State*, 59 Ind. 416, 26 Am. Rep. 84, 2 Am. Crim. Rep. 596; *Walter* v. *State*, 105 Ind. 589, 5 N. E. 735. Compare *Dunn* v. *State*, 70 Ind. 47; *State ex rel. Voorhies* v. *Edwards*, 42 La. Ann. 414, 7 So. 678; *Rocco* v. *State*, 37 Miss. 357; *Brown* v. *State*, 72 Miss. 95, 16 So. 202; *State* v. *Edwards*, 19 Mo. 674; *State* v. *Andrews*, 27 Mo. 267; *State* v. *Orr*, 64 Mo. 339; Cobbey's Anno. Stat. (Neb.) 1903, § 2583; *State* v. *Ackerman*, 64 N. J. L. 99, 45 Atl. 27; *People* v. *Benjamin*, 2 Park. Crim. Rep. 201; *Robbins* v. *Budd*, 2 Ohio, 16; *Jacobs* v. *State*, 4 Lea, 196; *State* v. *Ainsworth*, 11 Vt. 91; *State* v. *Hudkins*, 35 W. Va. 247, 13 S. E. 367; *State* v. *Wells*, 69 Kan. 792, 77 Pac. 547; *State* v. *Ireland*, 89 Miss. 763, 42 So. 797; *Benson* v. *State*, 53 Tex. Crim. Rep. 254, 109 S. W. 166; *Zinn* v. *State*, — Tex. Crim. Rep. —, 117 S. W. 136.

[8] *State* v. *Bowen*, 16 Kan. 475; *George* v. *State*, 59 Neb. 163, 80 N. W. 486; *McNish* v. *State*, 47 Fla. 69, 36 So. 176. See *Ex parte Vickery*, 51 Fla. 141, 40 So. 77; *State* v. *White*, 71 Kan. 356, 80 Pac. 589, 6 A. & E. Ann. Cas. 132; *Horner* v.

jeopardy can be established by other evidence.[9] Any person present at the former trial may testify as to the identity of the parties, the offense, and what occurred at the trial.[10] Where the record of the former prosecution is produced, the question of former jeopardy is decided by the judge,[11] but where extrinsic evidence is resorted to, the question of former jeopardy must be determined by the jury.[12]

State, 8 Ohio C. C. N. S. 441; *Riggs* v. *State*, — Tex. Crim. Rep. —, 96 S. W. 25.

[9] See *Walter* v. *State*, 105 Ind. 589, 5 N. E. 735. See *State* v. *Neagle*, 65 Me. 468; *People* v. *Benjamin*, 2 Park. Crim. Rep. 201; *Robbins* v. *Budd*, 2 Ohio, 16.

[10] *Dunn* v. *State*, 70 Ind. 47; *State* v. *Maxwell*, 51 Iowa, 314, 1 N. W. 666; *State* v. *Waterman*, 87 Iowa, 255, 54 N. W. 359; *Page* v. *Com.* 27 Gratt. 954; *Reg.* v. *Bird*, 5 Cox, C. C. 20, Temple & M. 437, 2 Den. C. C. 94, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193.

[11] *Reg.* v. *Bird*, 5 Cox, C. C. 20, Temple & M. 437, 2 Den. C. C. 94, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193; *State* v. *Bowen*, 16 Kan. 475; *Brady* v. *Com.* 1 Bibb, 517. See *State* v. *Williams*, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; *State* v. *Ellsworth*, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; *Hill* v. *State*, 2 Yerg. 248; *Hite* v. *State*, 9 Yerg. 357; *Slaughter* v. *State*, 6 Humph. 410; *Lanphere* v. *State*, 114 Wis. 193, 89 N. W. 128; *State* v. *Bladgett*, 143 Iowa, 578, 121 N. W. 685; *State* v. *Foley*, 114 La. 412, 38 So. 402; *Watson* v. *State*, 105 Md. 650, 66 Atl. 635; *State* v. *Potter*, 125 Mo. App. 465, 102 S. W. 668; *State* v. *Rosa*, 72 N. J. L. 462, 62 Atl. 696; *Territory* v. *West*, 14 N. M. 546, 99 Pac. 343; *Horner* v. *State*, 8 Ohio C. C. N. S. 441, 28 Ohio C. C. 568; *Morris* v. *State*, 1 Okla. Crim. Rep. 617, 99 Pac. 760, 101 Pac. 111; *State* v. *Dewees*, 76 S. C. 72, 56 S. E. 674, 11 A. & E. Ann. Cas. 991; *McGinnis* v. *State*, 17 Wyo. 106, 96 Pac. 525.

[12] *Rex* v. *Parry*, 7 Car. & P. 836; *Reg.* v. *Bird*, 5 Cox, C. C. 20, Temple & M. 437, 2 Den. C. C. 94, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193; *People* v. *Hamberg*, 84 Cal. 468, 24 Pac. 298; *Kinkle* v. *People*, 27 Colo. 459, 62 Pac. 197; *Daniels* v. *State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Willard* v. *State*, 4 Ind. 407; *Cooper* v. *State*, 47 Ind. 61; *Dunn* v. *State*, 70 Ind. 47; *Chesapeake & O. R. Co.* v. *Com.* 88 Ky. 368, 11 S. W. 87; *Raubold* v. *Com.* 111 Ky. 433, 63 S. W. 781; *State ex rel. Voorhies* v. *Edwards*, 42 La. Ann. 414, 7 So. 678; *State* v. *Williams*, 45 La. Ann. 936, 12 So. 932; *Helm* v. *State*, 67 Miss. 562, 7 So. 487; *State* v. *Huffman*, 136 Mo. 58, 37 S. W. 797; *State* v. *Hatcher*, 136 Mo. 641, 38 S. W. 719; *State* v. *Wiseback*, 139 Mo. 214, 40 S. W. 946; *State* v. *Williams*, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; *State* v. *Laughlin*, 168 Mo. 415, 68 S. W. 340; *Arnold* v. *State*, 38 Neb.

§ 583c. In homicide; general rule.—The rule incorporated in American jurisprudence is that a person charged with homicide in any degree might be convicted, in a proper case, of any other degree thereof included in the degree charged, whether it was a felony or a misdemeanor. Thus, a charge of murder in the first degree includes, and will support, a conviction for murder in any of its degrees and a conviction for manslaughter in any of its degrees, except, of course, where the law provides that under a felony charge there cannot be conviction of a misdemeanor.

The minor offense for which a conviction may be had, on an indictment for the major offense, must necessarily be included in the major offense, as arising out of the same physical act; or the indictment must contain such essential averments as to charge the minor offense as included in the major, so that a verdict of acquittal or conviction may include both degrees.

There is no dissent from this rule, although it is expressed in various phrasings by different courts. Hence the principle of former jeopardy deduced is, that when a person is tried for the major offense, but convicted of a necessarily included minor offense, the conviction operates as an acquittal of all grades of offenses higher than the one of which he was convicted, and he cannot be again tried for any of the higher grades.[1]

752, 57 N. W. 378; *State* v. *Johnson*, 11 Nev. 273; *State* v. *Ackerman*, 64 N. J. L. 99, 45 Atl. 27; *Grant* v. *People*, 4 Park. Crim. Rep. 527; *Miller* v. *State*, 3 Ohio St. 476; *Hite* v. *State*, 9 Yerg. 357; *Troy* v. *State*, 10 Tex. App. 319; *Grisham* v. *State*, 19 Tex. App. 504; *Munch* v. *State*, 25 Tex. App. 30, 7 S. W. 341; *McCullough* v. *State*, — Tex. Crim. Rep. —, 34 S. W. 753; *Woodward* v. *State*, 42 Tex. Crim. Rep. 188, 58 S. W. 135; *Scott* v. *State*, — Tex. Crim. Rep. —, 68 S. W. 680; *Cook* v. *State*, 43 Tex. Crim. Rep. 182, 96 Am. St. Rep. 854, 63 S. W. 872; *People* v. *Kerm*, 8 Utah, 268, 30 Pac. 988; *State* v. *Day*, 5 Penn. (Del.) 101, 58 Atl. 946; *State* v. *Irwin*, 17 S. D. 380, 97 N. W. 7. Contra, *Storm* v. *Territory*, 12 Ariz. 109, 99 Pac. 275; *Dockstader* v. *People*, 43 Colo. 437, 97 Pac. 254.

[1] Post, § 584.

§ 583d. In homicide; conclusiveness of acquittal or conviction on reversal of judgment.—The authorities are all in accord on the general rule stated, but the divergence of opinion is noted upon the various constructions placed by the various courts upon the conclusiveness of the judgment of acquittal or conviction, depending, of course, upon the construction given to the varying statutory and constitutional provisions in which former jeopardy is expressed. Under the common-law procedure in criminal cases, no difficulty is experienced in giving the better and the broader construction as to former jeopardy.

But in many states, civil and criminal procedure is regulated by Code provisions, and the granting of a new trial under such Codes practically nullifies the first proceedings. Again, many of the constitutional provisions defining former jeopardy provide that, where the judgment of conviction is reversed, the accused shall not be deemed to have been in jeopardy.

In the construction of these provisions courts are in direct conflict.

The greater weight of authority, based on the more logical construction, holds to the general rule that a verdict convicting of the minor offense, necessarily included in the major charge, is an acquittal of any higher degree, and that, on a retrial or reversal of the judgment, the accused cannot again be tried for a degree higher than that of which he was first convicted. These authorities hold that the judgment set aside, or appealed from and reversed, is conclusive on every degree, and, on reversal, no higher can be tried than the degree appealed from.[1]

[1] United States.—*United States* v. *Houston*, 4 Cranch, C. C. 261, Fed. Cas. No. 15,398; *Re Bennett*, 84 Fed. 324.

As to right to retry on higher charge after setting aside verdict for lower charge, see notes in 5 L.R.A.(N.S.) 571, and 22 L.R.A. (N.S.) 959.

Alabama.—*Lewis* v. *State*, 51 Ala. 1; *Sylvester* v. *State*, 72 Ala. 201; *Berry* v. *State*, 65 Ala. 117; *State*

But there is a very respectable line of authorities holding that the setting aside of, or the reversal of, the judgment,

v. *Standifer*, 5 Port. (Ala.) 523; *Fields* v. *State*, 52 Ala. 348; *Bell* v. *State*, 48 Ala. 685, 17 Am. Rep. 40.

Arkansas.—*Johnson* v. *State*, 29 Ark. 31, 21 Am. Rep. 154, 2 Am. Crim. Rep. 430; *Allen* v. *State*, 37 Ark. 433.

California.—*People* v. *Gilmore*, 4 Cal. 376, 60 Am. Dec. 620; *People* v. *McFarlane*, 138 Cal. 481, 61 L.R.A. 245, 71 Pac. 568, 72 Pac. 48; *People* v. *Huntington*, 8 Cal. App. 612, 97 Pac. 760; *People* v. *Gordon*, 99 Cal. 227, 33 Pac. 901; *People* v. *Muhlner*, 115 Cal. 303, 47 Pac. 128.

Colorado.—*Carson* v. *People*, 4 Colo. App. 463, 36 Pac. 551.

England.—*Rex* v. *Jennings*, Russ. & R. C. C. 388.

Florida.—*Golding* v. *State*, 31 Fla. 262, 12 So. 525; *Ex parte Vickery*, 51 Fla. 141, 40 So. 77; *West* v. *State*, 55 Fla. 200, 46 So. 93; *Potsdamere* v. *State*, 17 Fla. 897; *Johnson* v. *State*, 27 Fla. 245, 9 So. 208.

Georgia.—*Jordan* v. *State*, 22 Ga. 545.

Illinois.—*Brennan* v. *People*, 15 Ill. 511; *Barnett* v. *People*, 54 Ill. 325; *Sipple* v. *People*, 10 Ill. App. 144; *People* v. *McGinnis*, 234 Ill. 68, 123 Am. St. Rep. 73, 84 N. E. 687.

Indiana.—*State* v. *Morrison*, 165 Ind. 461, 75 N. E. 968; *Clem* v. *State*, 42 Ind. 420, 13 Am. Rep. 369.

Iowa.—*State* v. *Walker*, 133 Iowa, 489, 110 N. W. 925; *State* v. *Tweedy*, 11 Iowa, 350; *State* v. *Helm*, 92 Iowa, 540, 61 N. W. 246; *State* v. *Smith*, 132 Iowa, 645, 109 N. W. 115.

Kentucky.—*Conner* v. *Com.* 13 Bush, 714; *Williams* v. *Com.* 102 Ky. 381, 43 S. W. 455.

Louisiana.—*State* v. *Dennison*, 31 La. Ann. 847; *State* v. *Victor*, 36 La. Ann. 978; *State* v. *Hornsby*, 8 Roh. (La.) 583, 41 Am. Dec. 314; *State* v. *Joseph*, 40 La. Ann. 5, 3 So. 405.

See *State* v. *Byrd*, 31 La. Ann. 419.

Massachusetts.—*Com.* v. *Roby*, 12 Pick. 503; *Com.* v. *Herty*, 109 Mass. 348.

Michigan.—*People* v. *Knapp*, 26 Mich. 112; *People* v. *Comstock*, 55 Mich. 405, 21 N. W. 384; *People* v. *Farrell*, 146 Mich. 264, 109 N. W. 440; *People* v. *McArron*, 121 Mich. 1, 79 N. W. 944.

Minnesota.—*State* v. *Lessing*, 16 Minn. 75, Gil. 64.

Mississippi.—*Morris* v. *State*, 8 Smedes & M. 762; *Hart* v. *State*, 25 Miss. 378, 59 Am. Dec. 225; *Powers* v. *State*, 83 Miss. 691, 36 So. 6; *Rolls* v. *State*, 52 Miss. 391; *Mixon* v. *State*, 55 Miss. 525.

Missouri.—(Prior to alteration of Constitution) *State* v. *Kattlemann*, 35 Mo. 105; *State* v. *Brannon*, 55 Mo. 63, 17 Am. Rep. 643; *State* v. *Smith*, 53 Mo. 139; *State* v. *Ross*, 29 Mo. 32.

New Jersey.—*State* v. *Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490.

clears the entire record, and places the accused in the same position as at the first trial, and, though convicted of a minor offense, he can be retried for the highest degree of the major offense.[2] The latter construction has recently received con-

New York.—(Prior to Code provision) *People* v. *Dowling,* 84 N. Y. 478; *People* v. *Cignarale,* 110 N. Y. 23, 30, 17 N. E. 135; *People* v. *Cox,* 67 App. Div. 344, 73 N. Y. Supp. 774.

North Dakota.—*State* v. *Barry,* 14 N. D. 316, 103 N. W. 637.

Oregon.—*State* v. *Steeves,* 29 Or. 85, 43 Pac. 947.

Pennsylvania.—*Com.* v. *Neeley,* 2 Chester Co. Rep. 191; *Com.* v. *Winters,* 1 Pa. Co. Ct. 537.

See *Com* v. *Hiland,* 1 Pa. Co. Ct. 532; *Hilands* v. *Com.* 114 Pa. 372, 6 Atl. 267; *Com.* v. *Deitrick,* 221 Pa. 7, 70 Atl. 275.

Tennessee.—*Campbell* v. *State,* 9 Yerg. 333, 30 Am. Dec. 417; *Slaughter* v. *State,* 6 Humph. 410, 415.

See *Greer* v. *State,* 3 Baxt. 321; *Lang* v. *State,* 16 Lea, 433, 1 S. W. 318.

Texas.—*Thomas* v. *State,* 40 Tex. 39; *Flynn* v. *State,* 43 Tex. Crim. Rep. 407, 66 S. W. 551; *Ex parte Moore,* 46 Tex. Crim. Rep. 417, 80 S. W. 620; *Jackson* v. *State,* 55 Tex. Crim. Rep. 79, 131 Am. St. Rep. 792, 115 S. W. 262; *State* v. *Jones,* 13 Tex. 168, 62 Am. Dec. 550.

Virginia.—(Before statute) *Briggs* v. *Com.* 82 Va. 554; *Stuart* v. *Com.* 28 Gratt. 950.

West Virginia.— *State* v. *Cross,* 44 W. Va. 315, 29 S. E. 527.

Washington.—*State* v. *Murphy,* 13 Wash. 229, 43 Pac. 44.

Wisconsin.—*State* v. *Martin,* 30 Wis. 216, 11 Am. Rep. 567; *State* v. *Belden,* 33 Wis. 120, 14 Am. Rep. 748; *Rasmussen* v. *State,* 63 Wis. 1, 22 N. W. 835 (exception as to misdemeanors).

Alaska.—*United States* v. *Owens,* 2 Alaska, 480.

[2] United States.—*Trono* v. *United States,* 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773.

Georgia.—*Waller* v. *State,* 104 Ga. 505, 30 S. E. 835; *Brantley* v. *State,* 132 Ga. 573, 22 L.R.A.(N.S.) 959, 131 Am. St. Rep. 218, 64 S. E. 676, 16 A. & E. Ann. Cas. 1203, 217 U. S. 284, 54 L. ed. 768, 30 Sup. Ct. Rep. 514; *Perdue* v. *State,* 134 Ga. 300, 67 S. E. 810.

Indiana.—*Ex parte Bradley,* 48 Ind. 548.

Kansas.—*State* v. *Morrison,* 67 Kan. 144, 72 Pac. 554.

Kentucky.—(Under Code) *Com.* v. *Arnold,* 83 Ky. 1, 4 Am. St. Rep. 114, 7 Am. Crim. Rep. 210.

Missouri.—(Under New Constitution) *State* v. *Simms,* 71 Mo. 538; *State* v. *Kring,* 11 Mo. App. 92; *State* v. *Anderson,* 89 Mo. 312, 1 S. W. 135; *State* v. *Goddard,* 162 Mo. 198, 62 S. W. 697; *State* v. *Billings,* 140 Mo. 193, 41 S. W. 778.

siderable support from the case of Trono v. United States.[3]

Nebraska.—*Bohanan* v. *State,* 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390, 6 Am. Crim. Rep. 487.

Nevada.—*Re Somers,* 31 Nev. 531, 24 L.R.A.(N.S.) 504, 135 Am. St. Rep. 700, 103 Pac. 1073.

New York.—*People* v. *Wheeler,* 79 App. Div. 396, 79 N. Y. Supp. 454.

North Carolina.—*State* v. *Groves,* 121 N. C. 563, 28 S. E. 262; *State* v. *Matthews,* 142 N. C. 621, 55 S. E. 342.

Ohio.—*State* v. *Behimer,* 20 Ohio St. 572.

Oklahoma.—*Turner* v. *Territory,* 15 Okla. 557, 82 Pac. 650.

South Carolina.—*State* v. *Gillis,* 73 S. C. 318, 5 L.R.A.(N.S.) 571, 114 Am. St. Rep. 95, 53 S. E. 487, 6 A. & E. Ann. Cas. 993.

Utah.—*State* v. *Kessler,* 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293.

Vermont.—*State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238.

Virginia.—*Forbes* v. *Com.* 90 Va. 550, 19 S. E. 164; *Benton* v. *Com.* 91 Va. 782, 21 S. E. 495; *Hawley* v. *Com.* 75 Va. 847.

[3] *Trono* v. *United States,* 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773; *Pendleton* v. *United States,* 216 U. S. 305, 54 L. ed. 491, 30 Sup. Ct. Rep. 315.

In the *Trono Case,* Justice Harlan, Justice McKenna, Justice White, and the Chief Justice dissented. The case has been subjected to serious criticism, but represents the position taken by the Supreme Court of the United States upon the effect of a reversal of a judgment of conviction, holding that it practically clears the record.

In opposition to this view, in the case of *People* v. *Gordon,* 99 Cal. 227, 33 Pac. 901, in disposing of the view that the granting of a new trial, upon the application of the accused, places him in the same position in a criminal case as though no trial had been had, the court says: "But if it was meant by the section to go further, and provide that when the indictment charges two or more offenses, and on the first trial the accused is acquitted of one of the offenses charged, and convicted of another, the granting of a new trial of the offense of which he was convicted places him in the same position as to the offense of which he was acquitted as if no trial had been had, and thus subjects him to be tried again for the last-named offense,—then the section is clearly in conflict with the provision of the Constitution above quoted, and for that reason is void."

The position taken by the Supreme court of California in the case of *People* v. *Gordon,* supra, is impregnable. The legislative power could not have intended, in providing for new trials in criminal cases, to have contemplated a substantive change in the Constitution, by making the availability of the

§ 583e. Inclusion of degrees in homicide.—Under the doctrine accepted as a part of our jurisprudence, that the highest offense included all of the lesser degrees, so long as the judgment of conviction of any degree remains final, it can be plead in bar of a subsequent prosecution for the same offense in any degree. This is necessarily based upon the fact that, on a prosecution for homicide in the first degree, the accused can be convicted of the first or any lesser included degree, because all the issues as to all the degrees are determined in the one prosecution.[1] Hence, on a charge of homicide, there

constitutional safeguard against former jeopardy depend upon the success of the accused in being granted or refused a new trial, or in obtaining a reversal of the judgment of conviction.

The substantive reasons urged, as giving conclusive character to judgments in civil cases, are that no man shall be twice vexed for the same cause, and that it is to the interest of the public that there shall be an end to litigation.

If these reasons possess a molding and controlling force in civil proceedings, there exists the greatest necessity for the strictest application of them to criminal proceedings. Surely, no man should be twice placed in danger of his life and liberty, and no community should be twice disturbed by the enforcement of its penal laws for the same offense, upon the same person. Yet this is the effect, and those states that hold that a new trial, or the reversal of the judgment by the appellate court, opens the entire proceeding for a re-examination and a retrial, seem under an obsession to the Code procedure, as governing all issues, both civil and criminal, that could never have been within the contemplation of the reformed procedure. But where the judgment appealed from is considered as an acquittal, and presenting the single issue of a legal conviction of the degree imposed, the matter is simplified, and the constitutional safeguard upheld without subjecting the accused to a gaming chance, or inviting him to avail himself of appellate procedure at his own peril. See *United States* v. *Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301.

[1] *Watson* v. *State*, 116 Ga. 607, 21 L.R.A.(N.S.) 1, 43 S. E. 32; *State* v. *Phinney*, 13 Idaho, 307, 12 L.R.A. (N.S.) 935, 89 Pac. 634, 12 A. & E. Ann. Cas. 1079; *People* v. *Dolan*, 9 Cal. 576; *Thomas* v. *State*, 121 Ga. 331, 49 S. E. 273; *Goff* v. *Prime*, 26 Ind. 196; *People* v. *Connors*, 13 Misc. 582, 35 N. Y. Supp. 472; *State* v. *Howard*, 33 Wash. 250, 74 Pac. 382; *State* v. *Huber*, 8 Kan. 447; *Smith* v. *State*, 142 Ala. 14, 39 So. 329; *Green* v. *State*, 43 Fla. 556, 30 So. 656; *Lewis* v. *State*, 42 Fla. 253, 28 So. 397; *State* v. *Brinte*, 4

may be a conviction of murder in the second degree,[2] or of

Penn. (Del.) 551, 58 Atl. 258; *State* v. *Buchanan*, Houst. Crim. Rep. (Del.) 79; *State* v. *Honey*, — Del. —, 65 Atl. 764; *State* v. *Uzzo*, — Del. —, 65 Atl. 775; *Craft* v. *State*, 3 Kan. 450; *Buckner* v. *Com.* 14 Bush, 601; *Com.* v. *Couch*, 32 Ky. L. Rep. 638, 16 L.R.A.(N.S.) 327, 106 S. W. 830; *State* v. *Grant*, 7 Or. 414; *McPherson* v. *State*, 29 Ark. 225; *Garvey's Case*, 7 Colo. 384, 49 Am. Rep. 358, 3 Pac. 903, 4 Am. Crim. Rep. 254; *Keefe* v. *People*, 40 N. Y. 348; *Smith* v. *State*, 103 Ala. 4, 15 So. 843, 9 Am. Crim. Rep. 320; *Gregory* v. *State*, 148 Ala. 565, 42 So. 829; *Livingston* v. *Com.* 14 Gratt. 592; *Burge* v. *United States*, 26 App. D. C. 524; *State* v. *Moore*, 129 Iowa, 514, 106 N. W. 16; *United States* v. *Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301.

As to effect of conviction of lower degree in prosecution for homicide, as acquittal of higher degree, see note in 21 L.R.A.(N.S.) 20.

[2] *Potsdamer* v. *State*, 17 Fla. 896; *State* v. *Brinte*, 4 Penn. (Del.) 551, 58 Atl. 258; *State* v. *Huber*, 8 Kan. 447; *Craft* v. *State*, 3 Kan. 450; *Territory* v. *McGinnis*, 10 N. M. 269, 61 Pac. 208; *Giskie* v. *State*, 71 Wis. 612, 38 N. W. 334; *State* v. *Parnell*, 206 Mo. 723, 105 S. W. 742; *Weighorst* v. *State*, 7 Md. 442; *Com.* v. *Herty*, 109 Mass. 348; *State* v. *Feeley*, 194 Mo. 300, 3 L.R.A. (N.S.) 351, 112 Am. St. Rep. 511, 92 S. W. 663; *Keefe* v. *People*, 40 N. Y. 348; *Morrison* v. *State*, 42 Fla. 149, 28 So. 97; *Riptoe* v. *State*, — Tex. Crim. Rep. —, 42 S. W. 381; *State* v. *Matthews*, 142 N. C. 621, 55 S. E. 342; *People* v. *De La Cour Soto*, 63 Cal. 165; *People* v. *Thompson*, 41 N. Y. 1; *Burge* v. *United States*, 26 App. D. C. 524; *People* v. *Doe*, 1 Mich. 451; *State* v. *Schieller*, 130 Mo. 510, 32 S. W. 976; *State* v. *Babbitt*, 215 Mo. 10, 114 S. W. 511; *State* v. *Talmage*, 107 Mo. 543, 17 S. W. 990; *State* v. *Frazier*, 137 Mo. 317, 38 S. W. 913; *State* v. *Moxley*, 115 Mo. 644, 22 S. W. 575.

[3] *Henry* v. *State*, 33 Ala. 389; *Jackson* v. *State*, 77 Ala. 18; *Linnehan* v. *State*, 120 Ala. 293, 25 So. 6; *People* v. *Muhlner*, 115 Cal. 303, 47 Pac. 128; *People* v. *Borrego*, 7 Cal. App. 613, 95 Pac. 381; *Howard* v. *People*, 185 Ill. 552, 57 N. E. 442; *State* v. *Smith*, 132 Iowa, 645, 109 N. W. 115; *State* v. *Moore*, 129 Iowa, 514, 106 N. W. 16; *Plummer* v. *State*, 6 Mo. 231; *Jones* v. *Territory*, 4 Okla. 45, 43 Pac. 1072; *United States* v. *Meagher*, 37 Fed. 875; *United States* v. *Leonard*, 18 Blatchf. 187, 2 Fed. 669; *Mackalley's Case*, 9 Coke, 67b; *Salisbury's Case*, 1 Plowd. 101; *United States* v. *Carr*, 1 Woods, 480, Fed. Cas. No. 14,732; *Craft* v. *State*, 3 Kan. 450; *State* v. *Huber*, 8 Kan. 447; *Smith* v. *State*, 142 Ala. 14, 39 So. 329; *McPherson* v. *State*, 29 Ark. 225; *People* v. *Pearne*, 118 Cal. 554, 50 Pac. 676; *Garvey's Case*, 7 Colo. 384, 49 Am. Rep. 358, 3 Pac. 903, 4 Am. Crim. Rep. 254; *Brown* v. *State*, 31 Fla. 207, 12 So. 640; *Reynolds* v. *State*, 1 Ga. 222; *State*

manslaughter,[3] voluntary [4] or involuntary,[5] or of assault with intent to kill,[6] or of assault and battery,[7] provided, however,

v. *Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014; *Barnett* v. *State*, 100 Ind. 171; *Powers* v. *State*, 87 Ind. 144; *State* v. *Salter*, 48 La. Ann. 197, 19 So. 265; *People* v. *McArron*, 121 Mich. 1, 79 N. W. 944; *King* v. *State*, 5 How. (Miss.) 730; *State* v. *Ludwig*, 70 Mo. 412; *Keefe* v. *People*, 40 N. Y. 348; *White* v. *Territory*, 3 Wash. Terr. 397, 19 Pac. 37; *McCoy* v. *State*, 40 Fla. 494, 24 So. 485; *State* v. *Seaborne*, 8 Rob. (La.) 518; *People* v. *McDonnell*, 92 N. Y. 657; *State* v. *Behimer*, 20 Ohio St. 572; *State* v. *Halliday*, 112 La. 846, 36 So. 753; *Watson* v. *State*, 5 Mo. 497; *State* v. *Gordon*, 3 Iowa, 410; *Roy* v. *State*, 2 Kan. 405; *United States* v. *Densmore*, 12 N. M. 99, 75 Pac. 31; *Re Alcorn*, 7 Idaho, 101, 60 Pac. 561; *Earll* v. *People*, 73 Ill. 329; *Howard* v. *People*, 185 Ill. 552, 57 N. E. 442; *State* v. *Noble*, 1 Ohio Dec. Reprint, 1; *Birch* v. *State*, 1 Ohio Dec. Reprint, 453; *People* v. *Butler*, 3 Park. Crim. Rep. 377; *State* v. *Griffin*, 34 La. Ann. 37; *Packer* v. *People*, 8 Colo. 361, 8 Pac. 564; *Nelson* v. *State*, 10 Humph. 518.

[4] *Linnehan* v. *State*, 120 Ala. 293, 25 So. 6; *Allison* v. *State*, 74 Ark. 444, 86 S. W. 409; *Brown* v. *State*, 31 Fla. 207, 12 So. 640; *Thomas* v. *State*, 121 Ga. 331, 49 S. E. 273; *Powers* v. *State*, 87 Ind. 144; *Com.* v. *Couch*, 32 Ky. L. Rep. 638, 16 L.R.A.(N.S.) 327, 106 S. W. 830; *Buckner* v. *Com.* 14 Bush, 601; *Conner* v. *Com.* 13 Bush, 714; *Slaughter* v. *State*, 6 Humph. 410; *Jones* v. *Territory*, 4 Okla. 45, 43 Pac. 1072; *State* v. *Ludwig*, 70 Mo. 412; *State* v. *Gaffney*, Rice, L. 431; *Henry* v. *State*, 33 Ala. 389, overruling *Bob* v. *State*, 29 Ala. 20; *State* v. *Stephen*, 15 Ala. 534.

[5] *Conner* v. *Com.* 13 Bush, 714; *Buckner* v. *Com.* 14 Bush, 601; *Com.* v. *Couch*, 32 Ky. L. Rep. 638, 16 L.R.A.(N.S.) 327, 106 S. W. 830; *Powers* v. *State*, 87 Ind. 144; *Thomas* v. *State*, 121 Ga. 331, 49 S. E. 273; *Wood* v. *Com.* 9 Ky. L. Rep. 872, 7 S. W. 391; *People* v. *Pearne*, 118 Cal. 154, 50 Pac. 376; *Bush* v. *Com.* 78 Ky. 268; *Bradshaw* v. *State*, — Tex. Crim. Rep. —, 50 S. W. 359; *Thomas* v. *State*, 73 Miss. 46, 19 So. 195; *Lucas* v. *State*, 71 Miss. 471, 14 So. 537; *People* v. *Huntington*, 8 Cal. App. 612, 97 Pac. 760; *Pigg* v. *State*, 145 Ind. 560, 43 N. E. 309; *McNevins* v. *People*, 61 Barb. 307; *Brown* v. *State*, 28 Ga. 199; *Bruner* v. *State*, 58 Ind. 159; *Adams* v. *State*, 65 Ind. 565; *Overby* v. *State*, 115 Ga. 240, 41 S. E. 609; *Com.* v. *Gable*, 7 Serg. & R. 423; *Walters* v. *Com.* 44 Pa. 135; *Hilands* v. *Com.* 114 Pa. 372, 6 Atl. 267, affirming 1 Pa. Co. Ct. 532; *Presley* v. *State*, 30 Tex. 160; *Isham* v. *State*, 38 Ala. 213.

[6] *Letcher* v. *State*, 145 Ala. 669, 39 So. 922; *Thomas* v. *State*, 121 Ga. 331, 49 S. E. 273; *Davis* v. *State*, 45 Ark. 464; *Thomas* v. *State*, 125 Ala. 45, 27 So. 920; *Smith* v. *State*, 126 Ga. 544, 55 S. E. 475; *Peterson* v. *State*, 12 Tex. App.

that the indictment necessarily covers the included degrees in the general charge of the greater, or the averments of the indictment describing the commission of the offense contain al-

650; *Stapp* v. *State*, 3 Tex. App. 138; *State* v. *Parker*, 66 Iowa, 586, 24 N. W. 225, 5 Am. Crim. Rep. 339; *Ex parte Curnow*, 21 Nev. 33, 24 Pac. 430; *Pyke* v. *State*, 47 Fla. 93, 36 So. 577; *Moody* v. *State*, 54 Ga. 660; *People* v. *Sanchez*, 24 Cal. 17; *Napper* v. *State*, 123 Ga. 571, 51 S. E. 592; *Scott* v. *State*, 60 Miss. 268; *People* v. *Huson*, 114 App. Div. 693, 94 N. Y. Supp. 1081.

[7] *Thomas* v. *State*, 121 Ga. 331, 49 S. E. 273; *Com.* v. *Drum*, 19 Pick. 479; *State* v. *Scott*, 24 Vt. 127; *Logan* v. *United States*, 144 U. S. 307, 36 L. ed. 444, 12 Sup. Ct. Rep. 617; *Moody* v. *State*, 54 Ga. 660; *Bush* v. *Com.* 78 Ky. 268; *State* v. *Powell*, 1 Ohio Dec. Reprint, 38; *State* v. *Coleman*, 5 Port. (Ala.) 32; *State* v. *Barrington*, 198 Mo. 23, 95 S. W. 235; *Gillespie* v. *State*, 9 Ind. 380, overruling *State* v. *Kennedy*, 7 Blackf. 233; *Mapula* v. *Territory*, 9 Ariz. 199, 80 Pac. 389; *State* v. *O'Kane*, 23 Kan. 244; *Bean* v. *State*, 25 Tex. App. 346, 8 S. W. 278; *Green* v. *State*, 8 Tex. App. 71; *Lang* v. *State*, 16 Lea, 433, 1 S. W. 318; *Housman* v. *Com.* 128 Ky. 818, 110 S. W. 236; *Reed* v. *State*, 141 Ind. 116, 40 N. E. 525; *Wright* v. *State*, 5 Ind. 527; *Scott* v. *State*, 60 Miss. 268; *People* v. *Connors*, 13 Misc. 582, 35 N. Y. Supp. 472; *People* v. *McDonald*, 159 N. Y. 309, 54 N. E. 46; *Com.* v. *Adams*, 2 Pa. Super. Ct. 46; *Burns* v. *People*, 1 Park. Crim. Rep. 182; *People* v. *Adams*, 52 Mich. 24, 17 N. W. 226; *Baysinger* v. *Territory*, 15 Okla. 386, 82 Pac. 728; *State* v. *Thomas*, 65 N. J. L. 598, 48 Atl. 1007, 13 Am. Crim. Rep. 432, reversing 64 N. J. L. 532, 45 Atl. 913; *State* v. *Scaduto*, 74 N. J. L 289, 65 Atl. 908; *People* v. *Schiavi*, 96 App. Div. 479, 89 N. Y. Supp. 564; *Presley* v. *State*, 30 Tex. 160; *Reg.* v. *Greenwood*, 7 Cox, C. C. 404; *State* v. *Greer*, 11 Wash. 244, 39 Pac. 874; *State* v. *Phinney*, 13 Idaho, 307, 12 L.R.A.(N.S.) 935, 89 Pac. 634, 12 A. & E. Ann. Cas. 1079; *State* v. *Matthews*, 142 N. C. 621, 55 S. E. 342; *Lane* v. *Com.* 59 Pa. 371; *State* v. *Howard*, 33 Wash. 250, 74 Pac. 382; *State* v. *Fleetwood*, — Del. —, 65 Atl. 772; *State* v. *Bobbitt*, 215 Mo. 10, 114 S. W. 511; *People* v. *Huntington*, 138 Cal. 261, 70 Pac. 284; *Morrisett* v. *People*, 21 How. Pr. 203; *State* v. *Bertoch*, 112 Iowa, 195, 83 N. W. 967; *Ex parte Dela*, 25 Nev. 346, 83 Am. St. Rep. 603, 60 Pac. 217, 15 Am. Crim. Rep. 382; *State* v. *Belyea*, 9 N. D. 353, 83 N. W. 1; *People* v. *McDonald*, 49 Hun, 67, 1 N. Y. Supp. 703; *Goff* v. *Prime*, 26 Ind. 196; *Brown* v. *State*, 28 Ga. 199; *State* v. *Ross*, 29 Mo. 32; *Territory* v. *McGinnis*, 10 N. M. 269, 61 Pac. 208; *Jones* v. *State*, 130 Ga. 274, 60 S. E. 840; *State* v. *Burbage*, 51 S. C. 284, 28 S. E. 937; *State* v. *Coleman*, 5 Port. (Ala.) 32; *State* v. *Robinson*, 12 Wash. 491, 41 Pac. 884; *State* v. *Robinson*, 12 Wash. 349, 41 Pac. 51, 902.

legations that are essential to constitute the included degrees;[8] and, under such indictment, the prosecution is entitled to introduce any relevant evidence which would be admissible under an indictment specifically charging the included degrees,[9] and, in submitting a charge of homicide to the jury, the trial court should explain to the jury that it has the right to convict the accused of any of the included degrees of the offense charged, or to acquit, as they may determine upon a full consideration of the evidence.[10]

[8] *Scott* v. *State,* 60 Miss. 268; *Housman* v. *Com.* 128 Ky. 818, 110 S. W. 236; *Buckner* v. *Com.* 14 Bush, 603; supra, § 111, chap. 3; *Conner* v. *Com.* 13 Bush, 722; supra, § 111, chap. 3; *State* v. *Thomas,* 65 N. J. L. 598, 48 Atl. 1007, 13 Am. Crim. Rep. 432, reversing 64 N. J. L. 532, 45 Atl. 913; *Wall* v. *State,* 18 Tex. 683, 70 Am. Dec. 302; *White* v. *State,* 16 Tex. 206; *Com.* v. *Desmarteau,* 16 Gray, 1; *Tenorio* v. *Territory,* 1 N. M. 279; *State* v. *Douglass,* 41 W. Va. 537, 23 S. E. 724; *State* v. *Cole,* 132 N. C. 1069, 44 S. E. 391; *State* v. *Lessing,* 16 Minn. 75, Gil. 64; *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409.

[9] *State* v. *Salter,* 48 La. Ann. 197, 19 So. 265; *Gregory* v. *State,* 148 Ala. 566, 42 So. 829; *Keefe* v. *People,* 40 N. Y. 348; *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409; *State* v. *Mahly,* 68 Mo. 315, 3 Am. Crim. Rep. 183; *State* v. *Stoeckli,* 71 Mo. 559; *Virgil* v. *State,* 63 Miss. 317; *People* v. *Connors,* 13 Misc. 582, 35 N. Y. Supp. 472; *State* v. *Millain,* 3 Nev. 409; *McNevins* v. *People,* 61 Barb. 307; *Russell* v. *State,* 66 Neb. 497, 92 N. W. 751; *People* v. *Muhlner,* 115 Cal. 303, 47 Pac. 128; *State* v. *Phinney,* 13 Idaho, 307, 12 L.R.A. (N.S.) 935, 89 Pac. 634, 12 A. & E. Ann. Cas. 1079; *State* v. *Todd,* 194 Mo. 377, 92 S. W. 674; *People* v. *Borrego,* 7 Cal. App. 613, 95 Pac. 381; *Moore* v. *People,* 26 Colo. 213, 57 Pac. 857; *Brown* v. *State,* 31 Fla. 207, 12 So. 640; *Murphy* v. *People,* 9 Colo. 435, 13 Pac. 528; *People* v. *Huntington,* 8 Cal. App. 612, 97 Pac. 760; *State* v. *West,* 202 Mo. 128, 100 S. W. 478; *State* v. *Schieller,* 130 Mo. 510, 32 S. W. 976; *State* v. *Sebastian,* 215 Mo. 58, 114 S. W. 522; *Stone* v. *State,* 57 Fla. 28, 48 So. 996; *Morrison* v. *State,* 42 Fla. 149, 28 So. 97; *Castlin* v. *State,* — Tex. Crim. Rep. —, 57 S. W. 827; *Taylor* v. *State,* 72 Ark. 613, 82 S. W. 495; *Clemmons* v. *State,* 43 Fla. 200, 30 So. 699; *Fuller* v. *State,* 30 Tex. App. 559, 17 S. W. 1108; *McCoy* v. *State,* 40 Fla. 494, 24 So. 485; *State* v. *Bobbitt,* 215 Mo. 10, 114 S. W. 511; *Casey* v. *State,* 49 Tex. Crim. Rep. 174, 90 S. W. 1018.

[10] *Craft* v. *State,* 3 Kan. 450; *Territory* v. *Gonzales,* 11 N. M. 301, 68 Pac. 925; *State* v. *Todd,* 194 Mo. 377, 92 S. W. 674; *Stone* v. *State,* 57 Fla. 28, 48 So. 996; *State* v. *Tal-*

§ 584. Acquittal of the minor offense as a bar to a subsequent indictment.—Wherever a minor offense is inclosed in a major, then, if the two be contained in the same count, either an acquittal or conviction of the minor is admissible as a bar to a subsequent indictment for the major offense.[1] On an indictment for murder, as we have shown,[2] if the jury convicts of manslaughter this is a virtual acquittal of murder, and the case cannot be retried on an indictment for murder.[3]

mage, 107 Mo. 543, 17 S. W. 990; *State* v. *Sloan,* 47 Mo. 604; *Haddix* v. *State,* 76 Neb. 369, 107 N. W. 781; *State* v. *Babbitt,* 215 Mo. 10, 114 S. W. 511; *People* v. *DeGarmo,* 73 App. Div. 46, 76 N. Y. Supp. 477; *State* v. *Frazier,* 137 Mo. 317, 38 S. W. 913; *State* v. *Parks,* 115 La. 765, 40 So. 39; *State* v. *Underwood,* 35 Wash. 558, 77 Pac. 863; *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409; *Boulden* v. *State,* 102 Ala. 78, 15 So. 341; *Nabors* v. *State,* 120 Ala. 323, 25 So. 529; *State* v. *Hicks,* 113 La. 779, 37 So. 753; *Giskie* v. *State,* 71 Wis. 612, 38 N. W. 334; *Taylor* v. *State,* 72 Ark. 613, 82 S. W. 495; *Pigg* v. *State,* 145 Ind. 560, 43 N. E. 309; *Goodman* v. *State,* 122 Ga. 111, 49 S. E. 922; *McDuffie* v. *State,* 121 Ga. 580, 49 S. E. 708; *Clemons* v. *State,* 48 Fla. 9, 37 So. 647; *Parker* v. *State,* 22 Tex. App. 105, 3 S. W. 100; *State* v. *Tweedy,* 11 Iowa, 350.

[1] *Reg.* v. *Oliver,* 8 Cox, C. C. 384, Bell, C. C. 287, 30 L. J. Mag. Cas. N. S. 12, 6 Jur. N. S. 1214, 3 L. T. N. S. 311, 9 Week. Rep. 60; *Reg.* v. *Yeadon,* 9 Cox, C. C. 91, Leigh & C. C. C. 81, 31 L. J. Mag. Cas. N. S. 70, 7 Jur. N. S. 1128, 5 L. T. N. S. 329, 10 Week. Rep. 64; *Reg.* v. *Bird,* Temple & M. 437, 2 Den. C. C. 94, 5 Cox, C. C. 20, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193, 5 Cox, C. C. 11; *State* v. *Waters,* 39 Me. 54; *State* v. *Dearborn,* 54 Me. 442; *Com.* v. *Griffin,* 21 Pick. 523; *Stewart* v. *State,* 5 Ohio, 242; *State* v. *Wiles,* 26 Minn. 381, 4 N. W. 615, 2 Am. Crim. Rep. 621; s. c. 9 Rep. 472; *Swinney* v. *State,* 8 Smedes & M. 576; *State* v. *Chaffin,* 2 Swan, 493; *Miller* v. *State,* 58 Ga. 200; *State* v. *De Laney,* 28 La. Ann. 434; *Cameron* v. *State,* 13 Ark. 712; *State* v. *Taylor,* 3 Or. 10. See supra, §§ 130, 144; Wharton, Crim. Pl. & Pr. § 465.

[2] Supra, § 583d.

[3] 2 Hale, P. C. 246; 1 Fost. C. L. 329; *Livingston* v. *Com.* 14 Gratt. 592; *Brennan* v. *People,* 15 Ill. 511; *Barnett* v. *People,* 54 Ill. 325; *Jordan* v. *State,* 22 Ga. 545; *Hurt* v. *State,* 25 Miss. 378, 59 Am. Dec. 225; *State* v. *Ross,* 29 Mo. 32; *Slaughter* v. *State,* 6 Humph. 410; *State* v. *Lessing,* 16 Minn. 80, Gil. 64; *State* v. *Byrd,* 31 La. Ann. 419; *State* v. *Dennison,* 31 La. Ann. 847; *State* v. *Martin,* 30 Wis. 216, 11 Am. Rep. 567; *People* v. *Gilmore,* 4 Cal. 376, 60 Am. Dec. 620. See, however, *United States* v. *Harding,* 1

A conviction, also, of murder in the second degree is a bar to a prosecution for murder in the first degree.[4] On the same reasoning, a defendant convicted of an assault on an indictment for an assault and battery, or for an assault with intent to kill, cannot afterwards be tried for the assault and battery, or the assault with intent to kill;[5] and a defendant convicted of an assault with intent to ravish, under an indictment for rape, cannot be subsequently tried for the rape.[6] And it has been held that a defendant convicted of a breach of the peace cannot afterwards be tried for an assault of which the breach of the peace was an ingredient.[7]

From these decisions the general rule follows that when the facts constitute two or more offenses, wherein the minor offense is necessarily involved in the major, and when the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to a final judgment is a bar to the second.[8] Thus, conviction of a battery is a bar to a prosecution for assault with intent

Wall. Jr. 127, Fed. Cas. No. 15,301; *State* v. *Behimer,* 20 Ohio St. 579. See also Wharton, Crim. Pl. & Pr. § 465; and notes in 5 L.R.A.(N.S.) 571; 22 L.R.A.(N.S.) 959; and 21 L.R.A.(N.S.) 20.

[4] *Lewis* v. *State,* 51 Ala. 1; *Fields* v. *State,* 52 Ala. 348; *State* v. *Smith,* 53 Mo. 139; *Slaughter* v. *Com.* 6 Humph. 410; *Johnson* v. *State,* 29 Ark. 31, 21 Am. Rep. 154, 2 Am. Crim. Rep. 430.

[5] Wharton, Crim. Pl. & Pr. § 465; *State* v. *Dearborn,* 54 Me. 442; *State* v. *Hardy,* 47 N. H. 538; *State* v. *Coy,* 2 Aik. (Vt.) 181; *State* v. *Reed,* 40 Vt. 603; *State* v. *Johnson,* 30 N. J. L. 185; *Francisco* v. *State,* 24 N. J. L. 30; *Stewart* v. *State,* 5 Ohio, 242; *Clark* v. *State,* 12 Ga. 350; *State* v. *Stedman,* 7 Port. (Ala.) 495; *Carpenter* v. *State,* 23 Ala. 84; *Reynolds* v. *State,* 11 Tex. 120; *State* v. *Robey,* 8 Nev. 312; *People* v. *Apgar,* 35 Cal. 389.

[6] *State* v. *Shepard,* 7 Conn. 54.

[7] *Com.* v. *Miller,* 5 Dana, 320; *Com.* v. *Hawkins,* 11 Bush, 603, 1 Am. Crim. Rep. 65. See Wharton, Crim. Pl. & Pr. § 465.

[8] *State* v. *Elder,* 65 Ind. 282, 32 Am. Rep. 69; *Com.* v. *Squire,* 1 Met. 258; *Rucker* v. *State,* — Miss. —, 24 So. 311; *State* v. *Standifer,* 5 Port. (Ala.) 523; *People* v. *Apgar,* 35 Cal. 389; *Com.* v. *Neeley,* 2 Chester Co. Rep. 191; *Com.* v. *Reed,* 4 Lanc. L. Rev. 89; *State* v. *Smith,* 43 Vt. 324; *State* v. *Martin,* 30 Wis. 216, 11 Am. Rep. 567.

to commit murder,[9] and a conviction of petit larceny is a bar to a prosecution for robbery founded on the same facts.[10]

§ 585. When acquittal of the minor does not bar prosecution for the major offense.—Where there could have been no conviction of the major offense on the first trial, then, on a subsequent prosecution for the major offense, the record of the first prosecution is not admissible.[1] Thus, an acquittal for assault with intent to kill or ravish (the acquittal being on the ground of merger) is no bar to a subse-

[9] *People* v. *McDaniels*, 137 Cal. 192, 59 L.R.A. 578, 92 Am. St. Rep. 81, 69 Pac 1006; *People* v. *Defoor*, 100 Cal. 150, 34 Pac. 642: *Hamilton* v. *State*, 36 Ind. 280, 10 Am. Rep. 22; *Com.* v. *Foster*, 3 Met. (Ky.) 1; *Com.* v. *Hawkins*, 11 Bush, 603, 1 Am. Crim. Rep. 65; *Offutt* v. *Com.* 3 Ky. L. Rep. 333; *State* v. *Cheevers*, 7 La. Ann. 40; *State* v. *Chaffin*, 2 Swan, 493. See *Wilcox* v. *State*, 6 Lea, 571, 40 Am. Rep. 53; *State* v. *Parker*, 13 Lea, 225; *Moore* v. *State*, 33 Tex. Crim. Rep. 166, 25 S. W. 1120; *Com.* v. *Kinney*, 2 Va. Cas. 139; *Moore* v. *State*, 71 Ala. 307; *People* v. *Gordon*, 99 Cal. 227, 33 Pac. 901; *State* v. *Chinault*, 55 Kan. 326, 40 Pac. 662; *People* v. *Comstock*, 55 Mich. 405, 21 N. W. 384 (where a conviction of assault with intent to kill is reversed, accused can be tried on same information only for the offense charged, and not for a single assault; and the number of his challenges cannot be restricted to less than the number to which he is entitled on the graver charge); *Paschal* v *State*, 49 Tex. Crim. Rep. 111, 90 S. W. 878.

[10] *Floyd* v. *State*, 80 Ark. 94, 96 S. W. 125; *Storrs* v. *State*, 129 Ala. 101, 29 So. 778; *Gregg* v. *State*, 55 Ala. 116; *State* v. *Murray*, 55 Iowa, 530, 8 N. W. 350; *State* v. *Mikesell*, 70 Iowa, 176, 30 N. W. 474; *Triplett* v. *Com.* 84 Ky. 193, 1 S. W. 84; *State* v. *Wiles*, 26 Minn. 381, 4 N. W. 615, 2 Am. Crim. Rep. 621; *State* v. *Brannon*, 55 Mo. 63, 17 Am. Rep. 643; *State* v. *Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *People* v. *M'Gowan*, 17 Wend. 386.

[1] Wharton, Crim. Pl. & Pr. § 465; *Reg.* v. *Morris*, L. R. 1 C. C. 90, 36 L. J. Mag. Cas. N. S. 84, 16 L. T. N. S. 636, 15 Week. Rep. 999, 10 Cox, C. C. 480; *Reg.* v. *Salvi*, 10 Cox, C. C. 481, note; *Reg.* v. *Button*, 11 Q. B. 929, 18 L. J. Mag. Cas. N. S. 19, 12 Jur. 1017, 3 Cox, C. C. 229; *Josslyn* v. *Com.* 6 Met. 236; *Com.* v. *Herty*, 109 Mass. 348; *Wilson* v. *State*, 24 Conn. 57; *State* v. *Worner*, 14 Ind 572; *Freeland* v. *People*, 16 Ill. 380; *Severin* v. *People*, 37 Ill. 414; *Scott* v. *United States*, Morris (Iowa) 142; *People* v. *Knapp*, 26 Mich. 112; *State* v. *Martin*, 30 Wis. 216, 11 Am. Rep. 567; *Duncan* v. *Com.* 6 Dana, 295.

quent indictment for the consummated offense;[2] and a conviction of an assault with intent to kill is not a bar to a subsequent prosecution for murder, where the person assaulted died from his injuries.[3] But if the major offense could have been included in the first prosecution, and was omitted, either negligently or wilfully, and the facts constituting the major offense were put in evidence on the first prosecution, then there can be no second trial for such offense.[4]

All offenses based on the same facts, supported by the same evidence, ought to be included in the one prosecution. While there are obvious instances of a single crime including two offenses of such different grade that the prosecution of the minor without the major would work great injustice, yet it would subvert the ends of justice to permit a crime to be split up into several offenses, any one of which could be prosecuted at different periods within the statute of limitations, and on these principles the first prosecution should include and be decisive of every grade of the offense of which the accused

[2] Wharton, Crim. Pl. & Pr. §§ 456, 465; *State* v. *Murray*, 15 Me. 100; *Com.* v. *Kingsbury*, 5 Mass. 106; *People* v. *Mather*, 4 Wend. 265, 21 Am. Dec. 122. See *Com.* v. *Parr*, 5 Watts & S. 345.

[3] *Reg.* v. *Morris*, L. R 1 C. C. 90, 36 L. J. Mag. Cas. N. S. 84, 16 L. T. N. S. 636, 15 Week. Rep. 999, 10 Cox, C. C. 480; *Reg.* v. *Salvi*, 10 Cox, C. C. 481, note; *Com.* v. *Evans*, 101 Mass. 25; *Burns* v. *People*, 1 Park. Crim. Rep. 182; *Wright* v. *State*, 5 Ind. 527; supra, § 570; *Hopkins* v. *United States*, 4 App. D. C. 430; *Com.* v. *Ramunno*, 219 Pa. 204, 14 L.R.A.(N.S.) 209, 123 Am. St. Rep. 653, 68 Atl. 184, 12 A. & E. Ann. Cas. 818. See also note in 14 L.R.A.(N.S.) 209.

[4] *Reg.* v. *Elrington*, 9 Cox, C. C. 89, 1 Best & S. 689, 10 Week. Rep. 13, 31 L. J. Mag. Cas. N. S. 14, 8 Jur. N. S. 97, 5 L. T. N. S. 284, citing *Reg.* v. *Stanton*, 5 Cox, C. C. 324; *Re Thompson*, 9 Week. Rep. 203; *Rex* v. *Champneys*, 2 Moody & R. 26; *State* v. *Smith*, 43 Vt. 324; *State* v. *Stanly*, 49 N. C. (4 Jones, L.) 290. Though see *Smith* v. *Com.* 7 Gratt. 593. See Wharton, Crim. Pl. & Pr. §§ 407, 465; *Reg.* v. *Tancock*, 13 Cox, C. C. 217, 34 L. T. N. S. 455; *McNulty* v. *State*, 110 Tenn. 482, 75 S. W. 1015, 15 Am. Crim. Rep. 302; *Davis* v. *State*, — Tex. Crim. Rep. —, 47 S. W. 978; *Murphy* v. *Com.* 23 Gratt. 960.

could be convicted. Courts generally recognize these conditions, and interpose the bar of the first prosecution wherever it is sought to prosecute for a part of what is properly a single offense. Thus, where a note was in a pocketbook at the time it was stolen by the accused, a conviction of stealing the pocketbook is a bar to an indictment for stealing the note.[5] An accused charged with possession of a counterfeit plate, and acquitted, was charged on a second indictment with possession of another plate, and the evidence concerning the same was so connected that the possession of one necessarily involved possession of the other, so that the first prosecution was a bar to the second indictment.[6] The general rule is that an accused cannot be convicted and punished for two distinct offenses arising out of the same identical act, when one is a necessary ingredient of the other, and when one offense has been prosecuted to conviction.[7]

While the exceptions noted are clear and distinct, they do not alter the general rule that where there could have been no conviction of the major offense on the former indictment, nor, by any reasonable construction could the major offense have been included in the first indictment, then a judgment on such indictment is not a bar to a subsequent indictment for the major offense.[8]

[5] *United States* v. *Lee,* 4 Cranch, C. C. 446, Fed. Cas. No. 15,586.

[6] *United States* v. *Miner,* 11 Blatchf. 511, Fed. Cas. No. 15,780.

[7] *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490; *People* v. *Van Keuren,* 5 Park. Crim. Rep. 66; *State* v. *McCormack,* 8 Or. 236; *Wright* v. *State,* 17 Tex. App. 152; *State* v. *Egglesht,* 41 Iowa. 574, 20 Am. Rep. 612; *State* v. *Benham,* 7 Conn. 414; *Deshazo* v. *State,* 65 Ark. 38, 44 S. W. 453; *Noland* v. *People,* 33 Colo. 322, 80 Pac. 887; *Craig* v. *State,* 108 Ga. 776, 33 S. E. 653; *Com.* v. *Allegheny Valley R. Co.* 21 Pa. Super. Ct. 188. See *Hozier* v. *State,* 6 Tex. App. 542; *State* v. *Caston,* — Miss. —, 50 So. 569; *State* v. *Lismore,* 94 Ark. 211, 29 L.R.A.(N.S.) 721, 126 S. W. 855; *La Flour* v. *State,* — Tex. Crim. Rep. —, 129 S. W. 351; *Piper* v. *State,* 53 Tex. Crim. Rep. 485, 110 S. W. 899.

[8] *Nagel* v. *People,* 229 Ill. 598, 82 N. E. 315; *State* v. *Reed,* 168 Ind. 588, 81 N. E. 571; *Ex parte Roach,* 166 Fed. 344.

§ 586. Conviction on the major as a bar to prosecution on the minor offense, or vice versa.—On the principle of included degrees, or that a criminal act may include a major and a minor offense, a conviction or an acquittal of the major offense bars a subsequent prosecution for the minor offense. Thus, a conviction or acquittal on an indictment for murder is a bar to a subsequent prosecution for manslaughter; a conviction or acquittal on an indictment for burglary and larceny is a bar to a subsequent prosecution for larceny.[1] An accused, indicted for a major, but only convicted of a minor, offense, is acquitted of the major offense, and such acquittal is a bar to a subsequent indictment for the minor offense,[2] and it follows that where there can be a conviction of a minor offense included in the major, such conviction or acquittal of the minor offense is a bar to the prosecution of the major.[3]

As already shown,[4] the general rule is that when the facts constitute two or more offenses, wherein the minor offense is necessarily involved in the major, and when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, then the first prosecution is a bar

[1] *Vaux's Case,* 4 Coke, 45a; 2 Hale, P. C. 246; Fost. C. L. 339; *Reg.* v. *Barratt,* 9 Car. & P. 387; *People* v. *M'Gowan,* 17 Wend. 386; *People* v. *Loop,* 3 Park. Crim. Rep. 561; *Lohmon* v. *People,* 1 N. Y. 379, 49 Am. Dec. 340; *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490; *Dinkey* v. *Com.* 17 Pa. 126, 55 Am. Dec. 542; *State* v. *Reed,* 12 Md. 263; *State* v. *Lewis,* 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741; *State* v. *Scott,* 15 S. C. 434; *State* v. *Smith,* 16 Mo. 550; *State* v. *Keogh,* 13 La. Ann. 243; *Wilcox* v. *State,* 31 Tex 586; Wharton, Crim. Pl. & Pr. § 466.

[2] *People* v. *Apgar,* 35 Cal. 389; *State* v. *Standifer,* 5 Port. (Ala.) 523; *State* v. *Hattabough,* 66 Ind. 223; *Triplett* v. *Com.* 84 Ky. 193, 1 S. W. 84. See *State* v. *Ingles,* 3 N. C. (2 Hayw.) 4; *Com.* v. *Neeley,* 2 Chester Co. Rep. 191.

[3] *Com.* v. *Bass,* 3 Lanc. L. Rev. 278; *Com.* v. *Reed,* 4 Lanc. L. Rev. 89; *State* v. *Smith,* 43 Vt. 324; *People* v. *Defoor,* 100 Cal. 150, 34 Pac. 642 (conviction of an assault, under an information charging assault with intent to kill); *Hamilton* v. *State,* 36 Ind. 280, 10 Am. Rep. 22.

[4] Supra, § 584, note 8.

to the second. The converse of the rule, or where the major offense is necessarily involved in the minor offense, is also true. Hence, where the major offense necessarily involves the minor, and the major offense is prosecuted to a final judgment first, it is a bar to a second prosecution involving the minor offense.[5] There is, however, a clear distinction between an act which necessarily involves a major and a minor offense, or a higher and a lower degree of the same offense, and an act which in itself involves two or more distinct offenses. Thus, the accused may at the same time and by the same act commit two or more distinct crimes, and the acquittal of one is not a bar to a prosecution of the other.[6] The rule also holds that where there could not have been a conviction of the minor offense under the first indictment, then such first prosecution is not a bar to the second prosecution.[7] Thus, an acquittal for

[5] See *People* v. *Cox*, 107 Mich. 435, 65 N. W. 283; *Fox* v. *State*, 50 Ark. 528, 8 S. W. 836; *Re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *People* v. *Stephens*, 79 Cal. 428, 4 L.R.A. 845, 21 Pac. 856; *Reddy* v. *Com.* 97 Ky. 784, 31 S. W. 730; *State* v. *Lindsay*, 61 N. C. (Phill. L.) 468; *Monroe* v. *State*, 111 Ala. 15, 20 So. 634; *Lohman* v. *People*, 1 N. Y. 379, 49 Am. Dec. 340.

[6] *State* v. *Standifer*, 5 Port. (Ala.) 523; *United States* v. *Harmison*, 3 Sawy. 556, Fed. Cas. No. 15,308; *Brewer* v. *State*, 59 Ala. 101; *Copenhaven* v. *State*, 15 Ga. 264; *State* v. *Elder*, 65 Ind. 282, 32 Am. Rep. 69; *State* v. *Horneman*, 16 Kan. 452, 2 Am. Crim. Rep. 427; *State* v. *Faulkner*, 39 La. Ann. 811, 2 So. 539; *State* v. *Inness*, 53 Me. 536. See *Com.* v. *Clair*, 7 Allen, 525; *Com.* v. *Bakeman*, 105 Mass. 53; *Morey* v. *Com.* 108 Mass. 433; *Teat* v. *State*, 53 Miss. 439, 24 Am. Rep. 708; *Ball* v. *State*, 67 Miss. 358, 7 So. 353; *State ex rel. Burton* v. *Williams*, 11 S. C. 288; *Clifford* v. *State*, 29 Wis. 327 (holding that where several offenses are averred conjunctively, an acquittal or conviction may be pleaded in bar of a second prosecution for either of the offenses; but it is not a bar where the charge is made in the disjunctive); *Caudle* v. *State*, 57 Tex. Crim. Rep. 363, 123 S. W. 413.

[7] Hawk. P. C. bk. 2, chap. 25, § 5; *Rex* v. *Westbeer*, 1 Leach, C. L. 12; *Reg.* v. *Henderson*, Car. & M. 328, 2 Moody, C. C. 192; *State* v. *Warner*, 14 Ind. 572; *State* v. *Jesse*, 20 N. C. 95 (3 Dev. & B. L. 98); *State* v. *Standifer*, 5 Port. (Ala.) 523; *State* v. *Wightman*, 26 Mo. 515. See however *Reg.* v. *Gould*, 9 Car. & P. 364.

burglary with intent to steal does not bar a prosecution for larceny;[8] and an acquittal of homicide, on the ground that the assaults averred did not contribute to it, is not a bar to a subsequent indictment for the assaults.[9]

§ 587. Where two are simultaneously killed, a prosecution for killing one does not bar a prosecution for killing the other.—There are several decisions to the effect that it is permissible to include in one indictment the killing of B and C simultaneously by one blow, and the homicides can be tried together, and a verdict found that will include both.[1] With the exception of these decisions, the rule is universal that one who kills another, mistaking such other for the person whom he intended to kill, is guilty or innocent of the offense charged the same as though the act had killed the person he intended to kill.[2] This rule is based upon the theory

[8] *State* v. *Warner*, 14 Ind. 572; *Roberts* v. *State*, 14 Ga. 8, 58 Am. Dec. 528.

[9] *Reg.* v. *Bird*, Temple & M. 437, 2 Den. C. C. 94, 20 L. J. Mag. Cas. N. S. 70, 15 Jur. 193, 5 Cox, C. C. 20. See supra, §§ 91–93; *Moore* v. *State*, 59 Miss. 25.

[1] *Womack* v. *State*, 7 Coldw. 508; *Rucker* v. *State*, 7 Tex. App. 549, 9 Rep. 525. And so *Clem* v. *State*, 42 Ind. 420, 13 Am. Rep. 369.

[2] *Clarke* v. *State*, 78 Ala. 474, 56 Am. Rep. 45, 6 Am. Crim. Rep. 525; *Tidwell* v. *State*, 70 Ala. 33; *Murphy* v. *State*, 108 Ala. 10, 18 So. 557; *Jackson* v. *State*, 106 Ala. 12, 17 So. 333; *State* v. *Dugan*, Houst. Crim. Rep. (Del.) 563; *Ringer* v. *State*, 74 Ark. 262, 85 S. W. 410; *State* v. *Brown*, 4 Penn. (Del.) 120, 53 Atl. 534; *Brown* v. *State*, 147 Ind. 28, 46 N. E. 34; *State* v. *Williams*, 122 Iowa, 115, 97 N. W. 992; *Thompkins* v. *Com.* 28 Ky. L. Rep. 642, 90 S. W. 221; *Jennings* v. *Com.* 13 Ky. L. Rep. 79, 16 S. W. 348; *State* v. *Baptiste*, 105 La. 661, 30 So. 147; *State* v. *Renfrow*, 111 Mo. 589, 20 S. W. 299; *McGehee* v. *State*, 62 Miss. 772, 52 Am. Rep. 209; *State* v. *Benton*, 19 N. C. (2 Dev. & B. L.) 222; *State* v. *Johnson*, 7 Or. 210; *Wareham* v. *State*, 25 Ohio St. 601; *Com.* v. *Breyessee*, 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824; *State* v. *Smith*, 2 Strobh. L. 77, 47 Am. Dec. 589; *Wright* v. *State*, 44 Tex. 645; *Angell* v. *State*, 36 Tex. 542, 14 Am. Rep. 380; *Thornton* v. *State*, — Tex. Crim. Rep. —, 65 S. W. 1105; *Nelson* v. *State*, 48 Tex. Crim. Rep. 274, 87 S. W. 143; *State* v. *Clifford*, 59 W. Va. 1, 52 S. E. 981; *State* v. *Briggs*, 58 W. Va.

that if A aims at B, and hits C, the intent will be transferred to C, and A will be guilty;[3] and the grade of the offense is the same as though the accused had effected his original intent.[4] A, for instance, shooting at B in self-defense, negligently kills C, but an acquittal for killing B does not bar a prosecution for killing C. Or, A, an officer, when killing B under legal warrant, negligently kills C, but an acquittal for killing B is not a bar to a prosecution for killing C. Or, A, designing to poison B, by the same poison at the same meal negligently poisons C, but a verdict of manslaughter for killing C does not bar a prosecution for the murder of B.[5]

291, 52 S. E. 218. And see *State* v. *Shanley,* 20 S. D. 18, 104 N. W. 522.

[3] *Reg.* v. *Stopford,* 11 Cox, C. C. 643 (1870); *Reg.* v. *Latimer,* L. R. 17 Q. B. Div. 359, s. c. 16 Cox, C. C. 70, 55 L. J. Mag. Cas. N. S. 135, 54 L. T. N. S. 768, 51 J. P. 184 (1886); *Dunaway* v. *People,* 110 Ill. 333, 51 Am. Rep. 686. 4 Am. Crim. Rep. 60 (1884); *McGehee* v. *State,* 62 Miss. 772, 52 Am. Rep. 209 (1885); *Burchet* v. *Com.* 8 Ky. L. Rep. 258, 1 S. W. 423 (1886); *Territory* v. *Rowand,* 8 Mont. 432, 20 Pac. 688, 21 Pac. 19 (1889); *Jennings* v. *Com.* 13 Ky. L. Rep. 79, 16 S. W. 348 (1891); *Com.* v. *Breyessee,* 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824 (1894); Contra, *Reg.* v. *Hewlett,* 1 Fost. & F. 91 (1858); *Morgan* v. *State,* 13 Smedes & M. 242 (1849); *Barcus* v. *State,* 49 Miss. 17, 19 Am. Rep. 1, 1 Am. Crim. Rep. 249 (1873); *Com.* v. *Morgan,* 11 Bush, 601 (1876); *Lacefield* v. *State,* 34 Ark. 275, 36 Am. Rep. 8 (1879); *People* v. *Robinson,* 6 Utah, 101, 21 Pac. 403 (1889); *Callahan* v. *State,* 21 Ohio St. 306; *State* v. *Renfrow,* 111 Mo. 589, 20 S. W. 299; *State* v. *Gilmore,* 95 Mo. 554, 8 S. W. 359, 912; *State* v. *Clark,* 147 Mo. 20, 47 S. W. 886; *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490; *Clark* v. *State,* 19 Tex. App. 495.

[4] *State* v. *Henson,* 81 Mo. 384 (1884); *State* v. *Montgomery,* 91 Mo. 52, 3 S. W. 379 (1886); *Pinder* v. *State,* 27 Fla. 370, 26 Am. St. Rep. 75, 8 So. 837 (1891); *State* v. *Renfrow,* 111 Mo. 589, 20 S. W. 299 (1892). *Com.* v. *Breyessee,* 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824 (1894); *Musick* v. *State,* 21 Tex. App. 69, 18 S. W. 95 (1886).

[5] *State* v. *Standifer,* 5 Port. (Ala.) 523; *Gunter* v. *State,* 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632; *People* v. *Majors,* 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486, — Cal. —, 2 Pac. 744; *State* v. *Vines,* 34 La. Ann. 1079, 4 Am. Crim. Rep. 296; *Teat* v. *State,* 53 Miss. 439, 24 Am. Rep. 708; *Jones* v. *State,* 66 Miss. 380,

In such cases two distinct crimes are committed, and a plea of former jeopardy on the trial of one is no defense to a subsequent prosecution for the other crime, and this is true of all criminal offenses where the crimes are distinct, even though they are committed at the same time, with the same intent, and based upon the same act.[6]

14 Am. St. Rep. 570, 6 So. 231; *People* v. *Warren,* 1 Park. Crim. Rep. 338; *State* v. *Nash,* 86 N. C. 650, 41 Am. Rep. 472; *Ashton* v. *State,* 31 Tex. Crim. Rep. 482, 21 S. W. 48; *State* v. *Robinsan,* 12 Wash. 491, 41 Pac. 884; *Winn* v. *State,* 82 Wis. 571, 52 N. W. 775.

[6] *McNish* v. *State,* 47 Fla. 66, 36 So. 175; *McIntosh* v. *State,* 116 Ga. 543, 42 S. E. 793, 15 Am. Crim. Rep. 292; *Baker* v. *Com.* 20 Ky. L. Rep. 879, 47 S. W. 854; *Com.* v. *Hope,* 22 Pick. 1; *People* v. *Ochotski,* 115 Mich. 601, 73 N. W. 889; *Burton* v. *United States,* 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362 (acquittal upon charge of receiving forbidden compensation from a person is not a bar to a prosecution for receiving such compensation from a corporation); *Gully* v. *State,* 116 Ga. 527, 42 S. E. 790, 15 Am. Crim. Rep. 294 (acquittal on charge of bigamy by contracting an illegal marriage with one does not bar prosecution for contracting an illegal marriage with another); *Ex parte Dreesen,* 54 Tex. Crim. Rep. 612, 114 S. W. 806 (defacing records); *State* v. *Blodgett,* 143 Iowa, 578, 121 N. W. 685 (acquittal of uttering a forgery is not a bar for committing the forgery); *State* v. *Temple,* 194 Mo. 228, 92 S. W. 494; *Augustine* v. *State,* 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77; *Kelley* v. *State,* 43 Tex. Crim. Rep. 40, 62 S. W. 915; *State* v. *Burlingame,* 146 Mo. 207, 48 S. W. 72 (an acquittal of a charge of receiving deposits in an insolvent bank made by one person does not bar a subsequent prosecution for a deposit made by another person); *Com.* v. *Hazlett,* 16 Pa. Super. Ct. 534; *Hotema* v. *United States,* 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895 (trial on consolidated indictments not a bar); *Wallace* v. *State,* 41 Fla. 547, 26 So. 713 (acquittal of conspiracy to extract money from one person does not bar prosecution for extraction from another person); see *Dunn* v. *State,* 43 Tex. Crim. Rep. 25, 63 S. W. 571; *Wallace* v. *State,* 57 Tex. Crim. Rep. 354, 123 S. W. 135; *State* v. *Bobbitt,* 228 Mo. 252, 128 S. W. 953 (acquittal of murder at the time of an attempt at arson does not bar prosecution for arson); *Phillips* v. *State,* 85 Tenn. 551, 3 S. W. 434, 7 Am. Crim. Rep. 318 (prosecution for burglary and larceny for taking the goods of one person does not bar prosecution for larceny by taking the goods of another person, although taken from the same place); *Greenwood* v.

§ 587a. Offenses against different sovereignties, arising out of the same act.—Where the same act violates a

State, 64 Ind. 250, 3 Am. Crim. Rep. 154 (prosecution for assault and battery upon one, no bar to a similar prosecution for assault and battery upon another at the same time and place, both assaults being made during the continuance of an affray); *United States* v. *Flecke,* 2 Ben. 456, Fed. Cas. No. 15,120 (acquittal for distilling without license is not a bar for knowingly using a still for the purpose of distilling in a dwelling house, even though the place is the same); *State* v. *White,* 123 Iowa, 425, 98 N. W. 1027 (conviction for keeping a gambling house, or permitting persons to play for money, is not a bar to a prosecution for gambling, although the latter offense arises out of the same act); *Mann* v. *Com.* 118 Ky. 67, 111 Am. St. Rep. 289, 80 S. W. 438 (breaking into a house with intent to steal, and shooting at the owner, constitute two offenses, so that conviction of the shooting is not a bar to a prosecution for burglary); *State* v. *Magone,* 33 Or. 570, 56 Pac. 648 (acquittal for malicious destruction of property does not bar prosecution for the illegal disinterment of a body, though the first prosecution related to the casket in which it was inclosed); *Miller* v. *State,* 33 Ind. App. 509, 71 N. E. 248 (provoking an assault and attempting an assault are distinct offenses under the statute, and an acquittal of one is not a bar to prosecution for another); *Richardson* v. *State,* 79 Miss. 289, 30 So. 650 (trial for assault with intent to kill does not bar prosecution on charge of intentionally shooting at a person); *State* v. *Caddy,* 15 S. D. 167, 91 Am. St. Rep. 666, 87 N. W. 927 (acquittal of an assault with a deadly weapon, with intent to rob, does not bar a prosecution for robbery committed against the same person); *Taylor* v. *State,* 41 Tex. Crim. Rep. 564, 55 S. W. 961 (conviction of assault with attempt to rob is not a bar to a prosecution for a murder committed in the same transaction); *Ford* v. *State,* — Tex. Crim. Rep. —, 56 S. W. 918 (conviction of an assault with intent to kill does not bar prosecution for carrying firearms, though both offenses were committed on the same occasion, as parts of the same transaction); *People* v. *Devlin,* 143 Cal. 128, 76 Pac. 900 (conviction of larceny immediately on entering a building does not bar prosecution for burglary in entering the building); *People* v. *Kerrick,* 144 Cal. 46, 77 Pac. 711 (conviction of altering brands on cattle with intent to steal does not bar prosecution for grand larceny in stealing such cattle); *Spears* v. *People,* 220 Ill. 72, 4 L.R.A.(N.S.) 402, 77 N. E. 112 (acquittal of larceny does not bar prosecution for passing a forged instrument, though both prosecutions grew out of the same act); *State* v. *Anderson,* 186 Mo. 25, 84 S. W. 946 (larceny and obtaining money by false pretenses,

state law and a city ordinance, the accused may be tried for both offenses. A conviction or acquittal by one sovereignty is not a bar to a prosecution of the same offense by another sovereignty, and the subsequent prosecution is not such a vio-

though based on the same facts, contain such essentially different elements that acquittal of the larceny charge is not a bar to a subsequent prosecution for obtaining the same money by false pretenses); *Sharp* v. *State,* 61 Neb. 187, 85 N. W. 38, 15 Am. Crim. Rep. 462 (burglary and resulting larceny constitute two offenses, so that a conviction of one does not bar a prosecution for the other); *Blair* v. *State,* 81 Ga. 629, 7 S. E. 855, and *Smith* v. *State,* 105 Ga. 724, 32 S. E. 127 (conviction for selling liquor to minor, no bar to prosecution for selling liquor without a license, although the two offenses are founded on the same act); *State* v. *Gapen,* 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; *Com.* v. *Vaughn,* 101 Ky. 603, 45 L.R.A. 858, 42 S. W. 117; *State* v. *Wold,* 96 Me. 401, 52 Atl. 909 (having liquor in possession with intent to sell, and maintaining a common nuisance, are distinct offenses, even on the same facts, so that an acquittal of one does not bar prosecucution for the other); *Carroll* v. *State,* 80 Miss. 349, 31 So. 742 (acquittal on charge of selling liquor does not bar prosecution for conniving at a sale on the same premises, founded on the same fact): *Com.* v. *Montross,* 8 Pa. Super. Ct. 237 (acquittal of selling liquor on Sunday does not bar prosecution for selling without a license); *Carter* v. *McClaughry,* 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181 (dismissal from the Army by sentence of court-martial, and imposing imprisonment for conspiring to defraud the government, are two offenses, although to be guilty of the latter involves being guilty of the former); see *Burnam* v. *State,* 2 Ga. App. 395, 58 S. E. 683 (under the "same transaction test," prosecution for killing one person may constitute a bar to a prosecution for assault with intent to kill a different person); *Wilcox* v. *West,* 7 Ind. Terr. 86, 103 S. W. 774 (acquittal of an assault against a United States officer is not a bar to a prosecution for disturbing the peace and quiet of a family in whose presence the assault was committed); *State* v. *Oakes,* 202 Mo. 86, 119 Am. St. Rep. 792, 100 S. W. 434 (the question presented by a plea of former jeopardy is one of law, for the determination of the court); *Wood* v. *State,* 30 Ohio C. C. 255 (prosecution for cruelty to one animal will not bar prosecution for cruelty to another animal under control of a different driver, for the two offenses are distinct and committed by different agents); *Thomas* v. *United States,* 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897 (acquittal of conspiracy to induce rebates is not a bar to a prosecution for inducing shippers to accept them).

lation of the constitutional provision against twice in jeopardy that he can plead the former in bar of the latter.[1] The same principle applies where the act committed is an offense against the laws of the state and of the United States,[2] although it has been held that where an act is punishable by the laws of the state and also by the laws of the United States, that the accused ought not to be twice punished for the same offense, but the court which first exercises jurisdiction ought to enforce it by trial and judgment.[3] And, in harmony with the definition of the text, that it is essential to former jeopardy that the former and subsequent prosecutions must occur in the same state, a conviction in one state does not prevent a

[1] *Hamilton* v. *State,* 3 Tex. App. 643; *Greenwood* v. *State,* 6 Baxt. 567, 32 Am. Rep. 539; *Anderson* v. *O'Donnell,* 29 S. C. 355, 1 L.R.A. 632, 13 Am. St. Rep. 728, 7 S. E. 523; *Koch* v. *State,* 8 Ohio C. C. 641; *State* v. *Stevens,* 114 N. C. 873, 19 S. E. 861; *State* v. *Reid,* 115 N. C. 741, 20 S. E. 468; *Johnson* v. *State,* 59 Miss. 543; *State* v. *Lee,* 29 Minn. 445, 13 N. W. 913; *Shafer* v. *Mumma,* 17 Md. 331, 79 Am. Dec. 656; *State* v. *Clifford,* 45 La. Ann. 980, 13 So. 281; *Fortner* v *Duncan,* 91 Ky. 171, 11 L.R.A. 188, 15 S. W. 55; *Kemper* v. *Com.* 85 Ky. 219, 7 Am. St. Rep. 593; 3 S. W. 159; *Levy* v. *State,* 6 Ind. 281; *Robbins* v. *People,* 95 Ill. 175; *De-Graffenreid* v. *State,* 72 Ga. 212; *Purdy* v. *State,* 68 Ga. 295; *Theisen* v. *McDavid,* 34 Fla. 440, 26 L.R.A. 234, 16 So. 321; *Van Buren* v. *Wells,* 53 Ark. 368, 22 Am. St. Rep. 214, 14 S. W. 38; *Black* v. *State,* 144 Ala. 92, 40 So. 611; *Bueno* v. *State,* 40 Fla. 160, 23 So. 862. See *Lucas* v. *Com.* 118 Ky. 818, 82 S. W. 440; *State* v. *Muir,* 86 Mo. App. 642; *State* v. *Taylor,* 133 N. C. 755, 46 S. E. 5; *State* v. *Lytle,* 138 N. C. 738, 51 S. E. 66; *Morganstern* v. *Com.* 94 Va. 787, 26 S. E. 402; *Ehrlick* v. *Com.* 125 Ky. 742, 10 L.R.A.(N.S.) 995, 128 Am. St. Rep. 269, 102 S. W. 289; *Re Henry,* 15 Idaho, 756, 21 L.R.A.(N.S.) 207, 99 Pac. 1054; *Seattle* v. *MacDonald,* 17 L.R.A.(N.S.) 49 (exhaustive note on all questions connected with distinct offenses, concurrent jurisdiction, and former jeopardy).

[2] *United States* v. *Barnhart,* 10 Sawy. 491, 22 Fed. 285; *State* v. *Rankin,* 4 Coldw. 145; *State* v. *Norman,* 16 Utah, 457, 52 Pac. 986; *State* v. *Moore,* 143 Iowa, 240, 121 N. W. 1052. But see *United States* v. *Mason,* 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480

[3] *Com.* v. *Fuller,* 8 Met. 313, 41 Am. Dec. 509. See *Brooke* v. *State,* 155 Ala. 78, 46 So. 491.

subsequent prosecution in another state, where the same act violates the laws of such other state.[4]

§ 588. Prosecution for stealing from A does not bar prosecution for stealing from B by the same act; exception.—It is not only proper, but right, where a number of articles having a common ownership are stolen simultaneously, that they should be grouped in the same indictment,[1] from which it follows that on an indictment for stealing the goods of A, it is admissible to put in evidence, in bar, a prior prosecution for stealing at the same time other goods of A. If the prosecution did not lump all the goods stolen in the first indictment, it was its own fault; and it cannot avail itself of its own negligence to multiply indictments against the defendant. But a more difficult question arises where articles simultaneously stolen belong to different owners, in which case it is argued that, because each owner is entitled to restitution, he cannot be precluded from this by a proceeding as to which he may not have had notice, and that therefore several stealings from different owners cannot be grouped in the same indictment.[2] This conclusion, however, has been rejected by

[4] *Phillips* v. *People*, 55 Ill. 429; *Bloomer* v. *State*, 48 Md. 521, 3 Am. Crim. Rep. 37; *Marshall* v. *State*, 6 Neb. 120, 20 Am. Rep. 363. But see *Com.* v. *Frazee*, 2 Phila. 191.

[1] *Rex* v. *Carson*, Russ. & R. C. C. 303; *Rex* v. *Furneaux*, Russ. & R. C. C. 335; *State* v. *Snyder*, 50 N. H. 150; *State* v. *Cameron*, 40 Vt. 555; *Com.* v. *Williams*, 2 Cush. 583; *Com.* v. *O'Connell*, 12 Allen, 451; *Com.* v. *Eastman*, 2 Gray, 76; *Jackson* v. *State*, 14 Ind. 327; *State* v. *Williams*, 10 Humph. 101; *Lorton* v. *State*, 7 Mo. 55, 37 Am. Dec. 179; *Hatch* v. *State*, 6 Tex. App. 384. See Wharton, Crim. Pl. & Pr. § 470. See also *State* v. *Egglesht*, 41 Iowa, 574, 20 Am. Rep. 612. Compare *Walter* v. *Com.* 88 Pa. 137, 32 Am. Rep. 429, cited supra, § 580; *State* v. *McCormack*, 8 Or. 236; *Quitzow* v. *State*, 1 Tex. App. 47, 28 Am. Rep. 396. See *Wright* v. *State*, 17 Tex. App. 152; *State* v. *Benham*, 7 Conn. 414; *Foster* v. *State*, 88 Ala. 182, 7 So. 185; *Fisher* v. *Com.* 1 Bush, 211, 89 Am. Dec. 620; *State* v. *Augustine*, 29 La. Ann. 119; *Com.* v. *Prescott*, 153 Mass. 396, 26 N. E. 1005.

[2] *Reg.* v. *Knight*, Leigh & C. C. C.

several courts, and the preponderating opinion is that, when there is a taking of the articles of several owners by a single act, the prosecution may elect to indict for all the articles together.[3] If so, on the reasoning already given, by indicting for stealing a single article, it may preclude itself from a further prosecution of the transaction.[4] But as to whether or not the prosecution would preclude itself by indicting for a single offense, where several offenses were committed, concurring only in point of time of commission, depends upon the statutory provisions relating to the same. It is obvious that in those states in which there can be no joinder of distinct offenses against different owners, an acquittal of one would not bar the other.[5] But wherever the prosecution is at liberty to

278, 9 L. T. N. S. 808, 9 Cox, C. C. 437; *State* v. *Newton*, 42 Vt. 537; *Com.* v. *Andrews*, 2 Mass. 409; *State* v. *Thurston*, 2 McMull, L. 382; *Com.* v. *Hoffman*, 121 Mass. 369; *State* v. *English*, 14 Mont. 399, 36 Pac. 815; *State* v. *Bynum*, 117 N. C. 752, 23 S. E. 219; *Alexander* v. *State*, 21 Tex. App. 406, 57 Am. Rep. 617, 17 S. W. 139; *State* v. *Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432.

[3] *Com.* v. *Williams*, Thacher, Crim. Cas. 84; *State* v. *Nelson*, 29 Me. 329; *State* v. *Merrill*, 44 N. H. 624; *Com.* v. *Dobbins*, 2 Pars. Sel. Eq. Cas. 380; *State* v. *Hennessey*, 23 Ohio St. 339, 13 Am. Rep. 253; *Lowe* v. *State*, 57 Ga. 171, 2 Am. Crim. Rep. 344; *Ben* v. *State*, 22 Ala. 9, 58 Am. Dec. 234; *Lorton* v. *State*, 7 Mo. 55, 37 Am. Dec. 179; *State* v. *Morphin*, 37 Mo. 373; *Wilson* v *State*, 45 Tex. 76, 23 Am. Rep. 602, 2 Am. Crim. Rep. 356; *United States* v. *Beerman*, 5 Cranch, C. C. 412, Fed. Cas. No. 14,560. See Wharton, Crim. Pl. & Pr. § 470; *Hudson* v. *State*, 9 Tex. App. 151, 35 Am. Rep. 732.

[4] See supra, § 580.

[5] *Reg.* v. *Firth*, L. R. 1 C. C. 172, 38 L. J. Mag. Cas. N. S. 54, 19 L. T. N. S. 746, 11 Cox, C. C. 234, 17 Week. Rep. 327. See *Rex* v. *Jones*, 4 Car. & P. 217; Wharton, Crim. Pl. & Pr. § 474; *United States* v. *Beerman*, 5 Cranch, C. C. 412, Fed. Cas. No. 14,560; *State* v. *Nelson*, 29 Me. 329; *State* v. *Merrill*, 44 N. H. 624; *State* v. *Hennessey*, 23 Ohio St. 339, 13 Am. Rep. 253; *Bell* v. *State*, 42 Ind. 335; *State* v. *Egglesht*, 41 Iowa, 574, 20 Am. Rep. 612; *State* v. *Lambert*, 9 Nev. 321; *Lowe* v. *State*, 57 Ga. 171, 2 Am. Crim. Rep. 344; *Ben* v. *State*, 22 Ala. 9, 58 Am. Dec. 234; *State* v. *Morphin*, 37 Mo. 373; *Fulmer* v. *Com.* 97 Pa. 503; *Shubert* v. *State*, 21 Tex. App. 551, 2 S. W. 883; *Willis* v. *State*, 24 Tex. App 586, 6 S. W. 857; *Hudson* v. *State*, 9 Tex. App. 151, 35 Am. Rep. 732. See

join in one indictment simultaneous offenses, such as larceny of all articles simultaneously stolen, and it selects only one of them for trial, an acquittal or conviction is a bar to a subsequent prosecution for the other.[6] Hence the general rule now obtains that the selection of one offense from a series against the same or against different persons, where there is liberty to join offenses, bars any subsequent prosecution for the others.

§ 589. Offenses continuing through periods of time.— It must be remembered, in view of the terms of the present discussion, that, to constitute simultaneousness, it is not necessary that there should be exact coincidence in a particular point of time. It may appear, for instance, that the defendant has tapped his neighbor's gas pipe, and has for weeks been consuming his neighbor's gas. This, however, will not justify a series of prosecutions for each day's or each hour's appropriation. The tapping, with the subsequent appropriations, constitute one act, and must be prosecuted as such.[1] The same reasoning applies to the removal, piece by piece, of ore from a neighboring quarry, by an orifice made at one specific time.[2] And it has been held that the setting on fire a block of houses constitutes a simultaneous offense, though the houses take fire and are consumed at successive periods of time.[3]

With regard then to similar offenses that cover periods of time, where a conviction has been had, and the prosecution did not elect a particular offense at a particular time, and there

supra, § 252; Wharton, Crim. Law, 9th ed. §§ 931-948; *State* v. *Clark*, 32 Ark. 231.

[6] Ibid.

[1] *Reg.* v. *Firth*, L. R. 1 C. C. 172, 38 L. J. Mag. Cas. N. S. 854, 19 L. T. N. S. 746, 11 Cox, C. C. 234, 17 Week. Rep. 327. See *Rex* v. *Jones*, 4 Car. & P. 217; Wharton, Crim. Pl. & Pr. § 474.

[2] *Reg.* v. *Bleasdale*, 2 Car. & K. 765, 4 Mor. Min. Rep. 177.

[3] *Woodford* v. *People*, 62 N. Y. 117, 20 Am. Rep. 464, affirming s. c. 3 Hun, 310, 5 Thomp. & C. 539.

was evidence of similar offenses during the statutory period of limitation,—such conviction is a bar to a prosecution for all similar offenses committed for all time previous to the conviction.[4]

§ 590. On trial for battery, prosecution for prior simultaneous battery of another is a bar.—It has been frequently held admissible for the prosecution, when there have been simultaneous batteries on several persons, to include these batteries in the same count. It follows from this that on a trial for one of these batteries it is admissible for the defendant to show, in bar of the indictment, that he has been previously prosecuted for a simultaneous battery on another person, the indictment in the first case averring the double battery;[1] and

[4] *State* v. *Nullelly*, 43 Ark. 68; *United States* v. *Burch*, 1 Cranch, C. C. 36, Fed. Cas. No. 14,683; *Dixon* v. *Washington*, 4 Cranch, C. C. 114, Fed. Cas. No. 3,935; *State* v. *Blahut*, 48 Ark. 34, 2 S. W. 190; *Freeman* v. *State*, 119 Ind. 501, 21 N. E. 1101; *State* v. *Layton*, 25 Iowa, 193; *State* v. *Waterman*, 87 Iowa, 255, 54 N. W. 359; *State* v. *Brownrigg*, 87 Me. 500, 33 Atl. 11; *Com.* v. *Robertson*, 126 Mass. 259, 30 Am. Rep. 674, 3 Am. Crim. Rep. 143; *People* v. *Cox*, 107 Mich. 435, 65 N. W. 283. See *Pope* v. *State*, 63 Miss. 53; *State* v. *Dunston*, 78 N. C. 418; *Altenburg* v. *Com.* 126 Pa. 602, 4 L.R.A. 543, 17 Atl. 799; *Com.* v. *Markley*, 17 Pa. Co. Ct. 254; *Crenshaw* v. *State*, Mart. & Y. 122, 17 Am. Dec. 788; *Fleming* v. *State*, 28 Tex. App. 234, 12 S. W. 605; *State* v *Nutt*, 28 Vt. 598; *Reynolds* v. *State*, 114 Ga. 265, 40 S. E. 234; *Bryant* v. *State*, 72 Ark. 419, 81 S. W. 234; *McWilliams* v. *State*, 110 Ga. 290, 34 S. E. 1016; *McCoy* v. *State*, 121 Ga. 359, 49 S. E. 294; *Cawein* v. *Com.* 110 Ky. 273, 61 S. W. 275; *Standard Oil Co.* v. *Com.* 29 Ky. L. Rep. 19, 91 S. W. 1127; *State* v. *Goff*, 66 Mo. App. 491; *State* v. *Stephens*, 70 Mo. App. 554; *State* v. *Roberson*, 136 N. C. 591, 48 S. E. 596.

[1] *Rex* v. *Benfield*, 2 Burr. 984; *Reg.* v. *Giddins*, Car. & M 634; *Com.* v. *McLaughlin*, 12 Cush. 615; *Com.* v. *O'Brien*, 107 Mass. 208; *Kenney* v. *State*, 5 R. I. 385; *Fowler* v. *State*, 3 Heisk 154. See Wharton, Crim. Pl. & Pr. § 469; *State* v. *Johnson*, 70 Kan. 861, 79 Pac. 732; *Com.* v. *Chamberlain*, 107 Mass. 209; *People* v. *Ellsworth*, 90 Mich. 442, 51 N. W. 531; *People* v. *Rockhill*, 74 Hun, 241, 26 N. Y. Supp. 222; *Fowler* v. *State*, 3 Heisk. 154; *Scott* v. *State*, 46 Tex. Crim. Rep. 305, 81 S. W. 950; *Ben* v.

this has been applied as well to more serious crimes. Thus, where two or more persons are killed by the same act, and the state elects to prosecute for the killing of one, the accused can plead conviction or acquittal in bar of an indictment for killing the other.[2]

§ 591. Judgment on successive offenses.—A question of importance arises when there is a series of successive offenses of the same kind and character. It will not be contended that an acquittal or conviction for a nuisance to-day will bar a prosecution for a like nuisance on the same premises to-morrow [1] it will not be contended that a judgment for plaintiff for yesterday's nuisance would be conclusive in a suit for to-day's nuisance;[2] nor that a judgment for yesterday's obstruction of a public highway would bar a suit brought for to-day's obstruction;[3] nor, if a series of illegal sales of liquor were made yesterday, that a conviction or acquittal of the same would bar an action brought for a sale made to-day.[4] The weight of

State, 22 Ala. 9, 58 Am. Dec. 234. See contra, *People* v. *Warren*, 1 Park. Crim. Rep. 338.

[2] *People* v. *Warren*, 1 Park. Crim. Rep. 338; *Vaughan* v. *Com.* 2 Va. Cas. 273; *Smith* v. *Com.* 7 Gratt. 593; *State* v. *McClintock*, 8 Iowa, 203; *State* v. *Standifer*, 5 Port. (Ala.) 523. See Wharton, Crim. Pl. & Pr. § 469.

[1] See Wharton, Crim. Pl. & Pr. § 475; *People* v. *Townsend*, 3 Hill, 479; *Reg.* v. *Fairie*, 8 El. & Bl. 486, 4 Jur. N. S. 300, 6 Week. Rep. 56; 8 Cox, C. C. 66. See Wharton, Ev. §§ 788, 789; *Com.* v. *Connors*, 116 Mass. 35; *Com.* v. *Hanley*, 140 Mass. 457, 5 N. E. 468; *Com.* v. *Respass*, 21 Ky. L. Rep. 140, 50 S. W. 549; *State ex rel. Hohm* v. *Baker*, 105 La. 373, 29 So. 940; *Gormley* v. *State*, 37 Ohio St. 120; *State* v. *Cassety*, 1 Rich L. 90.

[2] *Richardson* v. *Boston*, 19 How. 263, 15 L. ed. 639. See *Gormley* v. *State*, 37 Ohio St. 120.

[3] *Evelyn* v. *Haynes*, cited in Taylor, Ev. § 1509; *Connery* v. *Brooke*, 73 Pa. 80; *Chesapeake & O. R. Co.* v. *Com.* 88 Ky. 368, 11 S W 87.

[4] *State* v. *Coombs*, 32 Me 529; supra, § 581; *State* v. *Shafer*, 20 Kan. 226; *State* v. *Derichs*, 42 Iowa, 196; *Com.* v. *Keefe*, 7 Gray, 332; *Com.* v. *Hudson*, 14 Gray, 11; *Com.* v. *Goulet*, 160 Mass. 276, 35 N. E. 780; *People* v. *Gault*, 104 Mich. 575, 62 N. W. 724; *Tucker* v. *Moultrie*, 122 Ga. 160, 50 S. E 61; *Morton* v. *State*, 37 Tex. Crim. Rep. 131, 38 S. W. 1019.

authority is, then, that where one offense is selected from a series and prosecuted as a single offense, without reference to other offenses in the same series, that a conviction or acquittal of such an offense does not bar a prosecution for prior nor subsequent offenses relating to the same transaction;[5] and where the question is whether or not a certain thing is a nuisance, or a certain act constitutes a trespass, and the question has been determined by a judgment for the plaintiff or the prosecution, as the case may be, then the accused is estopped to deny, on a suit for a continuing offense, the fact that the thing complained of is a nuisance or a trespass.[6]

§ 592. Question, how raised.—In criminal procedure the question of former jeopardy is presented to the court by way of special plea of *autrefois acquit* or *autrefois convict*.[1] Such plea is regarded as an essential prerequisite to the introduction of the record of the trial procedure.[2] In some states,

[5] *Com.* v. *Campbell*, 22 Pa. Super. Ct. 98; *Morgan* v. *State*, 119 Ga. 964, 47 S. E. 567; *St. Joseph* v. *Dienger*, 165 Mo. 95, 65 S. W. 223; *Nichols* v. *State*, 37 Tex. Crim. Rep. 616, 40 S. W. 502; *Miller* v. *State*, — Tex. Crim. Rep. —, 72 S. W. 856; *United States* v. *Snow*, 4 Utah, 295, 9 Pac. 686; *State* v. *Malone*, 28 La. Ann. 80; *State* v. *Ingraham*, 96 Iowa, 278, 65 N. W. 152. See *State* v. *Kuhuke*, 30 Kan. 462, 2 Pac. 689; *People* v. *Sinell*, 131 N. Y. 571, 30 N. E. 47; *People ex rel. Lichtenstein* v. *Hodgson*, 126 N. Y. 647, 27 N. E 378; *State* v. *White*, 146 N. C. 608, 60 S. E. 505; *Storm* v. *Territory*, 12 Ariz. 26, 94 Pac. 1099; *Teague* v. *State*, 51 Tex. Crim. Rep. 523, 102 S. W. 1142; *Smith* v. *State*, 55 Tex Crim. Rep. 320, 116 S. W. 593.

Conviction or acquittal of offense as bar to prosecution for homicide in commission of offense, see note in 63 L.R.A. 405, and note in 14 L.R.A.(N.S.) 209.

Acquittal of larceny as bar to prosecution for forgery in the same transaction, see note in 4 L.R.A. (N.S.) 402.

[6] Wharton, Crim. Law, 8th ed § 475; *Fowle* v. *New Haven & N. Co.* 107 Mass. 352; *Plate* v. *New York C. R. Co.* 37 N. Y. 472.

[1] For form of plea, see Wharton, Precedents, § 1150.

[2] 2 Hale, P. C. 241; 2 Hawk. P. C. chap. 35; *Reg.* v. *Crofts*, 9 Car. & P. 219; *State* v. *Barnes*, 32 Me. 530; *Com.* v. *Merrill*, 8 Allen, 545; *Com.* v. *Chesley*, 107 Mass. 223; *Solliday* v. *Com.* 28 Pa. 13; *Nonemaker* v. *State*, 34 Ala. 211; *Foster*

by statute, the record can be offered in evidence under the plea of not guilty.[3]

§ 593. Parol evidence admissible to prove identity.— Even when the parties are the same, and the judgment prima facie admissible, it is always open to a party against whom such judgment is offered, to show, by parol or otherwise, that, notwithstanding this apparent identity, there is a difference in the points submitted in the two cases, either as to the offense or the offender. The issue thus raised as to identity is one of fact, which the jury must determine.[1] So, substantial as well as formal identity may be shown by parol.[2] The burden of disputing a prima facie case of identity is on the party disputing.[3] But a point not at issue by the record cannot be shown by parol to have been decided by the case.[4]

v. *State*, 39 Ala. 229; *Mountain* v. *State*, 40 Ala. 344; *Rocco* v. *State*, 37 Miss. 357; *Clem* v. *State*, 42 Ind. 420, 13 Am. Rep. 369; *State* v. *Salge*, 2 Nev. 321. See Wharton, Crim. Pl. & Pr. §§ 477, et seq.; supra, § 583b.

[3] *Clem* v. *State*, 42 Ind. 420, 13 Am. Rep. 369.

[1] *Reg.* v. *Crofts*, 9 Car. & P. 219; *Rex* v. *Parry*, 7 Car. & P. 836, 1 Jur. 674; *Ricardo* v. *Garcias*, 12 Clark & F. 368, 9 Jur. 1019; *Reg.* v. *Bird*, 2 Den. C. C. 94, 5 Cox, C. C. 20; *Aspden* v. *Nixon*, 4 How. 467, 11 L. ed. 1059; *Goodrich* v. *Chicago*, 5 Wall. 566, 18 L. ed. 511; *Washington, A. & G. Steam Packet Co.* v *Sickles*, 5 Wall. 580, 18 L. ed. 550; *Post* v. *Smilie*, 48 Vt. 185; *Piper* v. *Richardson*, 9 Met. 155; *Com.* v. *Dillane*, 11 Gray, 67; *Leonard* v. *Whitney*, 109 Mass. 265; *Com.* v. *Sutherland*, 109 Mass. 342; *Smith* v. *Sherwood*, 4 Conn. 276, 10 Am. Dec. 143; *People* v. *M'Gowan*, 17 Wend. 386; *Porter* v. *State*, 17 Ind. 415; *State* v. *Maxwell*, 51 Iowa, 314, 1 N. W. 666; *Duncan* v. *Com.* 6 Dana, 295; *Newton Mfg. Co.* v. *White*, 47 Ga. 400; *Chamberlain* v. *Gaillard*, 26 Ala. 504; *Robinson* v. *Lane*, 14 Smedes & M. 161; *State* v. *Andrews*, 27 Mo. 267; *State* v. *Small*, 31 Mo. 197; *State* v. *Thornton*, 37 Mo. 360; supra, §§ 509–511. See Wharton, Ev. § 785.

[2] Wharton, Ev. § 795

[3] 2 Hale, P. C. 241; *Com.* v. *Daley*, 4 Gray, 209; *State* v. *Small*, 31 Mo. 197; *State* v. *Thornton*, 37 Mo. 360; Wharton, Crim. Pl. & Pr. § 483.

[4] *Manny* v. *Harris*, 2 Johns. 24, 3 Am. Dec. 386; *Jackson ex dem. Genet* v. *Wood*, 3 Wend. 27.

II. When Judgment may be Impeached.

§ 594. Collateral impeachment of judgment.—A procedure before a court which, on the face of the record, has either no jurisdiction, or a jurisdiction which does not attach, is *coram non judice,* and may be impeached, even by the party in favor of whom the proceeding is instituted;[1] *a fortiori* by the party against whom it is offered.[2] An inferior court must show on the record that it had jurisdiction.[3] The same distinction holds good with respect to superior courts with limited statutory jurisdiction,[4] and with regard to courts of any class obviously transcending their powers.[5] If the record, however, avers the facts necessary to constitute jurisdiction, such averments cannot (except in cases of fraud to be here-

[1] *Mercier* v. *Chace,* 9 Allen, 242.

[2] Supra, § 571; *Rex* v. *Chester,* 1 W. Bl. 25; *Rex* v. *Washbrook,* 4 Barn. & C. 732, 7 Dowl. & R. 221; *Rex* v. *Bowman,* 6 Car. & P. 337; *Briscoe* v. *Stephens,* 2 Bing. 213, 9 J. B. Moore. 413, 3 L. J. C. P. 257, 27 Revised Rep. 597; *Thompson* v. *Whitman,* 18 Wall. 457, 21 L. ed. 897; *Hill* v. *Mendenhall,* 21 Wall. 453, 22 L. ed. 616; *Penobscot R. Co.* v. *Weeks,* 52 Me. 456; *State* v. *Hodgkins,* 42 N. H. 475; *Com.* v. *Alderman,* 4 Mass. 477; *Com.* v. *Goddard,* 13 Mass. 457; *Borden* v. *Fitch,* 15 Johns. 121, 8 Am. Dec. 225; *Latham* v. *Edgerton,* 9 Cow. 227; *Gage* v. *Hill,* 43 Barb. 44; *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490; *Fisher* v. *Longnecker,* 8 Pa. 410; *Com.* v. *Myers,* 1 Va. Cas. 198; *Wortham* v. *Com.* 5 Rand. (Va.) 669; *James* v. *Smith,* 2 S. C. 183; *Parish* v. *Parish,* 32 Ga. 653; *Richardson* v. *Hunter,* 23 La. Ann. 255; *State* v. *Payne,* 4 Mo. 376; *Bonsall* v. *Isett,* 14 Iowa, 309; *Mayo* v. *Ah Loy,* 32 Cal. 477, 91 Am. Dec. 595; *Dorsey* v. *Kendall,* 8 Bush, 294; *North* v. *Moore,* 8 Kan. 143.

[3] *Harris* v. *Willis,* 15 C. B. 710, 3 C. L. R. 609, 24 L. J. C. P. N. S. 93, 3 Week Rep. 238; *Crawford* v. *Howard,* 30 Me. 422; *Clark* v. *Bryan,* 16 Md. 171; *Adams* v. *Tiernan,* 5 Dana, 394; *Gray* v. *McNeal,* 12 Ga. 424.

[4] *Harris* v. *Hardeman,* 14 How. 334, 14 L. ed. 444; *Morse* v. *Presby,* 25 N. H. 299; *Carleton* v. *Washington Ins. Co.* 35 N. H. 162; *Huntington* v. *Charlotte,* 15 Vt. 46; *Embury* v. *Conner,* 3 N. Y. 511, 53 Am. Dec. 325. See however *Hahn* v. *Kelly,* 34 Cal. 391, 94 Am. Dec. 742; *Tibbs* v. *Allen,* 27 Ill. 119, Bigelow, Estoppel, 2d ed. 124.

[5] *Windsor* v. *McVeigh,* 93 U. S. 274, 23 L. ed. 914.

after noticed) be collaterally disputed by parties or privies.[6] Nor, where the record shows jurisdiction (unless with the exception already noticed) can parties or privies collaterally dispute the rulings of courts on questions of jurisdiction which were ruled against them at the time.[7]

§ 595. Impeachment of judgment for fraud.—Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite party may show the fraud and thus avoid the judgment. In criminal issues this is settled law. An acquittal or conviction a defendant manages to have fraudulently entered is no bar to a second prosecution.[1] Fraud, however, must be substantively proved, or the prior judgment will be a bar.[2] The burden is on the party setting up the fraud to show it.[3]

[6] *M'Cormick* v. *Sullivant,* 10 Wheat. 192, 6 L. ed. 300; *Morse* v. *Presby,* 25 N. H. 299; *Carleton* v. *Washington Ins. Co.* 35 N. H. 162; *Coit* v. *Haven,* 30 Conn. 190, 79 Am. Dec. 244; *Hartman* v. *Ogborn,* 54 Pa. 120, 93 Am. Dec. 679; *Clark* v. *Bryan,* 16 Md. 171; *Simmons* v. *McKay,* 5 Bush, 25; *Callen* v. *Ellison,* 13 Ohio St. 446, 82 Am. Dec. 448; *Moffitt,* v. *Maffitt,* 69 Ill. 641; *Rice* v. *Brown,* 77 Ill. 549; *Hahn* v. *Kelly,* 34 Cal. 391, 94 Am. Dec. 742; *Sharp* v. *Brunning,* 35 Cal. 533; *McCauley* v. *Fultan,* 44 Cal. 355; *Smith* v. *Wood,* 37 Tex. 616. Though see *Comstock* v. *Crawford,* 3 Wall. 397, 18 L. ed. 34.

[7] *Sheldon* v. *Wright,* 5 N. Y. 497; *Fitzhugh* v. *McPherson,* 9 Gill & J. 51.

[1] *Duchess of Kingston's Case,* 20 How. St. Tr. 544; *Reg.* v. *Davis,* 12 Mod. 9; *Rex* v. *Furser,* Sayer, 90; *State* v. *Little,* 1 N. H. 257; *State* v. *Brown,* 16 Conn. 54; *Com.* v. *Alderman,* 4 Mass. 477; *Com.* v. *Jackson,* 2 Va. Cas. 501; *Bulson* v. *People,* 31 Ill. 409; *State* v. *Green,* 16 Iowa, 239; *Dunlap* v. *Cody,* 31 Iowa, 260, 7 Am. Rep. 129; *Hulverson* v. *Hutchinson,* 39 Iowa, 316; *State* v. *Davis,* 4 Blackf. 345; *Halloran* v. *State,* 80 Ind. 586; *State* v. *Simpson,* 28 Minn. 66, 41 Am. Rep. 269, 9 N. W. 78; *State* v. *Colvin,* 11 Humph. 599, 54 Am. Dec. 58; *Ellis* v. *Kelly,* 8 Bush, 621; *State* v. *Jones,* 7 Ga. 422; *State* v. *Cole,* 48 Mo. 70. See *State* v. *Lowry,* 1 Swan, 34.

[2] *State* v. *Cascy,* 44 N. C. (Busbee, L.) 209; *State* v. *Tisdale,* 19 N. C. (2 Dev. & B. L.) 159; *Burdett* v. *State,* 9 Tex. 43.

[3] Supra, note 2; §§ 226, 590a;

§ 596. Impeachment of judgment for want of jurisdiction.—A foreign judgment is impeachable for want of jurisdiction, and, hence, for want of personal service, within the jurisdiction, on the defendant, this being internationally essential to jurisdiction. Thus, where a settlement was made in England on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, Hall, V. C., held that a Turkish court could not, by a decree of divorce pronounced without notice to the wife or other persons interested under the settlement, make void the settlement. So, it has been held that a foreign judgment can be contested, even by parties and privies, for fraud in its concoction; or for its flagrant violation of justice; or for nonidentity of subject-matter; or for incurable defectiveness or obscurity; or for manifest errors in its processes; or, generally, for any violation of the principles of international law.[1]

§ 596a. When a conviction of crime may be impeached.—A conviction of crime, when offered to disqualify a witness, cannot be impeached by him, by proof of his innocence, since the law is that it is the conviction that disqualifies.[1] The same rule obtains as to convictions when admitted under statutes which permit convictions of infamous crimes to be introduced in order to discredit a witness.[2] It is otherwise, however, when there is no such statute. Even

post, § 596a. See *Welch* v. *Mandeville*, 1 Wheat. 233, 4 L. ed. 79; *State ex rel. Cartwright* v. *Holmes*, 69 Ind. 577. See supra, § 570a.

[1] Wharton, Ev. § 803. As to the conclusiveness of judgments rendered by a foreign court, see *Dunstan* v. *Higgins*, 138 N. Y. 70, 34 Am. St. Rep. 431, 33 N. E. 729, with full annotations on the same case in 20 L.R.A. 668, and *Fisher* v. *Fielding*, 67 Conn. 91, 52 Am. St. Rep. 270, 34 Atl. 714, with full annotations on the same case in 32 L.R.A. 236.

[1] Supra, § 489.

[2] *Com.* v. *Gallagher*, 126 Mass. 54. See *Bartholomew* v. *People*, 104 Ill. 601, 44 Am. Rep. 97.

supposing that it is admissible at common law to put in evidence in order to discredit a witness, his conviction of a specific crime, not involving perjury, the record, when admitted, is, so far as concerns the parties to the suit, *res inter alios acta*, and hence it is open to impeachment by proof of the witness's innocence.[3] And a judgment, so far as it affects persons not parties to the record, and who could not have become parties, is *res inter alios acta*, and, if admissible at all, is open to impeachment.[4]

III. Administration and Probate.

§ 597. Letters of administration as prima facie proof of facts.—Letters of administration are not, so far as concerns third parties, adequate proof of the fact of death of the alleged decedent; and when offered, even as between parties or privies, they may be rebutted and invalidated by proof that the party whom they declared to be dead was really alive.[1]

§ 598. Probate of will as prima facie proof.—A probate of a will is the judicial action of a court having jurisdiction, admitting a will as prima facie genuine and valid. Technically it is a copy of the will, sealed with the seal of the court of probate, and attached to a certificate that the will has been proved, and that administration of the goods of the deceased has been granted to one or more of the executors named, or, in default of executors, to administrators. A probate of a will is only prima facie proof of the validity of the will as

[3] *Sims* v. *Sims*, 75 N. Y. 472, citing *Maybee* v. *Avery*, 18 Johns, 352; *People* v. *Buckland*, 13 Wend. 592. See *Gibson* v. *M'Carty*, Cas. t. Hardw. 311; *Mead* v. *Boston*, 3 Cush. 404; supra, §§ 439, 489.

[4] Wharton, Ev. § 803. See *Bell* v. *State*, 57 Md. 108; post, § 602.

[1] Wharton, Ev. § 810, and cases there cited. See article in 14 Am. L. Rev. 337.

against parties seeking to avoid it on ground of insanity,[1] or on the ground of other incompetency,[2] or of imperfect execution.[3] And a person indicted for forging a will cannot set up the probate of the will as even prima facie a defense.[4] With regard to recitals (*e. g.,* that of the presence of a party in court), a decree of a court of probate has been held to be prima facie evidence as to strangers,[5] though this can only be good to prove the record action of the court. Such recitals cannot be received to estop parties not served, but who should have been served.[6]

§ 599. Inquisition of lunacy prima facie proof.—Inquisitions of lunacy are necessarily *ex parte,* so far as concerns the person claimed to be a lunatic; since, on the assumption by which alone they have validity, he is a lunatic, and if a lunatic, he is not capable of putting in a valid appearance. Unless upon the hypothesis that such proceedings are *in rem,*[1] they cannot be held admissible against strangers; and at the best make out only a prima facie case.[2]

IV. Judgments in Rem.

§ 600. Effect of judgments in rem in criminal cases.—It is maintained by Mr. Taylor that whether a judgment *in rem* is conclusive in a criminal proceeding is a question which admits of some doubt. "In the *Duchess of Kingston's Case,* the

[1] *Marriot* v. *Marriot,* 1 Strange, 671.

[2] *Dickinson* v. *Hayes,* 31 Conn. 417.

[3] *Charles* v. *Huber,* 78 Pa. 449.

[4] *Rex* v. *Buttery,* Russ. & R. C. C. 342.

[5] *Sawyer* v. *Boyle,* 21 Tex. 28. See *Lovell* v. *Arnold,* 2 Munf. 167.

[6] Supra, § 594; *Randolph* v. *Bayne,* 44 Cal. 366.

As to the effect and conclusiveness of the probate of a will, see *Sly* v. *Hunt,* 159 Mass. 151, 21 L.R.A. 680, 34 N. E. 187, 38 Am. St. Rep. 403, and *Martin* v. *Stovall,* 103 Tenn. 1, 48 L.R.A. 130, 52 S. W. 296.

[1] See Wharton, Ev. § 817.

[2] Wharton, Ev. § 599.

judges express a decided opinion in the negative,—urging, first, that it would be contrary to public policy that the temporal courts, in the investigation of a criminal charge, should be bound by a decision, perhaps, of an ecclesiastical judge, addressed only to the conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision were conclusive in favor of a prisoner, it would be equally binding against him, and consequently, his life, liberty, property, and fame might depend upon the judgment of a court which had no organs to discover whether he had committed a crime or not.[1] On the other hand, it has been contended that this opinion of the judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, being merely an *obiter dictum* unnecessary for the decision of the points submitted to them;[2] and then, in answer to the reasons, it is said that nothing can be more inconvenient or dangerous than a conflict of decisions between different courts; and that, if judgments *in rem* are not regarded as binding upon all courts alike, the most startling anomalies may occur."[3] And there are some intimations that judgments *in rem* bind in criminal as well as in civil suits.[4]

V. Judgments Viewed Evidentially.

§ 601. Judgments as evidence of prior conviction.— Former judgments in criminal proceedings should be admitted to prove facts relevant to the offense charged.[1] Whenever

As to conclusive effect of judgment against an insane person, see *Spurlock* v. *Noe,* 19 Ky. L. Rep. 1321, 39 L.R.A. 775, 43 S. W. 231.

[1] 20 How. St. Tr. 540–543, 2 Smith, Lead. Cas. 642.

[2] 2 Smith, Lead. Cas. 676, 677.

[3] Taylor, Ev. § 1493.

[4] See *Reg.* v. *Hickling,* 7 Q. B. 880, 14 L. J. Mag. Cas. N. S 177, 9 Jur. 1075; *Rex* v. *Grundon,* Cowp. pt. 1, p. 315.

[1] See supra, §§ 570–573; *Janes* v. *Buzzard,* Hempst. 240, Fed. Cas. No. 7,206a; *Parsons* v. *Copeland,* 33 Me. 370, 54 Am. Dec. 628; *Canon* v. *Abbot,* 1 Root, 251.

such proceedings become material they should be shown by the record. Thus, in cases in which an offense is punished more severely on account of a former conviction, or where an increased penalty is attached to a second conviction for a like offense, it is necessary to produce evidence to establish the former conviction, to sustain the judgment of severer punishment or increased penalty. While the general rule is that such former conviction must be shown by the record, the question frequently arises whether or not such conviction must be averred in the indictment or information, or whether or not it must be established evidentially. It has been argued that it is a violation of the established principle that a man's character and his previous acts cannot be shown in evidence until he has first offered character evidence,[2] and also that such proof places the accused on trial for another offense at the same trial, but these arguments have not been the controlling force, although both the rulings upon the law and the statutory provisions as to the proof of former convictions show evidence that the principles argued for have not been disregarded. An act of Parliament was passed declaring the common law, that is, that the prior conviction should not be submitted to the jury until they find the accused guilty of the immediate offense under trial,[3] and in many of the states similar restrictions exist. Whether or not the former conviction should appear by averment, or as a fact to be put in evidence, depends upon the terms of the statute. Where the jury is called upon to find generally guilty or not guilty, leaving the punishment to be fixed by the court, then it is reasonable to assert that the jury has nothing to do with the prior conviction, but that such fact can only be made to appear as a basis for the additional sentence imposed by the act; but where the jury, by their verdict, pass upon all the issues and fix the punishment,

[2] Supra, §§ 59–61.

[3] *Reg.* v. *Martin*, L. R. 1 C. C. 314, 39 L. J. Mag. Cas. N. S. 31, 21 L. T. N. S. 469, 18 Week. Rep. 72, 11 Cox, C. C. 343; *Reg.* v. *Key*, 5 Cox, C. C. 369, 2 Den. C. C. 347.

then the former conviction is of substance, and it is reasonable to aver it in the indictment or to prove it as a fact in evidence. In this case the former conviction goes to the jury as a part of the record, and one of the essential allegations is identity of the accused, upon which question the jury must pass.[4] Such statutes have been held to be constitutional, and not violative of the provision against compelling the accused to be a witness against himself, or of being twice in jeopardy for the same offense.[5] But such statutes do not dispense with the substantive rules of the law as to evidence. Thus, evidence of a distinct crime not averred in the indictment, nor necessarily connected with the offense charged, cannot be received to increase the statutory penalty.[6] The record of a former conviction is inadmissible without the production of the indictment on which it was based,[7] but this ruling has not been generally followed, and courts have allowed proof of former convictions in varying degrees, and in accord with the provisions and constructions of the local statute.[8]

[4] *Maguire* v. *State*, 47 Md. 497; *Thomas* v. *Com.* 22 Gratt. 912. See *Tuttle* v. *Com.* 2 Gray, 505; *Johnson* v. *People*, 65 Barb. 342; *Smith* v. *Com.* 14 Serg. & R. 69; *Hines* v. *State*, 26 Ga. 614. See *State* v. *Dolan*, 69 Me. 573; *People* v. *King*, 64 Cal. 338, 30 Pac. 1028; *State* v. *Hudson*, 32 La. Ann. 1052; *Com.* v. *Morrow*, 9 Phila. 583; *Com.* v. *Hagan*, 10 Pa. Co. Ct. 22; *State* v. *Freeman*, 27 Vt. 523. See *State* v. *Haynes*, 35 Vt. 570; *State* v. *Spaulding*, 61 Vt. 505, 17 Atl. 844; *People* v. *Price*, 6 N. Y. Crim. Rep. 141, 2 N. Y. Supp. 414; *People* v. *Carlton*, 57 Cal. 559 (where prior conviction is charged in the indictment, such prior conviction may be considered as though charged in the information).

[5] *People* v. *Coleman*, 145 Cal. 609, 79 Pac. 283; *Herndon* v. *Com.* 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989; *White* v. *Com.* 20 Ky. L. Rep. 1942, 50 S. W. 678; *McDonald* v. *Com.* 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874; *Whorton* v. *Com.* 7 Ky. L. Rep. 826; *Com.* v. *Phillips*, 11 Pick. 28. See *Stover* v. *Com.* 92 Va. 780, 22 S. E. 874; *King* v. *Lynn*, 90 Va. 345, 18 S. E. 439; *Re Mallon*, 16 Idaho, 737, 22 L.R.A.(N.S.) 1123, 102 Pac. 374.

[6] *Ingram* v. *State*, 39 Ala. 247, 84 Am. Dec. 782.

[7] *Cross* v. *State*, 78 Ala. 430.

[8] See *Rector* v. *Com.* 80 Ky. 468; *State* v. *Brown*, 115 Mo. 409, 22 S. W. 367; *State* v. *Smith*, 129 Iowa, 709, 4 L.R.A.(N.S.) 539, 106 N. W.

§ 602. Judgment of conviction of principal, evidence against accessory.—As at common law the conviction of the principal is a condition precedent to the conviction of the accessory, it is necessary, on the trial of the accessory, to put in evidence the record of the conviction of the principal. This record is, however, only prima facie proof of the guilt of the principal, and may be impeached by proof that such conviction was erroneous.[1] Judgment must have been entered on the verdict to make the record admissible.[2] The burden of proving that the principal was not guilty is on the accessory,[3] but the accessory is not restricted to proof of facts shown on the former trial.[4] On the other hand, it is admissible for the prosecution to put in evidence the facts tending to show the

187, 6 A. & E. Ann. Cas. 1023; *State* v. *Volmer,* 6 Kan. 379 (former conviction pending on appeal not admissible to prove accused guilty of a second offense); *State* v. *Cox,* 69 N. H. 246, 41 Atl. 862 (original complaint, with clerk's indorsement, on plea of guilty and fine imposed, is competent to prove former conviction). See *Tall* v. *Com.* 33 Ky. L. Rep. 541, 110 S. W. 425 ("record" proof of former conviction held only to include verdict, judgment, and sentence); *State* v. *Payne,* 223 Mo. 112, 122 S. W. 1062. See *State* v. *Court,* 225 Mo. 609, 125 S. W. 451; *People use of State Bd. of Health* v. *Koehler,* 146 Ill. App. 541; *People* v. *Sickles,* 156 N. Y. 541, 51 N. E. 288, 26 App. Div. 470, 13 N. Y. Crim. Rep. 138, 50 N. Y. Supp. 377. (It is held in New York that where the accused is indicted for a crime charged as a second offense, and pleads not guilty, the first conviction must be proved, although, before the jury was impaneled, the accused admitted the first conviction, the rule being that the plea of guilty puts in issue every material averment of the indictment, and an admission of part of the charges does not restrict the jury to the other charges only.)

[1] *Rex* v. *Turner,* 1 Moody C. C. 347; *Ratcliffe's Case,* 1 Lewin, C. C. 121; *United States* v. *Hartwell,* 3 Cliff. 221, Fed. Cas. No. 15,318; *State* v. *Ricker,* 29 Me. 84; *State* v. *Rand,* 33 N. H. 216; *Com.* v. *Knapp,* 10 Pick. 477, 20 Am. Dec. 534; *People* v. *Buckland,* 13 Wend. 592; *Anderson* v. *State,* 63 Ga. 675; *Keithler* v. *State,* 10 Smedes & M. 192; *Levy* v. *People,* 80 N. Y. 329; *Coleman* v. *People,* 55 N. Y. 81.

[2] *State* v. *Duncan,* 28 N. C. (6 Ired. L.) 236.

[3] *Com.* v. *Knapp,* 10 Pick. 484, 20 Am. Dec. 534; *State* v. *Chittem,* 13 N.C. (2 Dev. L.) 49; *State* v. *Duncan,* 28 N. C. (6 Ired. L.) 236.

[4] *State* v. *Sims,* 2 Bail. L. 29.

principal's guilt.[5] In most jurisdictions proof of such conviction is, by statute, no longer necessary in order to convict the accomplice or accessory.[6]

§ 602a. Judgments as evidence to establish facts.—A prior judgment may be also admissible as a part of the evidence on which the case for or against the defendant may be made out.[1] This is eminently the case in proceedings for perjury, in which the record of the trial at which the alleged perjury was committed is admissible as inducement, though not to prove the perjury.[2] And on indictment for escape, it is necessary, if the person escaped was a convict, to put in evidence his conviction.[3] It has also been held that on the trial of an indictment for manslaughter, the record of a conviction of the defendant for the assault which caused death (the deceased having died after such conviction) is conclusive evidence that the assault was unjustifiable.[4]

It may be relevant, also, to prove a former offense committed by the defendant, as part of a system of crime of which the offense under trial is another part.[5] If so, it is admissible to put in evidence the defendant's conviction of the former offense.[6] Where, also, the offense charged is that of being a common thief, a prior conviction of the defendant in the

[5] *Levy* v. *People*, 80 N. Y. 329; 21 Alb. L. J. 313; post, § 702.

[6] Wharton, Crim. Law, 8th ed. § 237; *Hatchett* v. *Com.* 75 Va. 925.

[1] *Com.* v. *M'Pike*, 3 Cush. 181, 50 Am. Dec. 727.

[2] *Reg.* v. *Christian*, Car. & M. 388; *Reg.* v. *Browne*, 3 Car. & P. 572, Moody & M. 315; *Rex* v. *Iles*, Buller, N. P. 243; *Rex* v. *Stoveld*, 6 Car. & P. 489; *Brown* v. *State*, 47 Ala. 47.

[3] *Rex* v. *Shaw*, Russ. & R. C. C. 526; *Reg.* v. *Waters*, 12 Cox, C. C. 390; *Davies* v. *Lowndes*, 1 Bing. N. C. 607; *Com.* v. *Miller*, 2 Ashm. (Pa.) 61; *Kyle* v. *State*, 10 Ala. 236.

[4] *Com.* v. *Evans*, 101 Mass. 25; *Com.* v. *Roby*, 12 Pick. 496; *Com.* v. *Cutler*, 9 Allen, 486. See also *Reg.* v. *Salvi*, 10 Cox, C. C. 481, note (and see post, § 585); *Com.* v. *M'Pike*, 3 Cush. 181, 50 Am. Dec. 727; *Com.* v. *Austin*, 97 Mass. 595.

[5] *Dubose* v. *State*, 13 Tex. App 418.

[6] *State* v. *Neagle*, 65 Me. 468.

same jurisdiction, of larceny, is admissible as part of the case of the prosecution.[7] And a record of conviction of the defendant in the same jurisdiction, being an adjudication in which the same parties were litigant, may be conclusive when showing a relevant fact.[8]

§ 603. To prove judgment, record must be complete.— If the object of the evidence be to prove a particular judicial result, *e. g.*, the entering of a judgment, it is not enough to have a certificate of the result. The whole record, so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete.[1] The component parts

[7] *World* v. *State*, 50 Md. 49.

[8] *Com.* v. *Evans*, 101 Mass. 25; *Phillips* v. *Fadden*, 125 Mass. 198; *Com.* v. *Feldman*, 131 Mass. 588. See *Brunet* v. *State*, 12 Tex. App. 521.

[1] See supra, §§ 179, 184, 195; *Rex* v. *Smith*, 8 Barn. & C. 341, 6 L. J. Mag. Cas. 99; *Godefroy* v. *Jay*, 3 Car. & P. 192; *R.* v. *Robinson*, 1 Craw. & D. C. C. (Ir.) 329; *Porter* v. *Cooper*, 6 Car. & P. 354, 1 Cromp. M. & R. 387, 4 Tyrw. 456; *King* v. *Birch*, 3 Q. B. 431, 2 Gale & D. 513, 11 L. J. Q. B. N. S. 183; *Jay* v. *East Livermore*, 56 Me. 107; *Hawks* v. *Truesdell*, 99 Mass. 557; *Davidson* v. *Murphy*, 13 Conn. 213; *Belden* v. *Meeker*, 2 Lans. 470; *Com.* v. *Trout*, 76 Pa. 379; *Numbers* v. *Shelly*, 78 Pa. 426; *Carrick* v. *Armstrong*, 2 Coldw. 265; *Evans* v. *Reed*, 2 Mich. N. P. 212; *Sternburg* v. *Callanan*, 14 Iowa, 251; *Smith* v. *Smith*, 22 Iowa, 516; *Miles* v. *Wingate*, 6 Ind. 458; *Miller* v. *Deaver*, 30 Ind. 371; *Young* v. *Thompson*, 14 Ill. 380; *Oliver* v. *Persons*, 30 Ga. 391, 76 Am. Dec. 657; *Mitchell* v. *Mitchell*, 40 Ga. 11; *Hallet* v. *Eslava*, 3 Stew. & P. (Ala.) 105; *Anderson* v. *Cox*, 6 La. Ann. 9; *Loper* v. *State*, 3 How. (Miss.) 429; *Wash* v. *Foster*, 3 Mo. 205; *Mason* v. *Wolff*, 40 Cal. 246; *Ogden* v. *Walters*, 12 Kan. 282.

In Black on Judgments 2d ed., the definition of the judgment roll or record is thus concisely stated:

"It seems appropriate, in this connection, to give some account of the judgment roll or record of the judgment. At common law the judgment roll was a roll of parchment upon which all the proceedings in the cause, up to the issue, and the award of venire inclusive, together with the judgment which the court awarded in the cause, were entered. It included as well the pleadings and process as the signing of the judgment. In our modern practice, the proceedings are not thus transcribed, although

of the record should be so attached that it will appear that the certificate extends to them all.[2] A certificate that a transcript is true and perfect, enumerating all the usual parts of a record, is sufficient.[3] But a complete extension of the record will not be exacted when all that is substantial appears,[4] though if the judgment of a court is put in evidence to effect a transfer of rights, the preliminary conditions of the judg-

in some states they are required to be copied with more or less detail into books kept for that purpose, and in others a judgment roll, consisting of the writ, pleadings, and other papers in the cause, must be on file when the clerk enters judgment. And for the purpose of an appeal, or other similar use, the record comprises a full copy of all the papers and proceedings in the cause. The following account of the practice obtaining in Illinois will be found applicable in many of the states: 'Under our practice, while the pleadings, process, etc., are not, as at common law, required to be copied on a parchment roll, nor in the record book in which final judgment is entered, they are required to be filed in the office of the clerk; and when a copy of the record of the judgment is required, for the purpose of bringing the case by appeal or writ of error into this court, or bringing suit upon it in another state, or as evidence under an issue of *nul tiel record*, or to establish a former adjudication of the same subject-matter between the same parties, and indeed in all cases where it is essential to have a complete record of a judgment, the pleadings and process are an indispensable part of it. And the general rule is that where the copy of a record of a judgment is required, it must be of the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part.' In Massachusetts the clerk's docket is the record of the court, until the record is fully extended, and every entry upon it is the statement of an act of the court, which is presumed to be made by its direction, in pursuance either of an order for the particular entry, or of a general order, or of a general usage presupposing such an order. A record, it will be remembered, imports absolute verity, must be tried by itself, and cannot be contradicted."

[2] *Susquehanna & H. Valley R. & Coal Co.* v. *Quick*, 68 Pa. 189; *Herndon* v. *Givens*, 16 Ala. 261.

[3] *Coffee* v. *Neely*, 2 Heisk. 304.

[4] See supra, § 179; *Reg.* v. *Newman*, 2 Den. C. C. 390, 3 Car. & K. 240, 21 L. J. Mag. Cas. N. S. 75, 16 Jur. 111, 5 Cox, C. C. 547; *Knapp* v. *Abell*, 10 Allen, 485; *Brainard* v. *Fowler*, 119 Mass. 262, Morton, J.; *Haynes* v. *Cowen*, 15 Kan. 637.

ment must, in some shape, appear on the record. Even a sentence in admiralty, to sustain its admissibility for such purpose, must have attached to it the preliminary proceedings on which it is based;[5] and a judgment of an ecclesiastical or probate court cannot prove title without producing the libel and answer, and the defensive allegations.[6] And to sustain a plea of *autrefois convict*, the record must show an unarrested judgment.[7]

§ 604. Journals of court admissible to prove actions of court.—The journals of a court, in those jurisdictions where such journals are kept, though not technically part of the record, are to be regarded as proof, when duly verified, of the action of the court in any matter to which they relate. They are, therefore, admissible, in any view, provisionally.[1] In such case, the object being to show that some other proceeding has occurred before the same court, a minute of the former proceeding will be admitted in lieu of the record, whenever the formal record cannot be presumed to have been made up.[2] The minutes of a court, however, cannot be introduced to contradict a record.[3] Nor is the entry on the docket of a presiding judge, such entry not being in his handwriting, nor part of the record, admissible to prove the entering of a *nolle prosequi*.[4]

[5] Comyns's Dig. Ev. chap. 1; Taylor, Ev. § 1411.

[6] *Leake* v. *Westmeath*, 2 Moody & R. 394, per Tindal, Ch. J., overruling *Stedman* v. *Gooch*, 1 Esp. 6.

[7] *State* v. *Sherburne*, 58 N. H. 535.

[1] *Rex* v. *Browne*, 3 Car. & P. 572.

[2] *Tooke's Trial*, 25 How. St. Tr. 446–449. Recognized in *Rex* v. *Smith*, 8 Barn. & C. 343, 6 L. J. Mag. Cas. 99; *R.* v. *Robinson*, 1 Craw. & D. C. C. (Ir.) 329; *R.* v. *Reilly*, Ir. Cir. R. 795, per Doherty, Ch. J.; supra, § 231. See *Fitzpatrick* v. *Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681; *Grosvenor* v. *Tarbox*, 39 Me. 129; *Wilkins* v. *Anderson*, 11 Pa. 399.

[3] *Den ex dem. Newcomb* v. *Downam*, 13 N. J. L. 135; *Mandeville* v. *Stockett*, 28 Miss. 398. See *Strong* v. *Bradley*, 13 Vt. 9.

[4] *Smith* v. *State*, 62 Ala. 29.

§ 605. Docket entries not admissible when full record can be had.—What has been said of the minutes of the court applies *a fortiori* to the docket entries, regularly entered by the clerk or prothonotary,[1] which give the details from which the record is made up, and which can be received in place of the record until it is made up.[2] In many jurisdictions, the docket, which contains the substantial parts of the record, is regarded as its substitute until such time as a full record is required for removal to a superior court.[3] Even after a record is extended, if it be lost, the docket entries become primary.[4]

The docket entries, when lost, can be proved by parol.[5]

§ 606. When ancient documents may be proved in fragments.—An ancient record, taken from the proper depositary, may be proved in fragments, when no fuller proof is attainable.[1] It is otherwise, however, when the fragments offered have no internal evidence of authority.[2]

§ 607. When portions of a record may be admitted as evidence.—It frequently happens, as is elsewhere inciden-

[1] *Com.* v. *Bolkom,* 3 Pick. 281; *Townsend* v. *Way,* 5 Allen, 426; *Keller* v. *Killion,* 9 Iowa, 329; *Prentiss* v. *Holbrook,* 2 Mich. 372; *Hair* v. *Melvin,* 47 N. C. (2 Jones, L.) 59; *Handley* v. *Russell,* Hardin (Ky.) 145.

[2] Wharton, Ev. § 826; *State* v. *Neagle,* 65 Me. 468; *Com.* v. *Weymouth,* 2 Allen, 144, 79 Am. Dec. 776; *Boyd* v. *Com.* 36 Pa. 355; *Boteler* v. *State,* 8 Gill & J. 359; *Weighorst* v. *State,* 7 Md. 446; *Maguire* v. *State,* 47 Md. 497.

[3] *Jay* v. *East Livermore,* 56 Me. 107; *Willard* v. *Harvey,* 24 N. H. 344; *Hamilton* v. *Com.* 16 Pa. 129, 55 Am. Dec. 485; *State* v. *Hines,* 68 Me. 202.

[4] Wharton, Ev. § 605.

[5] *Pruden* v. *Alden,* 23 Pick. 187, 34 Am. Dec. 51; *Tillotson* v. *Warner,* 3 Gray, 574. See Wharton, Ev. § 135.

[1] See Wharton, Ev. § 136.

[2] Taylor, Ev. § 1423, citing *Evans* v. *Taylor,* 7 Ad. & El. 617, 3 Nev. & P. 174, 7 L. J. Q. B. N. S. 73; Vaux Barony Min. Ev. 67; *Leighton* v. *Leighton,* 1 Strange, 308.

tally noticed,[1] that record proof is appealed to merely to establish evidentially (as distinguished from dispositively, or from estoppel) some circumstance relevent to the case.[2] Thus the object of the evidence may be merely to prove the fact of a former trial, and in such case, on an indictment for perjury committed at such trial, it has been held that the production by the officer of the court of the caption, the indictment with the indorsement of the prisoner's plea, the verdict and the sentence of the court upon it, is sufficient, without the production of the record.[3] Or again, the object is to prove that A B was resident at C at the particular time. As an item of proof in such a case, it is admissible to put in evidence a justice's process, of the date in question, in favor of A B, of C.[4] If the object is to prove an arrest or attachment, the officer's return to this effect establishes a prima facie case. And, generally, when the object is to introduce certain record facts as part of the indicatory evidence of a case (*e. g.*, to show that a certain writ issued, or was returned in a particular way), then the pertinent portions of a record may be certified and put in evidence separately.[5]

§ 608. Portions of records must be complete in themselves.—In order, however, to admit separate portions of record to prove certain facts, they must be shown to be complete in their relation to such facts.[1] Thus, if the object be to

[1] Supra, §§ 570, 602.

[2] See *Blower* v. *Hollis,* Car. & M. 396, 3 Tyrw. 356, 2 L. J. Exch. N. S. 176; *Leake* v. *Westmeath,* 2 Moody & R. 397; *Attwood* v. *Taylor,* 1 Mann. & G. 289, 1 Scott, N. R. 611; *Benedict* v. *Heineberg,* 43 Vt. 231; *Lee* v. *Stiles,* 21 Conn. 500; *Whitmore* v. *Johnson,* 10 Humph. 610; *Smith* v. *Pattison,* 45 Miss. 619; *Watts* v. *Clegg,* 48 Ala. 561.

[3] *Reg.* v. *Newman,* 2 Den. C. C. 390, 3 Car. & K. 240, 21 L. J. Mag. Cas. N. S. 75, 16 Jur. 111, 5 Cox, C. C. 547.

[4] *Cavendish* v. *Troy,* 41 Vt. 99. See supra, § 570.

[5] Wharton, Ev. § 828; *World* v. *State,* 50 Md. 49; supra, § 602a.

[1] *Buford* v. *Hickman,* Hempst. 232, Fed. Cas. No. 2,114a; *Glenn* v. *Garrison,* 17 N. J. L. 1; *Kendrick*

show that a search warrant legally issued, it must appear that it was preceded by the proper oath;[2] if the object is to prove service of process, an officer's return must be set forth.[3] It is also stated that writs and warrants, before their return, must be proved by actual production, though after their return, when they become matters of record, they are provable by copies.[4]

§ 609. When verdict is admissible as an evidentiary fact.—When the object of proving a verdict is the refreshing the memory of a witness, or forming one of the links of the chain of circumstantial evidence in a matter collateral to the merits of the verdict, the verdict may be put in evidence as a mere evidentiary fact, not as in any way showing that it was true, but simply as proving that it was taken.[1] For the purpose of proving reputation, a verdict, without judgment, has been held admissible, even against strangers, when the verdict goes directly to reputation. But this holds good only as to ancient verdicts, and such as have been acquiesced in by the parties; and, as a general rule, a verdict cannot be put in evidence unless judgment has been entered on it.[2] In criminal cases, however, as we have seen, a verdict of acquittal operates as a bar without a judgment; and so, under certain conditions, does a verdict of conviction.[3]

§ 610. When portions of ancient records may be received in evidence.—As has been already incidentally

v. *Kendrick,* 4 J. J. Marsh. 241; *Welch* v. *Walker,* 4 Port. (Ala.) 120; *Vassault* v. *Austin,* 32 Cal. 597.

[2] *Halsted* v. *Brice,* 13 Mo. 171.

[3] *Peers* v. *Carter,* 4 Litt. (Ky.) 268; *Lyne* v. *Bank of Kentucky,* 5 J. J. Marsh, 545.

[4] Taylor, Ev. § 1424, citing Buller, N. P. 234.

[1] *Tooke's Trial,* 25 How. St. Tr. 446; *Rex* v. *Smith,* 8 Barn. & C. 343, 6 L. J. Mag. Cas. 99; Wharton, Ev. § 824, note 7, § 825

[2] See Wharton, Ev. § 831; *Reg.* v. *Meek,* 9 Car. & P. 513.

[3] Supra, § 574.

observed,[1] when a record is ancient, and when its imperfect condition is to be ascribed to the usual deteriorating effects of time, it is admissible to prove such portions of it as are attainable, imperfect as they may be. It is essential, however, that such documents should have been produced from the proper office, and should on their face exhibit prima facie evidence of regularity. When lost, such records may be supplied by parol.[2]

§ 611. Return of officer as evidence of facts.—An officer's return in execution of a writ may be admissible for the following purposes:

1. As a link in title, or in any other way as a basis of suit.[1]

2. As binding the officer making it. In such case the return is a solemn admission, conclusive against the officer and his privies. He may, however, put in evidence supplementary facts,[2] not inconsistent with his return.[3] When offered in the officer's favor, however, the return is but prima facie proof of its contents.[4]

3. As binding the parties. A party issuing a writ is also bound by it, and is ordinarily estopped from disputing its averments.[5] So far as concerns such parties, the verity of the returns of the officers cannot, as we have seen, be disputed collaterally. The redress must be by application to the court from which the execution issues.[6] When, however, a return is ambiguous, it may be explained by parol.[7]

4. As proving its legal effects. A return may be put in evidence against strangers to prove that it issued; or to prove,

[1] Supra, § 606.
[2] Wharton, Ev. § 833; supra, §§ 204, 606.
[1] Wharton, Ev. § 833; post, § 642.
[2] Post, § 614.
[3] Wharton, Ev. § 834.
[4] Freeman, Executions, § 366.
[5] Wharton, Ev. § 834.
[6] Wharton, Ev. § 834. See Freeman, Executions, § 364.
[7] Wharton, Ev. § 834; Herman, Executions, §§ 240, 244, 295.

in the same manner as may a judgment, its legal effects.[8] But when used to effect the interest of strangers, such returns, so far as concerns facts which it is the duty of the officer to state, are only prima facie evidence at the best, and as to other facts are not evidence at all.[9]

§ 612. Return of execution as evidence of insolvency.—A fi. fa. returned nulla bona, or returned in such a way as to indicate insolvency in the execution defendant, may be admissible as prima facie proof in a link in the evidence to prove such insolvency. To the execution, however, it has been held proper that the record should be attached; and even if this be dispensed with, the execution must have the seal of the court. Proceedings in insolvency are in like manner admissible to prove, in collateral proceedings, the debtor's insolvency.[1]

VI. Records as Admissions.

§ 613. Judgment as evidence of an admission or confession.—A judgment has an evidentiary character when it involves an admission against the interest of the party against whom it is offered,[1] and, in criminal cases, where the accused plead guilty, the record showing the plea can be offered in evidence in a civil proceeding growing out of the same offense, but in such cases the record is admitted not as a judgment establishing the fact, but as the deliberate confession or admission of the accused himself acknowledging the fact.[2]

[8] See Wharton, Ev. §§ 822–824, 834.

[9] Wharton, Ev. § 833; post, § 642.

[1] Wharton, Ev. § 834.

[1] Post, §§ 638, et seq.; *Boston* v. *Richardson*, 13 Allen, 146; *Truby* v. *Seybert*, 12 Pa. 101; *McDermott* v. *Hoffman*, 70 Pa. 52.

[2] *Myers* v. *Maryland Casualty Co.* 123 Mo. App. 682, 101 S. W. 124; *Mead* v. *Boston*, 3 Cush. 404; Jacob's Fisher's Dig. Judgment, col.

§ 614. Conclusive effect of an officer's return on a writ.—When an officer, or his sureties, is sued on his return, then such return is conclusive against him so far as it involves admission of the reception of goods by himself; and the same rule holds on criminal proceedings against him on his return.[1] A party, also, who has obtained possession of property by decree of court solemnly prayed for by himself cannot afterwards, in a suit against him to recover claims on such property, deny the ownership. And a party may preclude himself from offering evidence inconsistent with the attitude assumed by him in a particular suit, as where, on demurrer, he is precluded from disputing facts the demurrer admits,[2] or where, after one plea is entered, a repugnant plea will not be received.[3] But this does not prevent the entering of successive pleas tentatively.[4]

§ 615. Pleadings filed in civil actions as evidence of admissions; exception.—The pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But in order to bring such admission home to him, the pleading must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts.[1] Yet even if such admissions

7930; *Corwin* v. *Walton*, 18 Mo. 71, 59 Am. Dec. 285; *Green* v. *Bedell*, 48 N. H. 546; *Birchard* v. *Booth*, 4 Wis. 67; *Bradley* v. *Bradley*, 11 Me. 367; *Crawford* v. *Bergen*, 91 Iowa, 675, 60 N. W. 205; *Clark* v. *Irvin*, 9 Ohio, 131; *Rudolph* v. *Landwerlen*, 92 Ind. 34; *Young* v. *Copple*, 52 Ill. App. 547; *Schreiner* v. *High Ct. C. O. F.* 35 Ill. App. 576; *Albrecht* v. *State*, 62 Miss. 516; *Webb* v. *State*, 4 Coldw. 199; *Com.* v. *Horton*, 9 Pick. 206. See also *Birchard* v. *Booth*, 4 Wis. 67, supra.

[1] Wharton, Ev. § 837; supra, § 611; post, §§ 638, 639.

[2] See Wharton, Crim. Pl. & Pr. § 400.

[3] Wharton, Crim. Pl. & Pr. § 419.

[4] Wharton, Crim. Pl. & Pr. § 420; Wharton, Ev. § 837.

[1] Post, § 697

are thus brought home to the party, they are entitled to little weight.[2] A plea of guilty in a criminal issue, however, being presumed to be solemnly entered by the defendant himself, may be put in evidence against him as a confession of the fact, in a civil issue.[3] And a plea verified by affidavit, or an answer in chancery, may be properly viewed as a solemn admission;[4] though the party must have been capable of binding himself by the plea; and hence a person cannot be made responsible criminally for a plea made by him when incompetent by reason of infancy.[5] A plea in abatement filed by a party in a particular suit, on which there is judgment in his favor, estops him from afterwards denying the facts set up in the plea.[6] But dilatory pleas, and pleas on which no judgment in favor of the party pleading is entered, are always rebuttable.[7] But there is generally a provision in all civil practice acts and civil codes of procedure that no pleading can be used in a criminal prosecution as evidence of a fact admitted or alleged in such pleading.

§ 616. Admission by demurrer.—A "demurrer only admits the facts which are well pleaded; it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument."[1]

[2] Post, §§ 638–642. See Wharton, Ev. § 838.

[3] Supra, § 577; Anonymous, cited in Phillipps, Ev. 25; *Reg.* v. *Fontaine Moreau,* 11 Q. B. 1033; *Bradley* v. *Bradley,* 11 Me. 367; *Green* v. *Bedell,* 48 N. H. 546; *Clark* v. *Irvin,* 9 Ohio, 131. See Wharton, Ev. § 776.

[4] Post, § 638–641.

[5] *Reg.* v. *Stone,* 1 Fost. & F. 311; post, § 638.

[6] Wharton, Crim. Pl. & Pr. § 425; supra, § 94.

[7] See Wharton, Ev. § 838; *Com.* v. *Lannan,* 13 Allen, 563; post, §§ 639–641.

[1] *Clifford, J., Gould* v. *Evansville & C. R. Co.* 91 U. S. 530, 23 L. ed. 419. Compare Wharton, Crim. Pl. & Pr. §§ 400–403.

And so the "mere averments of a legal conclusion are not admitted by a demurrer, unless the facts and circumstances set forth are sufficient to sustain the allegation." [2] In criminal cases a demurrer to the prosecution's evidence admits all the facts that the evidence tends to prove.[3]

§ 617. Binding effect of official certificates.—Facts pertaining to a record, but not entered on the record, may be certified to by the proper clerk, and the certificate received as evidence.[1] Thus the certificate of a clerk of a circuit court has been received to prove that a cause was not tried at the circuit; [2] and the certificate of a court of appeals may be evidence to prove reversal of a judgment.[3]

[2] *Gould* v. *Evansville & C. R. Co.* 91 U. S. 536, 23 L. ed. 419. Compare Wharton, Crim. Pl. & Pr. §§ 400–403.

[3] *Com.* v. *Parr,* 5 Watts & S. 345; *Brister* v. *State,* 26 Ala. 108. See *Golden* v. *Knowles,* 120 Mass. 336; Wharton, Crim. Pl. & Pr. § 407.

[1] See supra, §§ 166, 195–201.

[2] *Wright* v. *Murray,* 6 Johns. 286. See supra, § 166.

[3] *Hoy* v. *Couch,* 5 How. (Miss.) 188.

CHAPTER XIII.

MODIFICATION OF DOCUMENTS BY PAROL.

§ 620. Documents not to be varied by parol.—It is rarely that an issue can arise in criminal procedure, involving the modification of a document by parol. It is enough, therefore, in the present volume, to state, as a general rule, that to vary the terms of a document parol evidence cannot be received. It is important, at the same time, to keep in mind the distinction between documents which are uttered dispositively, *i. e.*, for the purpose of disposing of rights; and those uttered nondispositively, *i. e.*, not for the purpose of disposing of rights. A nondispositive, or, to adopt Mr. Bentham's term, a "casual," document, is more open to parol variation than is a document which is dispositive, or, as Mr. Bentham calls it, "predetermined." A casual or nondispositive document (*e. g.*, a letter or memorandum thrown off hurriedly in the ease and carelessness of familiar intercourse, without intending to institute a contract, and without reference to the litigation into which it is afterwards pressed) is peculiarly, dependent upon extraneous circumstances; is often inexplicable unless such circumstances are put in evidence; and employs language which, so far from being made up of phrases selected for their conventional business and legal limitations, is marked by the writer's idiosyncrasies, and sometimes comprises words peculiar to the writer himself. But whether such documents are informally or

formally constituted, they agree in this, that, so far as concerns the parties to the case in which they are offered, they were not prepared for the purpose of disposing of the rights of the party from whom they emanate. Dispositive documents, on the other hand, are deliberately prepared, and are usually couched in words which are selected for the purpose, because they have a settled legal or business meaning. Such documents are meant to bind the party uttering them in both his statements of fact and his engagements of future action; and they are usually accepted by the other contracting party (or, in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms. It stands to reason, therefore, that parol evidence is not as a rule to be received to vary the terms of documents so prepared and so accepted, though it is otherwise when such documents are offered, not dispositively, between the parties, but noncontractually, as to strangers. So far as concerns the parties or privies to a dispositive document, valid in itself, its terms cannot ordinarily be varied by parol.[1]

[1] See 2 Wharton, Ev. chap. XII., where the topic before us is discussed as follows:—

I. General Rules.

Parol evidence not admissible to vary documents as between parties, § 920.

New ingredients cannot be thus added, § 921.

Dispositive documents may be varied by parol as to strangers, § 923.

Whole document must be taken together, § 924.

Written entries are of more weight than printed, § 925.

Informal memoranda are excepted from rule, § 926.

Parol evidence admissible to show that document was not executed, or was only conditional, § 927.

And to show that it was conditional on a nonperformed contingency, § 928.

Want of due delivery, or of contingent delivery, may be proved by parol, § 930.

Fraud or duress in execution may be shown by parol, and so of insanity, § 931.

But complainant must have a strong case, § 932.

So as to concurrent mistake, § 933.

So of illegality, § 935.

§ 621. **But parol evidence admissible to identify and distinguish document.**—In criminal practice few cases

Between parties, intent cannot be proved to alter written meaning, § 936.

Otherwise as to ambiguous terms, § 937.

Declarations of intent need not have been contemporaneous, § 938.

Evidence admissible to bring out true meaning, § 939.

For this purpose extrinsic circumstances may be shown, § 940.

Acts admissible for the same purpose, § 941.

Ambiguous descriptions of property may be explained, § 942.

Erroneous particulars may be rejected as surplusage, § 945.

Ambiguity as to extrinsic objects may be so explained, § 946.

Parol evidence admissible to prove "dollar" means Confederate dollar, § 948.

Parol evidence admissible to identify parties, § 949.

To enable undisclosed principal to sue or be sued, he may be proved by parol, § 950.

But person signing as principal cannot set up that he was agent, § 951.

Suretyship on writing may be shown by parol, § 952.

Other cases of distinction and identification, § 953.

Evidence of writer's use of language admissible to solve ambiguities, § 954.

Party may be examined as to intent or understanding, § 955.

Patent ambiguities cannot be explained by parol, § 956.

"Patent" is "subjective," and "latent" "objective," § 957.

Usage cannot be proved to vary dispositive writings, § 958.

Otherwise in case of ambiguities, § 961.

Usage is to be brought home to the party to whom it is imputed, § 962.

May be proved by one witness, § 964.

Usage is to be proved to the jury, and must be reasonable, and not conflicting with *lex fori*, § 965.

When no proof exists of usage, meaning is for court, § 966

Power of agent may be construed by usage, § 967.

Usage resolved to explain broker's memoranda, § 968.

Customary incidents may be annexed to contract, § 969.

Course of business admissible in ambiguous cases, § 971.

Opinion of expert inadmissible as to construction of document; but otherwise to decipher and interpret, § 972.

arise in which the ordinary exceptions to this rule are appealed to. We may, however, generally say that parol evidence is

Parol evidence admissible to rebut an equity, § 973.
Opinion of witnesses as to libel admissible, § 975.
Dates not necessarily part of contract, § 976.
Dates presumed to be true, but may be varied by parol, § 977.
Exception to this, § 978.
Time may be inferred from circumstances, § 979.

II. Special Rules as to Records, Statutes, and Charters.
Records cannot be varied by parol, § 980.
And so of statutes and charters, § 980a.
Otherwise as to acknowledgment of sheriff's deeds, § 981.
Record imports verity, § 982.
But on application to court, record may be corrected by parol, § 983.
For relief on ground of fraud, petition should be specific, § 984.
Fraudulent record may be collaterally impeached, § 985.
When silent or ambiguous, record may be explained by parol, § 986.
Town records subject to same rules, § 987.
Former judgment may be shown to relate to a particular case, § 988.
Nature of cause of action may be proved, § 989.
So of hour of legal procedure, § 990.
So of collateral incidents of records, § 991.

III. Special Rules as to Wills.
Wills cannot be varied by parol. Intent must be drawn from writing, § 992.
When primary meaning is inapplicable to any ascertainable object, evidence of secondary meaning is admissible, § 996.
When terms are applicable to several objects, evidence admissible to distinguish, § 997.
In ambiguities, all the surroundings, family, and habits of the testator may be proved, § 998.
All the extrinsic facts are to be considered, § 999.
When description is only partly applicable to each of several objects, then declarations of intent are inadmissible, § 1001.
Evidence admissible to the other ambiguities, § 1002.
Erroneous surplusage may be rejected, § 1004.
Patent ambiguities cannot be resolved by parol, § 1006.
Ademption of legacy may be proved by parol, § 1007.
Parol proof of mistake of testator inadmissible, § 1008.
Fraud and undue influence may be so proved, § 1009.

admissible to identify a record and to explain its subject-matter;[1] to show that a forged document on its face invalid is one on which a prosecution may prima facie be sustained;[2] to support the innuendoes in a libel;[3] and to clear ambiguities in a written confession.[4]

V. Special Rules as to Deeds.
- Deeds not open to variation by parol proof, § 1050.
- Acknowledgment may be disputed by parol, § 1052.
- Between parties, deeds may be varied on proof of ambiguity and fraud, § 1054.
- Deeds may be attacked by bona fide purchasers, and judgment vendees, § 1055.
- And so as to mortgages, § 1056.
- Deed may be shown to be in trust, § 1057.
- (As to recitals see §§ 1039–1042.)

VI. Special Rules as to Negotiable Paper.
- Negotiable paper not susceptible of parol variation, § 1058.
- Blank indorsement may be explained, § 1059.
- Relations of parties with notice may be varied by parol, and so may consideration, § 1060.
- Real parties may be brought out by parol, § 1061.
- Ambiguities in such paper may be explained, § 1062.

VII. Special Rules as to Other Instruments.
- Releases cannot be contradicted by parol, § 1063.
- Receipts can be so contradicted, § 1064.
- Exception as to insurance receipts, § 1065.
- Receipts may be estoppels as to third parties, § 1066.
- Bonds may be shown to be conditioned on contingencies, § 1067.
- Subscriptions cannot be modified as to third parties by parol, § 1068.
- Bills of lading are open to explanation, § 1070.

Rex v. *Tucker*, 1 Moody, C. C. 134, Car. Crim. Law, 288; *Reg.* v. *Cooper*, 3 Cox, C. C. 547; *State* v. *Linthicum*, 68 Mo. 66.

[1] Supra, § 593.

[2] *Reg.* v. *Toshack*, Temple & M. 207, 1 Den. C. C. 492, 13 Jur. 1011, 4 Cox, C. C. 38; *Reg.* v. *Kay*, L. R. 1 C. C. 257, 39 L. J. Mag. Cas. N. S. 118, 22 L. T. N. S. 557, 18 Week. Rep. 934, 11 Cox, C. C. 529; *Com.* v. *Ray*, 3 Gray, 441; *People* v. *Shall*, 9 Cow. 778.

[3] See Wharton, Crim. Law, 8th ed. §§ 1651, et seq.

[4] Post, § 643.

CHAPTER XIV.

CONFESSIONS.

I. General Characteristics.

§ 622. Definition.—A confession, as applied in criminal law, is a statement by a person, made at any time afterwards, that he committed or participated in the commission of a crime.[1] Such confessions are generally divided into two clas-

[1] Black's Law Dict. "Confessions;" *Spicer* v. *Com.* 21 Ky. L. Rep. 528, 51 S. W. 802, 11 Am. Crim. Rep. 250; *Jones* v. *State*, 96 Ala. 102, 11 So. 399; *People* v. *Parton*, 49 Cal. 632; *People* v. *Strong*, 30 Cal. 157; *People* v. *LeRoy*, 65 Cal. 613, 4 Pac. 649; *People* v. *Miller*, 122 Cal. 84, 54 Pac. 523; *State* v. *Glynden*, 51 Iowa, 463, 1 N. W. 750; *State* v. *Porter*, 32 Or. 135, 49 Pac. 964; *State* v. *Carson*, 36 S. C. 524, 15 S. E. 588; *Austin* v. *State*, 15 Tex. App. 388; *State* v. *Red*, 53 Iowa, 69, 4 N. W. 831; Stephen's Digest of Ev. Chase's ed. 52; Bouvier's Law Dict.; *People* v. *Ammerman*, 118 Cal. 23, 50 Pac. 15; *Ross* v. *State*, 9 Mo. 696. See *State* v. *Willis*, 71 Conn. 293, 41 Atl. 820; *Shelton* v. *State*, 144 Ala. 106, 42 So. 30; *Owens* v. *State*, 120 Ga. 296,

ses,—judicial confessions and extrajudicial confessions.[2] Judicial confessions are those made by the accused in the court trying the crime charged,[3] and generally termed plea of guilt. Extrajudicial confessions are those made, by any person, outside of the sitting of the court.[4]

§ 622a. Confessions distinguished from admissions.—An admission is distinguished from a confession by the fact that the term "admission," in criminal matters, relates to matters of fact that do not involve a criminal intent, and a confession is an acknowledgment of guilt.[1] The distinction between confessions and admissions must always be maintained, from the fact that admissions are always admissible in evidence under an exception to the rule excluding hearsay evidence, provided such admissions are made against interest, while a confession must be affirmatively shown to have been made under conditions which would not induce a false statement.

§ 622b. Confession; what it excludes.—A confession, although differently phrased by different courts, being an acknowledgment, in express terms, by a party in a criminal case, of the truth of the crime charged, by the very force of the

48 S. E. 21; *Burk* v. *State*, 50 Tex. Crim. Rep. 185, 95 S. W. 1064; *State* v. *Carr*, 53 Vt. 37.

[2] *State* v. *Carr*, 53 Vt. 37; *Speer* v. *State*, 4 Tex. App. 474; *State* v. *Miller*, 9 Houst. (Del.) 564, 32 Atl. 137; *People* v. *Hennessey*, 15 Wend. 147.

[3] *Speer* v. *State*, 4 Tex. App. 474; *White* v. *State*, 49 Ala. 344; *Matthews* v. *State*, 55 Ala. 187, 28 Am. Rep. 698; *Hendrickson* v. *People*, 10 N. Y. 13, 61 Am. Dec. 721.

[4] *Speer* v. *State*, 4 Tex. App. 474.

[1] Greenl. Ev. § 170; Stephen's Digest of Ev. 39, 52; *Notara* v. *De Kamalaris*, 22 Misc. 337, 49 N. Y. Supp. 216; Chamberlayne's Best, Ev. § 523; *Shelton* v. *State*, 144 Ala. 106, 42 So. 30; *Owens* v. *State*, 120 Ga. 296, 48 S. E. 21; *Perkins* v. *State*, 124 Ga. 6, 52 S. E. 17; *State* v. *Campbell*, 73 Kan. 688, 9 L.R.A. (N.S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203; *Burnett* v. *State*, 86 Neb. 11, 124 N. W. 927.

definition logically excludes: First, acts or guilty conduct; second, exculpatory statements; third, admission of subordinate facts that do not constitute guilt. Much of the confusion that exists in the case law would be readily avoided if courts carefully measured every confession by the rule of direct acknowledgment of guilt, as entirely distinguished from acts, exculpatory statements, and admissions. As we shall see,[1] a confession was never intended to include anything but a plea of guilty by the accused in the court which had the crime charged under trial.[2] This obviously was conclusive of and necessarily excluded all testimony as to conduct, exculpation, and admissions.

1. *Exclusion by conduct.*—It is never admissible to prove a confession by admitting testimony of other crimes not in any way connected with the crime under charge.[3] An accused, on trial for hiring a prosecuting witness to absent himself, testified that he had offered the witness money, but, in connection, made explanation of his intent in giving the money to the witness, which acts did not constitute a confession within the defi-

[1] Post, § 638.

[2] Staundforde, P. C. bk. 2, chap. 51; Hale, P. C. Emlyn's ed. p. 225.

[3] *State* v. *Jackson,* 95 Mo. 623, 8 S. W. 749; *Com.* v. *Wilson,* 186 Pa. 1, 40 Atl. 283, 11 Am. Crim. Rep. 261; *Tidwell* v. *State,* 40 Tex. Crim. Rep. 38, 47 S. W. 466, 48 S. W. 184; *Drury* v. *Territory,* 9 Okla. 398, 60 Pac. 101, 13 Am. Crim. Rep. 300; *State* v. *Cowen,* 56 Kan. 470, 43 Pac. 687; *Lismore* v. *State,* 94 Ark. 207, 126 S. W. 853; *People* v. *Williams,* 159 Mich. 518, 124 N. W. 555; *State* v. *Wenzel,* 72 N. H. 396, 56 Atl. 918; *Knapp* v. *State,* 4 Ohio C. C. N. S. 184, 6 Ohio S. & C. P. Dec. 341; *State* v. *Lawrence,* 74 Ohio St. 38, 77 N. E. 266, 6 A. & E. Ann. Cas. 888; *Robinson* v. *State,* 55 Tex. Crim. Rep. 42, 114 S. W. 811; *Barnett* v. *State,* 50 Tex. Crim. Rep. 538, 99 S. W. 556; *State* v. *Knapp,* 70 Ohio St. 380, 71 N. E. 705, 1 A. & E. Ann. Cas. 819; *Gore* v. *People,* 162 Ill. 259, 44 N. E. 500; *Zuckerman* v. *People,* 213 Ill. 114, 72 N. E. 741; *State* v. *Jones,* 171 Mo. 401, 94 Am. St. Rep. 786, 71 S. W. 680; *Campos* v. *State,* 50 Tex. Crim. Rep. 289, 97 S. W. 100. See *State* v. *Poole,* 42 Wash. 192, 84 Pac. 727; *State* v. *Dalton,* 43 Wash. 278, 86 Pac. 590; *Pilgrim* v. *State,* — Tex. Crim. Rep. —, 128 S. W. 128.

nition of that word;[4] a statement by accused that when he found he was charged with murder he felt so distressed that he went to stealing horses, to pacify his mind, is not a confession of the crime of homicide;[5] a statement of accused that he had delivered the gun to C after doing the job he started out to do, is not a confession of the crime;[6] a description, by accused, of how a man could be killed, is not admissible as a confession, for it admits nothing connected with the homicide under trial;[7] the voluntary act of accused, in raising up a plank and searching thereunder, is not a confession of larceny of the money alleged to be stolen;[8] the acts and conduct of accused, while in jail, do not constitute a confession;[9] acts and admissions of an accused charged with criminal libel, tending to show his ownership of the paper in which the libel was published, are not a confession, in legal contemplation[10] offer to compromise an accusation by paying the amount of a forged check, or a greater sum, is not a confession;[11] accused stating that he did not participate in a robbery, but received part of the money from one who was running away, is not a confession;[12] the admission of a fact, from which guilt may be inferred, is not a confession;[13] directing accused to fit his shoe into a track does not involve a confession;[14] offering to pay a sheriff $100 or to sell his place for less than its worth, does not involve a confession.[15]

[4] *State* v. *Crowder*, 41 Kan. 101, 21 Pac. 208.

[5] *State* v. *Jackson*, 95 Mo. 623, 8 S. W. 749.

[6] *Taylor* v. *State*, 37 Neb. 788, 56 N. W. 623.

[7] *Moore* v. *State*, 2 Ohio St. 500.

[8] *Rhodes* v. *State*, 11 Tex. App. 563.

[9] *Adams* v. *State*, 34 Tex. Crim. Rep. 470, 31 S. W. 372.

[10] *People* v. *Miller*, 122 Cal. 84, 54 Pac. 523.

[11] *Michaels* v. *People*, 208 Ill. 603, 70 N. E. 747.

[12] *State* v. *Alexander*, 109 La. 557, 33 So. 600, 12 Am. Crim. Rep. 102.

[13] *State* v. *Jackson*, 95 Mo. 623, 8 S. W. 749. But see *Runnels* v. *State*, 42 Tex. Crim. Rep. 555, 61 S. W. 479.

[14] *Guerrero* v. *State*, 46 Tex. Crim. Rep. 445, 80 S. W. 1001.

[15] *State* v. *Keeland*, 39 Mont. 506, 104 Pac. 513.

It is to be observed that in the decisions just cited the acts and conduct of the accused were admissible as evidence tending to establish the truth of the charge, but that they were not direct acknowledgments of the accusation, and hence not admissible as a confession.[15a]

2. *Exclusion by exculpatory statements.*—Conflicting declarations by accused, with a view of exculpating instead of incriminating himself, do not constitute a confession;[16] and declarations by accused that he was casually present at the homicide, but took no part in it, and did not know it was contem-

[15a] It is to be observed that while the accepted definition of a confession is an acknowledgment of guilt by the accused, and that acts cannot be held to constitute a confession, nevertheless, in the state of Texas, the rule prevails that acts may constitute a confession, but this is based upon the peculiar wording of the Texas statute, forbidding the introduction of confessions unless the accused has been previously warned, or else there has been a discovery of property which corroborates a statement that may be made; and in this view the case of *Rhodes* v. *State,* 11 Tex. App. 563, was expressly overruled by the case of *Nolen* v. *State,* 14 Tex. App. 474, 46 Am. Rep. 247. In *Nolen* v. *State,* the court follows *State* v. *Graham,* 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182, upholding the admissibility of testimony where the accused was compelled to place his shoe in a track to show the resemblance, which the North Carolina court held was a confession induced by fear. It was not a confession at all, and should not have been offered as such. It was admissible, not as a confession, but as evidence tending to establish the identity of the accused. This difficulty, however, has been obviated by a late statute in Texas, requiring that the confession be reduced to writing. The Nolan and Graham Cases are interesting, as showing the error which trial courts so frequently commit in dealing with confessions. There seems to be no question of the admissibility of the acts in the two cases as tending to establish the guilt of the accused, but it was a serious and a reversible error to admit the acts as constituting a confession, for the moment that the jury understood that the acts constituted a confession, and were so instructed by the court, then no evidence, by way of defense, would have any weight with the jury, because the accused had already confessed the crime by his acts, and the court had told the jury that such acts constituted a confession.

[16] *Harrison* v. *State,* 55 Ala. 239.

plated, is not a confession;[17] statements by accused in which each accused the other, but did not inculpate himself, are not confessions;[18] where accused, in commenting on the testimony of a witness, said that "what C said was true as far as it went, but he didn't say all, or enough," is not admissible as a confession;[19] a statement by accused that he knows who committed the crime, and that he was present when another person (naming him) committed it, is not a confession;[20] what defendant said to a witness, about an alleged forged order, is not a confession of the crime;[21] statements by accused, before a grand jury, denying his guilt, are not confessions;[22] the statement by accused that he had given too much of a certain drug, but at the same time insisting that it was done by mistake, and that the homicide was without intent, is not a confession, and ought not to be submitted to the jury on that theory;[23] a statement of an accused, when returning the case of a stolen watch, that he did not take it, is not a confession;[24] a denial of a previous statement is not a confession.[25]

It is clear, then, that to give to a statement the binding force of a confession, it must be an acknowledgment of guilt as its distinctive feature, without any exculpating statement or ex-

[17] *Boston* v. *State*, 94 Ga. 590, 20 S. E. 98, 21 S. E. 603.

[18] *State* v. *Carson*, 36 S. C. 524, 15 S. E. 588.

[19] *Finn* v. *Com.* 5 Rand. (Va.) 701.

[20] *Bell* v. *State*, 93 Ga. 557, 19 S. E. 244; *People* v. *Elliott*, 8 N. Y. S. R. 223, 5 N. Y. Crim. Rep. 126; *Jones* v. *State*, 120 Ala. 303, 25 So. 204; *Dumas* v. *State*, 63 Ga. 600; *State* v. *Heidenreich*, 29 Or. 381, 45 Pac. 755; *State* v. *Gilman*, 51 Me. 206, 225; *Burnett* v. *State*, 86 Neb. 11, 124 N. W. 927; *State* v. *Keeland*, 39 Mont. 506, 104 Pac. 513.

[21] *Henderson* v. *State*, 120 Ala. 360, 25 So. 236.

[22] *State* v. *Campbell*, 73 Kan. 688, 9 L.R.A.(N.S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203.

[23] *State* v. *Thomas*, 135 Iowa, 717, 109 N. W. 900; *Owens* v. *State*, 120 Ga. 296, 48 S. E. 21.

[24] *Neville* v. *State*, 148 Ala. 681, 41 So. 1011.

[25] *Quintana* v. *State*, 29 Tex. Crim. Rep. 401, 25 Am. St. Rep. 730, 16 S. W. 258. See also *Robertson* v. *State*, 30 Tex. Crim. Rep. 498, 17 S. W. 1068; *State* v. *Carr*, 53 Vt. 37.

planation,[26] and it is error to treat mere exculpatory statements as confessions, and to instruct the jury that they are confessions.[27]

3. *Admission of subordinate facts that do not constitute guilt.*—There must be some distinctive feature, showing guilt,

[26] *State* v. *Broughton,* 29 N. C. (7 Ired. L.) 101, 45 Am. Dec. 507; *State* v. *Gilman,* 51 Me. 225; *State* v. *Cadotte,* 17 Mont. 315, 42 Pac. 857; *State* v. *Novak,* 109 Iowa, 717, 79 N. W. 465; *Pentecost* v. *State,* 107 Ala. 81, 18 So. 146; *Meadows* v. *State,* 136 Ala. 67, 34 So. 183; *People* v. *Hickman,* 113 Cal. 80, 45 Pac. 175; *People* v. *Ammerman,* 118 Cal. 23, 50 Pac. 15; *Mora* v. *People,* 19 Colo. 255, 262, 35 Pac. 179; Swift, Ev. 133; *Powell* v. *State,* 101 Ga. 9, 65 Am. St. Rep. 277, 29 S. E. 309; *Shaw* v. *State,* 102 Ga. 660, 29 S. E. 477; *Fuller* v. *State,* 109 Ga. 809, 35 S. E. 298; *State* v. *Spillers,* 105 La. 163, 29 So. 480; *Taylor* v. *State,* 37 Neb. 788, 56 N. W. 623; *State* v. *McDowell,* 129 N. C. 523, 39 S. E. 840; *State* v. *Vaigneur,* 5 Rich. L. 400, 402; *Goodwin* v. *State,* 114 Wis. 318, 90 N. W. 170. See *Bram v. United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547.

It must be observed that if the statement made by the accused is actually a confession, the confession rule must be applied to it, even when it is sought to use the confession for the purposes of impeaching the accused. But, while not admissible as a confession *per se,* the statement may be used by way of impeachment. *Com.* v. *Tolliver,* 119 Mass. 312; *People* v. *Case,* 105 Mich. 92, 62 N. W. 1017; *State* v. *Broadbent,* 27 Mont. 342, 71 Pac. 1; *Carwile* v. *State,* 148 Ala. 576, 39 So. 220; *Neville* v. *State,* 148 Ala. 681, 41 So. 1011; *People* v. *John,* 144 Cal. 284, 77 Pac. 950; *People* v. *Kelly,* 146 Cal. 119, 79 Pac. 846; *People* v. *Weber,* 149 Cal. 325, 86 Pac. 671. But see *Tuttle* v. *People,* 33 Colo. 243, 70 L.R.A. 33, 79 Pac. 1035, 3 A. & E. Ann. Cas. 513; *State* v. *Thomas,* 135 Iowa, 717, 109 N. W. 900; *State* v. *Aspara,* 113 La. 940, 37 So. 883; *State* v. *Royce,* 38 Wash. 111, 80 Pac. 268, 3 A. & E. Ann. Cas. 351. See *Parks* v. *State,* 46 Tex. Crim. Rep. 100, 79 S. W. 301; *State* v. *Gianfala,* 113 La. 463, 37 So. 30; *Owens* v. *State,* 120 Ga. 296, 48 S. E. 21; *Daniels* v. *State,* 57 Fla. 1, 48 So. 747; *State* v. *Keeland,* 39 Mont. 506, 104 Pac. 513; *Banks* v. *State,* 13 Tex. App. 182; *Weathersby* v. *State,* 29 Tex. Crim. Rep. 278, 15 S. W. 823; *Robertson* v. *State,* 30 Tex. Crim. Rep. 498, 17 S. W. 1068; *Ferguson* v. *State,* 31 Tex. Crim. Rep. 93, 19 S. W. 901; *Griffin* v. *State,* — Tex. Crim. Rep. —, 20 S. W. 552; *Corporal* v. *State,* — Tex. Crim. Rep. —, 24 S. W. 96. See *State* v. *Blay,* 77 Vt. 56, 58 Atl. 794.

[27] *Burnett* v. *State,* 86 Neb. 11, 124 N. W. 927.

in the fact acknowledged, and all other statements than those directly stating the fact of guilt are without the scope of the rule affecting the use of confessions. The danger to the accused, to be guarded against in the use of the statements touching subordinate facts not directly involving guilt, is this, that such statements are admissible as tending to show the truth of the charge, and hence their weight is no greater than that of all other evidence, but, when such subordinate facts are admitted with all the force that arises out of a direct acknowledgment of guilt, it gives to facts having merely probative value the conclusive effect of a direct acknowledgment of guilt, instead of facts from which guilt might be inferred. In other words, the erroneous admission of subordinate facts, under the peculiar rules of confession, changes evidentiary and inferential testimony into direct proof of the charge under trial. Hence, the third ground of exclusion is that the admission of subordinate facts, not directly involving guilt, do not constitute a confession. Thus, the statement of accused answering the remark of an officer that the possession of certain articles looked suspicious, that it did, is not a confession;[28] nor the fact that a party promised to make good articles claimed to have been stolen;[29] nor explaining the possession of stolen goods;[30] nor, where an accused remarked that he was a good shot and could have gotten away by shooting a man, and to instruct the jury that such a statement constituted a confession was an invasion of the right of the jury to decide upon the weight of the statement, as upon other evidence;[31] nor the statement of incriminating facts;[32] nor a statement from

[28] *People* v. *Hickman*, 113 Cal. 80, 45 Pac. 175; *State* v. *Heidenreich*, 29 Or. 381, 45 Pac. 755.

[29] *Lee* v. *State*, 102 Ga. 221, 29 S. E. 264.

[30] *People* v. *Ashmead*, 118 Cal. 508, 50 Pac. 681.

[31] *State* v. *Jones*, 33 Iowa, 9.

[32] *Johnson* v. *People*, 197 Ill. 51, 64 N. E. 286; *State* v. *Picton*, 51 La. Ann. 624, 25 So. 375.

which guilt might be inferred;[33] nor, on a trial for forgery, an admission by accused that he wrote the signature, unless he also admits that he did it with a fraudulent intent;[34] nor where, sometime after the burning of a barn, the accused stated that the house was insured and might "go to blazes with the barn," it not even being an admission that accused had burned the barn.[35] And the rule is in such cases that where the statement or the fact admitted is not a confession, but is admissible as circumstantial evidence, the court should not instruct as to the law on confessions, but upon the law of circumstantial evidence.[36]

[33] *Territory* v. *Egan,* 3 Dak. 119, 13 N. W. 568.

[34] *State* v. *Knowles,* 48 Iowa, 598.

[35] *Hamilton* v. *People,* 29 Mich. 173, 1 Am. Crim. Rep. 618.

[36] *Guerrero* v. *State,* 46 Tex. Crim. Rep. 445, 80 S. W. 1001.

Notwithstanding the very plausible claim that a confession may be made by acts as well as by words, it does not militate against nor form a proper explanation to the definition in the text. The acts and words are admissible as circumstantial evidence, but not as confessions. The text is further illustrated by the following cases:

United States.—*United States* v. *Tardy,* Pet. C. C. 458, Fed. Cas. No. 16,432; *Bollew* v. *United States,* 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263.

Alabama.—*Banks* v. *State,* 84 Ala. 430, 4 So. 382; *Pentecost* v. *State,* 107 Ala. 81, 18 So. 146; *Curry* v. *State,* 120 Ala. 366, 25 So. 237; *Spicer* v. *State,* 69 Ala. 159; *Holland* v. *State,* 162 Ala. 5, 50 So. 215; *Jones* v. *State,* 137 Ala. 12, 34 So. 681; *Parrish* v. *State,* 139 Ala. 16, 41, 36 So. 1012; *Talbert* v. *State.* 140 Ala. 96, 37 So. 78; *Plant* v. *State,* 140 Ala. 52, 37 So. 159; *Davis* v. *State,* 141 Ala. 62, 37 So. 676; *Braham* v. *State,* 143 Ala. 28, 38 So. 919.

Arkansas.—*Ince* v. *State,* 77 Ark. 426, 93 S. W. 65.

California.—*People* v. *Joy,* —Cal. —, 66 Pac. 964; *People* v. *Ashmead,* 118 Cal. 508, 50 Pac. 681; *People* v. *Hickman,* 113 Cal. 80, 45 Pac. 175; *People* v. *LeRoy,* 65 Cal. 613, 4 Pac. 649; *People* v. *Strong,* 30 Cal. 157; *People* v *Knowlton,* 122 Cal. 357, 55 Pac. 141; *People* v. *Parton,* 49 Cal. 637; *People* v. *Miller,* 122 Cal. 84, 54 Pac. 523; *People* v. *Weber,* 149 Cal. 325, 86 Pac. 671; *People* v. *Fallon,* 149 Cal. 287, 86 Pac. 689.

Colorado.—*Mora* v. *People,* 19 Colo. 255, 35 Pac. 179.

Florida.—*Daniels* v. *State,* 57 Fla. 1, 48 So. 747.

Georgia.—*Powell* v. *State,* 101 Ga. 9, 65 Am. St. Rep. 277, 29 S. E. 309; *Taylor* v. *State,* 110 Ga. 150, 35 S.

§ 622c. Judicial confessions; quasi judicial confessions.—1. *Judicial confessions.*—A judicial confession is a plea of

E. 161; *Shaw* v. *State,* 102 Ga. 660, 29 S. E. 477; *Goolsby* v. *State,* 133 Ga. 427, 66 S. E. 159; *Ransom* v. *State,* 2 Ga. App. 826, 59 S. E. 101; *Dumas* v. *State,* 63 Ga. 600; *Covington* v. *State,* 79 Ga. 687, 7 S. E. 153; *Fletcher* v. *State,* 90 Ga. 468, 17 S. E. 100; *Ford* v. *State,* 124 Ga. 793, 53 S. E. 335; *Lee* v. *State,* 102 Ga. 221, 29 S. E. 264; *Suddeth* v. *State,* 112 Ga. 407, 37 S. E. 747; *Johnson* v. *State,* 1 Ga. App. 129, 57 S. E. 934; *Mill* v. *State,* 3 Ga. App. 414, 60 S. E. 4.

Illinois.—*Bergen* v. *People,* 17 Ill. 426, 65 Am. Dec. 672; *Goon Bow* v. *People,* 160 Ill. 438, 43 N. E. 593; *Johnson* v. *People,* 197 Ill. 48, 64 N. E. 286.

Iowa.—*State* v. *Carroll,* 85 Iowa, 1, 51 N. W. 1159; *State* v. *Red,* 53 Iowa, 69, 4 N. W. 831; *State* v. *Glynden,* 51 Iowa, 463, 1 N. W. 750; *State* v. *Feltes,* 51 Iowa, 495, 1 N. W. 755.

Kansas.—*State* v. *Crowder,* 41 Kan. 101, 21 Pac. 208; *State* v. *Campbell,* 73 Kan. 688, 9 L.R.A. (N. S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203.

Louisiana.—*State* v. *Picton,* 51 La. Ann. 624, 25 So. 375; *State* v. *Lewis,* 39 La. Ann. 1110, 3 So. 343.

Massachusetts.—*Com.* v. *Crowe,* 165 Mass. 139, 42 N. E 563; *Com.* v. *Devaney,* 182 Mass. 33, 64 N. E. 402.

Minnesota.—*State* v. *Mims,* 26 Minn. 183, 2 N. W. 494, 683.

Mississippi.—*Richburger* v. *State,* 90 Miss. 806, 44 So. 772.

Missouri.—*State* v. *Wilkins,* 221 Mo. 444, 120 S. W. 22.

Montana.—*State* v. *Keeland,* 39 Mont. 506, 104 Pac. 513; *State* v. *Lu Sing,* 34 Mont. 31, 85 Pac. 521, 9 A. & E. Ann. Cas. 344.

Nebraska.—*McLain* v. *State,* 18 Neb. 154, 24 N. W. 720, 6 Am. Crim. Rep. 21; *Taylor* v. *State,* 37 Neb. 788, 56 N. W. 623; *Fouse* v. *State,* 83 Neb. 258, 119 N. W. 478.

New York.—*People* v. *Hughson,* 154 N. Y. 153, 47 N. E. 1092.

Oregon.—*State* v. *Heidenreich,* 29 Or. 381, 45 Pac. 755; *State* v. *Anderson,* 53 Or. 479, 101 Pac. 198.

Pennsylvania.—*Com.* v. *Johnson,* 162 Pa. 63, 29 Atl. 280.

Rhode Island.—*State* v. *Nagle,* 25 R. I. 105, 105 Am. St. Rep. 864, 54 Atl. 1063.

South Carolina.—*State* v. *Motley,* 7 Rich. L. 327.

South Dakota.—*State* v. *Vey,* 21 S. D. 612, 114 N. W. 719.

Tennessee.—*Deathridge* v. *State,* 1 Sneed, 75.

Texas.—*Banks* v. *State,* 13 Tex. App. 182; *Ferguson* v. *State,* 31 Tex. Crim. Rep. 93, 19 S. W. 901; *Corporal* v. *State,* — Tex. Crim. Rep. —, 24 S. W. 96; *Davis* v. *State,* — Tex. Crim. Rep. —, 23 S. W. 687; *McAdoo* v. *State,* — Tex. Crim. Rep. —, 35 S. W. 966; *Eckert* v. *State,* 9 Tex. App. 105; *Willard* v. *State,* 26 Tex. App. 130, 9 S. W. 358; *Keeton* v. *State,* — Tex. Crim. Rep. —, 128 S. W. 404; *Reinhard* v. *State,* 52 Tex. Crim. Rep. 59, 106 S. W. 128; *Purdy* v.

guilty made by an accused in a fit state of mind to plead before a court competent to try the pending charge in which the proceedings have been regularly instituted, and which upon entry of that plea is competent to enter judgment and affix the penalty. Such a confession is conclusive as to guilt in fact of the offense charged.[1]

Logically the definition of a judicial confession could not be extended further than it is here defined. Under these conditions it finally determines and concludes the case. An appeal from a judgment so entered has been properly dismissed as frivolous.[2] The distinctive feature, then, of a judicial confession is its conclusive character. Any departure from the definition is not merely an exception, but is governed by different procedure. Thus, where a plea is prepared by the attorney for the accused, which was rejected by the court, it cannot even be regarded as a confession.[3] A demurrer to an indictment can never be construed as a confession.[4] Even where a judgment on a plea of guilty is reversed, the record of the plea is not conclusive, but has merely the same evidentiary character as a confession proved in any other way,[5] but such

State, 50 Tex. Crim. Rep. 318, 97 S. W. 480.

Vermont.—*State* v. *Blay,* 77 Vt. 56, 58 Atl. 794.

Washington.—*State* v. *Munson,* 7 Wash. 239, 34 Pac. 932; *State* v. *McCauley,* 17 Wash. 88, 49 Pac. 221, 51 Pac. 382; *State* v. *Royce,* 38 Wash. 111, 80 Pac. 268, 3 A. & E. Ann. Cas. 351.

Wisconsin. — *Roszczyniala* v. *State,* 125 Wis. 414, 104 N. W. 113; *Anderson* v. *State,* 133 Wis. 601, 114 N. W. 112.

[1] Archhold, Crim. Pl. 23d ed. 330; Taylor, Ev. 10th ed. § 872; Phipson, Ev. 4th ed. 242; *R.* v. *Oliver,* 1 Crim. App. Rep. 45; *Marsh* v. *Mitchell,* 26 N. J. Eq. 497; *Com.* v. *Jackson,* 2 Va. Cas. 501; *Gridley* v. *Conner,* 4 La. Ann. 416; *Denton* v. *Erwin,* 5 La. Ann. 18; *Edson* v. *Freret Bros.* 11 La. Ann. 710. See *State* v. *Colvin,* 11 Humph. 599, 54 Am. Dec. 58; *Com.* v. *Brown,* 130 Mass. 330, 23 N. E. 49; *Reg.* v. *Stone,* 1 Fost. & F. 311; *Reg.* v. *Simmonds,* 4 Cox, C. C. 277.

[2] *R.* v. *Oliver,* 1 Crim. App. Rep. 45.

[3] *Com.* v. *Lannan,* 13 Allen, 563.

[4] *Ross* v. *State,* 9 Mo. 696; *State* v. *Meyers,* 99 Mo. 107, 12 S. W. 516.

[5] *Com.* v. *Ervine,* 8 Dana, 30.

plea may be used against the accused in all other cases in which it is relevant,[6] but not as a confession. Historically, no other confession than a judicial confession, in its technical sense, was ever recognized under criminal procedure as it is established under the common law. This is evident from the early works on pleading.[7] It is true, however, that the pressure to use summary methods often resulted in bitter incrimination, in the endeavor to force a statement. Direct torture to extort a confession continued as late as 1640,[8] and even as late

[6] *Reg.* v. *Fontaine Moreau,* 11 Q. B. 1033, 17 L. J. Q. B. N. S. 187, 12 Jur. 626; *Bradley* v. *Bradley,* 11 Me. 367; *Perry* v. *Simpson Waterproof Mfg. Co.* 40 Conn. 313.

[7] If one is indicted or appealed of felony, and on his arraignment he confesses it, this is the best and surest answer that can be, in our law, for quieting the conscience of the judge and for making it a good and firm condemnation; provided, however, that the said confession did not proceed from fear, menace, or duress; which if it was the case, and the judge has become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matter. Staundforde, P. C. bk. 2, chap. 51.

Concerning the plea of the prisoner upon his arraignment, and, first, of his confession of the fact charged and approving others. When the prisoner is arraigned, and demanded what he saith to the arraignment, either he confesseth the indictment, or pleads to it, or stands mute and will not answer. The confession is either simple, or relative in order to the attainment of some other advantage. That which I call a simple confession is where the defendant, upon hearing of his indictment, without any other respect confesseth it; this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession but to admit him to plead. If it be but an extrajudicial confession, though it be in court,—as where the prisoner freely tells the fact and demands the opinion of the court whether it be a felony,—though upon the fact thus shown it appear to be a felony, the court will not record his confession, but admit him to plead to the felony "not guilty." A confession in order to some other advantage is either where the prisoner confesseth the felony in order to his clergy, or where he confesseth the offense and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon if he convict them. Hale, P. C. Emlyn's ed. 225.

[8] Jardine, Torture in the Crim. Law of England; Judicial use of Torture, 11 Harvard L. Rev. 293;

as 1664; the accused says, "I confess I did confess it in the Tower, being threatened with the rack;" [9] and the confession so obtained was employed evidentially, without hesitation. From this it appears that the confession so extorted was evidentiary only, and not conclusive.

2. *Quasi judicial confessions.*—Confessions made before a magistrate, such as on a preliminary examination; or at an inquest, such as at a coroner's inquest, or a fire inquest; or before a grand jury, or on a trial of another,—cannot be properly designated as judicial confessions, as the term is defined in the text; for the reason that such courts or such inquests have no authority to determine finally, but conviction or acquittal, the offense charged. Hence, such quasi judicial confessions fall under the head of extrajudicial confessions, from the fact that the confession so obtained is merely evidential, and it must be based, when made before the magistrate, upon a strict compliance with the law, or be made under circumstances that give to it a voluntary character.[10] On such examinations or inquests there is, at least, the semblance of law, and statements made under such conditions have been generally admitted in evidence, the mere fact of being under arrest not excluding the confession.[11] The cases just cited show the

Mitchel's Trial, 6 How. St. Tr. 1207; Bradford's History of Plymouth Plantation, p. 473.

[9] *Tonge's Trial,* 6 How. St. Tr. 259.

[10] *State* v. *Hatcher,* 29 Or. 309, 44 Pac. 584; *State* v. *Bruce,* 33 La. Ann. 186; *State* v. *Shaw,* 32 Tex Crim. Rep. 155, 22 S. W. 588; *People* v. *Kelley,* 47 Cal. 125; *State* v. *O'Brien,* 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *State* v. *May,* 62 W. Va. 129, 57 S. E. 366; *State* v. *Glass,* 50 Wis. 218, 36 Am. Rep. 845, 6 N. W. 500.

[11] *Rex* v. *Lambe,* 2 Leach, C. L. 552; *Woodburne's Trial,* 16 How. St. Tr. 54; *Berwick's Case,* Fost. C. L. 10; *Thornton's Case,* 1 Moody, C. C. 27, s. c. 1 Lewin, C. C. 49; *Rex* v. *Gilham,* 1 Moody, C. C. 186. Car. Crim. Law, 51; *Rex* v. *Swatkins,* 4 Car. & P. 549; *Rex* v. *Richards,* 5 Car. & P. 318; *Rex* v. *Long,* 6 Car. & P. 179; *Rex* v. *Wild,* 1 Moody, C. C. 452; *Reg.* v. *Kerr,* 8 Car. & P. 177; *Rex* v. *Thomas,* 2 Leach, C. L. 637. As to admissibility of confession made before coroner, see note in 70 L.R.A. 47. As

modern English practice. The law declared by these rulings has been embodied into a statute, the object being to insure an authentic record of what the accused said in answer to the charge against him, and also to enable the trial judge to see whether the testimony given on the trial of the offense is consistent with that given at the preliminary hearing.[12] This confession is rather a deposition at a preliminary inquiry, than a confession, in the modern use of that word.

3. *Statement before the examining magistrate.*—In this

to confession on statements made before grand jury, see notes in 28 L.R.A. 318, and in 9 L.R.A.(N.S.) 533.

[12] After the examinations of all the witnesses on the part of the prosecution, as aforesaid, shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed, as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial," and whatever the prisoner shall then say in answer thereto shall be taken down in writing, and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favor, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

country it is the general practice, upon the arrest of the person charged with a criminal offense, to take such person, for preliminary examination, before a justice of the peace or other committing magistrate, generally for the purpose of fixing bail, or for a discharge, if, in the judgment of the justice, there is not sufficient evidence to hold the accused to answer before the grand jury, where the procedure is by indictment, or before the court, where the procedure is by information. In homicide cases, in addition to the preliminary examination, there is generally an inquest into the cause of death. Where the accused is taken before a magistrate, strictly speaking, or before the coroner, unless otherwise provided by statute, and whether cautioned or not, his confession is admissible in evidence against him, unless, as will hereafter be more fully shown, such confession was brought about by some inducement that renders the confession untrustworthy, or has induced a false confession. This is the universal rule in the United States, the mere fact that the accused is under arrest not being sufficient to exclude confession.[13]

[13] *Peck* v. *State,* 147 Ala. 100, 41 So. 759; *Seaborn* v. *State,* 20 Ala. 15, 17; *Sampson* v. *State,* 54 Ala. 241, 243; *Kelly* v. *State,* 72 Ala. 244; *Wilson* v. *State,* 110 Ala. 1, 55 Am. St. Rep. 17, 20 So. 415; *Jones* v. *State,* 137 Ala. 12, 34 So. 681; *Jones* v. *State,* 120 Ala. 303, 25 So. 204; *Angling* v. *State,* 137 Ala. 17, 34 So. 846; Code Crim. Proc. 1900, § 312 (like Or. Anno. Codes, 1892, § 1599) Alaska; *People* v. *Kelley,* 47 Cal. 125; *People* v. *Gibbons,* 43 Cal. 557; *People* v. *Taylor,* 59 Cal. 650; *People* v. *Wieger,* 100 Cal. 352, 357, 34 Pac. 826; *People* v. *Sexton,* 132 Cal. 37, 64 Pac. 107; *People* v. *Chrisman,* 135 Cal. 282, 67 Pac. 136; *Torris* v. *People,* 19 Colo 438, 36 Pac. 153; *Tuttle* v. *People,* 33 Colo. 243, 70 L.R.A. 33, 79 Pac. 1035, 3 A. & E. Ann. Cas. 513; District of Columbia Comp. Stat. 1894, chap. 20, § 29 (like U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661); *Ortiz* v. *State,* 30 Fla. 256. 283, 11 So. 611; *Jenkins* v. *State,* 35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182; *Green* v. *State,* 40 Fla. 474, 24 So. 537, 11 Am. Crim. Rep. 253; *McNish* v. *State,* 45 Fla. 83, 110 Am. St. Rep. 65, 34 So. 219, 12 Am. Crim. Rep. 125; *Ferrell* v. *State,* 45 Fla. 26, 34 So. 220; *Cicero* v. *State,* 54 Ga. 156; *Woolfolk* v. *State,* 81 Ga. 564, 8 S. E. 724; *Henderson* v. *State,* 95 Ga. 326, 22 S. E. 537;

Green v. *State,* 124 Ga. 343, 52 S. E. 431; *Austine* v. *People,* 51 Ill. 236, 239; *Anderson* v. *State,* 26 Ind. 89; *Davidson* v. *State,* 135 Ind. 254, 260, 34 N. E. 972; *Ginn* v. *State,* 161 Ind. 292, 68 N. E. 294; *State* v. *Briggs,* 68 Iowa, 416, 424, 27 N. W. 358; *State* v. *Carroll,* 85 Iowa, 1, 51 N. W. 1159; *State* v. *Clifford,* 86 Iowa, 550, 553, 41 Am. St. Rep. 518, 53 N. W. 299; *State* v. *Van Tassel,* 103 Iowa, 6, 72 N. W. 497; *State* v. *Sorter,* 52 Kan. 531, 539, 34 Pac. 1036; *State* v. *Taylor,* 36 Kan. 329, 13 Pac. 550; *State* v. *Finch,* 71 Kan. 793, 81 Pac. 494; *Tines* v. *Com.* 25 Ky. L. Rep. 1233, 77 S. W. 363; *Seaborn* v. *Com.* 25 Ky. L. Rep. 2203, 80 S. W. 223; *Bess* v. *Com.* 118 Ky. 858, 82 S. W. 576; *State* v. *Garvey,* 25 La. Ann. 191; *State* v. *Robinson,* 52 La. Ann. 616, 27 So. 124; *State* v. *Gilman,* 51 Me. 206; *State* v. *Bowe,* 61 Me. 174; *Faunce* v. *Gray,* 21 Pick. 245; *Judd* v. *Gibbs,* 3 Gray, 539, 543; *Com.* v. *King,* 8 Gray, 503; *Com.* v. *Lannan,* 13 Allen, 563, 569; *Com.* v. *Reynolds,* 122 Mass. 455, 458; *Com.* v. *Wesley,* 166 Mass. 248, 252, 44 N. E. 228; *Com.* v. *Hunton,* 168 Mass. 130, 46 N. E. 404; *People* v. *Lauder,* 82 Mich. 109, 46 N. W. 956; *Josephine* v. *State,* 39 Miss. 626, 650; *Jackson* v. *State,* 56 Miss. 312; *Farkas* v. *State,* 60 Miss. 847; *Ford* v. *State,* 75 Miss. 101, 21 So. 524; *Powell* v. *State,* — Miss. —, 23 So. 266; *Steele* v. *State,* 76 Miss. 387. 24 So. 910; *Mackmasters* v. *State,* 83 Miss. 1, 35 So. 302; *State* v. *Lamb,* 28 Mo. 218, 228; *State* v. *Young,* 119 Mo. 495, 507, 517, 24 S. W. 1038; *State* v. *Wisdom,* 119 Mo. 539, 546, 551, 24 S. W. 1047; *State* v. *David,* 131 Mo. 380, 33 S. W. 28; *State* v. *Punshon,* 133 Mo. 44, 34 S. W. 25; *State* v. *Hagan,* 164 Mo. 654, 65 S. W. 249; *State* v. *Jones,* 171 Mo. 401, 94 Am. St. Rep. 786, 71 S. W. 680; *State* v. *Mullins,* 101 Mo. 514, 14 S. W. 625; *State* v. *Woodward,* 182 Mo. 391, 103 Am. St. Rep. 646, 81 S. W. 857; *State* v. *O'Brien,* 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *Clough* v. *State,* 7 Neb. 320, 340; *Wood* v. *Weld,* Smith (N. H.) 367; *State* v. *Banusik,* — N. J. L. —, 64 Atl. 994; *Hendrickson* v. *People,* 10 N. Y. 13, 61 Am. Dec. 721; *People* v. *McMahon,* 15 N. Y. 384; *Teachout* v. *People,* 41 N. Y. 7; *People* v. *Mondon,* 103 N. Y. 213, 57 Am. Rep. 709, 8 N. E. 496; *People* v. *Chapleau,* 121 N. Y. 266, 24 N. E. 469; *People* v. *Wright,* 136 N. Y. 625, 632, 32 N. E. 629; *People* v. *Molineux,* 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *State* v. *Broughton,* 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507; *State* v. *Cowan,* 29 N. C. (7 Ired. L.) 239; *State* v. *Patterson,* 68 N. C. 292; *State* v. *Rogers,* 112 N. C. 874, 876, 17 S. E. 297; *State* v. *DeGraff,* 113 N. C. 688, 693, 18 S. E. 507; *State* v. *Melton,* 120 N. C. 591, 26 S. E. 933; *State* v. *Parker,* 132 N. C. 1014, 43 S. E. 830, 12 Am. Crim. Rep. 137; *State* v. *Simpson,* 133 N. C. 676, 45 S. E. 567, 15 Am. Crim. Rep. 611; *Jackson* v. *State,* 39 Ohio St. 37, 39; *State* v. *Hatcher,* 29 Or. 309, 44 Pac. 584; *State* v. *Robinson,* 32 Or. 43, 48 Pac. 357; *State* v. *Andrews,* 35 Or. 388, 58 Pac. 765; *Com.* v. *Harman,* 4 Pa. 269; *Williams* v. *Com.* 29 Pa. 102, 105; *Com.* v. *Clark,* 130 Pa. 641, 650, 18 Atl.

4. *Statement before a fire inquest.*—The rule also applies to the confession made by accused where he was summoned as a witness at a fire inquest.[14]

5. *Statement before a grand jury.*—Where the accused voluntarily testifies under oath before a grand jury, his confession may be given in evidence against him.[15] But, if the accused is taken before the grand jury and compelled to testify, by it, and not voluntarily, such a confession cannot be used in evidence against him.[16]

988; *State* v. *Vaigneur,* 5 Rich. L. 395, 402; *State* v. *Branham,* 13 S. C. 389; *State* v. *Senn,* 32 S. C. 392, 11 S. E. 292; *State* v. *Merriman,* 34 S. C. 38, 12 S. E. 619; *Beggarly* v. *State,* 8 Baxt. 521, 525; *Alston* v. *State,* 41 Tex. 40; *Bell* v. *State,* 33 Tex. Crim. Rep. 163, 25 S. W. 769; *Wisdom* v. *State,* 42 Tex. Crim. Rep. 579, 61 S. W. 926; *Grimsinger* v. *State,* 44 Tex. Crim. Rep. 1, 69 S. W. 583; *Twiggs* v. *State,* — Tex. Crim. Rep. —, 75 S. W. 531; *Miller* v. *State,* — Tex. Crim. Rep. —, 91 S. W. 582; *United States* v. *Fries,* Wharton, Am. St. Tr. 482, 535, 595; *United States* v. *Graff,* 14 Blatchf. 381, 385, Fed. Cas. No. 15,244; *Wilson* v. *United States,* 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; *Hardy* v. *United States,* 186 U. S. 224, 46 L. ed. 1137, 22 Sup. Ct. Rep. 889; *United States* v. *Kimball,* 117 Fed. 156; *Burrell* v. *Montana,* 194 U. S. 572, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787; *United States* v. *Kirkwood,* 5 Utah, 124, 127, 13 Pac. 234; *Chamberlain* v. *Willson,* 12 Vt. 491, 493. 36 Am. Dec. 356, per. Redfield, J.; *Moore* v. *Com.* 2 Leigh, 702, 704; *Hite* v. *Com.* 96 Va. 489, 31 S. E. 895; *State* v. *Hopkins,* 13 Wash. 5, 42 Pac. 627; *State* v. *Carpenter,* 32 Wash. 254, 73 Pac. 357; *State* v. *Washing,* 36 Wash. 485, 78 Pac. 1019; *State* v. *Hobbs,* 37 W. Va. 812, 818, 17 S. E. 380; *Schoeffler* v. *State,* 3 Wis. 823, 839; *Dickerson* v. *State,* 48 Wis. 288, 4 N. W. 321; *State* v. *Glass,* 50 Wis. 218, 221, 36 Am. Rep. 845, 6 N. W. 500.

[14] *Com.* v. *Wesley,* 166 Mass. 248, 44 N. E. 228; *Com.* v. *Bradford,* 126 Mass. 42; *Com.* v. *King,* 8 Gray, 501; *State* v. *Blay,* 77 Vt. 56, 58 Atl. 794.

[15] *State* v. *Carroll,* 85 Iowa, 1, 51 N. W. 1159; *Grimsinger* v. *State,* 44 Tex. Crim. Rep. 1, 69 S. W. 583; *Giles* v. *State,* 43 Tex. Crim. Rep. 561, 67 S. W. 411; *Thomas* v. *State,* 35 Tex. Crim. Rep. 178, 32 S. W. 771; *United States* v. *Kirkwood,* 5 Utah, 123, 13 Pac. 234. See also 89 Miss. 429, 42 So. 601, and notes in 28 L.R.A. 318, and in 9 L.R.A. (N.S.) 533.

[16] *State* v. *Clifford,* 86 Iowa, 550, 41 Am. St. Rep. 518, 53 N. W. 299; *Davis* v. *State,* 122 Ga. 564, 50 S. E. 376.

6. *Statement before the court, on trial of another.*—Where the accused made a statement under oath, before he was charged with the crime, at the preliminary examination, or on the trial of another person, such confession is admissible against him.[17]

§ 622d. Confessions of third persons not admissible.—In civil proceedings, a statement of fact against interest, or an admission against interest, is admitted on the ground that it would not be made unless compelled by truth, and for this reason it is considered as trustworthy as if testified to on trial and under cross-examination. Such statements are confined to pecuniary or proprietary interests, and have no application to criminal cases.[1]

As the only value of human testimony rests on the integrity and honesty of the witness, it is an anomalous condition of the law of evidence that admits only those statements as trustworthy which can be construed as against the interests of the party making them. If a witness cannot be trusted in his entire statement, both upon reason and authority it should be entirely rejected. If it is accepted as trustworthy when made against interest, upon reason, at least, it should be equally trustworthy when made in favor of his interests. A defendant in a civil proceeding is placed in a very compromising position when the court must hold, or the jury be told, that his credibility is measured wholly by his personal interests, as they may exist at the time he testifies. This rule, however, has never been applied to criminal cases, so as to admit the statement of

[17] *People* v. *Mitchell*, 94 Cal. 550, 29 Pac. 1106; *Burnett* v. *State*, 87 Ga. 622, 13 S. E. 552; *State* v. *Lewis*, 39 La. Ann. 1110, 3 So. 343; *People* v. *Burt*, 51 App. Div. 106, 15 N. Y. Crim. Rep. 43, 64 N. Y. Supp. 417; *People* v. *Thayer*, 1 Park. Crim. Rep. 595; *State* v. *Vaigneur*, 5 Rich. L. 391; *Robinson* v. *State*, — Tex. Crim. Rep. —, 63 S. W. 869; *Dickerson* v. *State*, 48 Wis. 288, 4 N. W. 321.

[1] *State* v. *Soper*, 16 Me. 293, 33 Am. Dec. 665.

a third person, even where such statement is a direct confession of crime. But confessions of crime, or statements of facts against penal interests, when made by third persons, are universally excluded by the courts.[2] But for this limitation in penal cases, it is evident that extrajudicial confessions would be admissible upon the ground that the fact of the crime confessed is directly against the interest of the accused.

The inconsistent but prevailing doctrines, first, that admissions against interest, of third persons, are always to be excluded in penal cases, and, second, that the confessions of the

[2] *Blair* v. *Hopkins,* 3 N. B. 540 (Canada); *Smith* v. *State,* 9 Ala. 995; *Snow* v. *State,* 58 Ala. 375; *West* v. *State,* 76 Ala. 99; *Welsh* v. *State,* 96 Ala. 92, 11 So. 450; *People* v. *Hall,* 94 Cal. 595, 30 Pac. 7; *Benton* v. *Starr,* 58 Conn. 285, 20 Atl. 450; *Lyon* v. *State,* 22 Ga. 399; *Daniel* v. *State,* 65 Ga. 199; *Kelly* v. *State,* 82 Ga. 441, 9 S. E. 171; *Delk* v. *State,* 99 Ga. 667, 26 S. E. 752; *Lowry* v. *State,* 100 Ga. 574, 28 S. E. 419; *Robison* v. *State,* 114 Ga. 445, 40 S. E. 253; *Perdue* v. *State,* 126 Ga. 112, 54 S. E. 820; *Jones* v. *State,* 64 Ind. 473, 484; *Hauk* v. *State,* 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Reilley* v. *State,* 14 Ind. 217; *State* v. *Sale,* 119 Iowa, 1, 92 N. W. 680, 95 N. W. 193; *Miller* v. *State,* 165 Ind. 566, 76 N. E. 245; *Com.* v. *Elisha,* 3 Gray, 460; *Davis* v. *Com.* 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585; *State* v. *West,* 45 La. Ann. 928, 929, 13 So. 173; *State* v. *Mitchell,* 107 La. 618, 31 So. 993; *Pike* v. *Crehore,* 40 Me. 503, 511; *Munshower* v. *State,* 55 Md. 11, 18, 39 Am. Rep. 414; *Com.* v. *Chabbock,* 1 Mass. 144; *Com.* v. *Densmore,* 12 Allen, 537; *Farrell* v. *Weitz,* 160 Mass. 288, 35 N. E. 783; *Com.* v. *Chance,* 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *People* v. *Stevens,* 47 Mich. 411, 11 N. W. 220; *People* v. *Hutchings,* 137 Mich. 527, 100 N. W. 753; *Helm* v. *State,* 67 Miss. 572, 7 So. 487; *State* v. *Evans,* 55 Mo. 460; *State* v. *Duncan,* 116 Mo. 288, 311, 22 S. W. 699; *State* v. *Hack,* 118 Mo. 92, 98, 23 S. W. 1089; *Mays* v. *State,* 72 Neb. 723, 101 N. W. 979; *Greenfield* v. *State,* 85 N. Y. 75, 86, 88, 39 Am. Rep. 636; *State* v. *May,* 15 N. C. (4 Dev. L.) 332; *State* v. *Duncan,* 28 N. C. (6 Ired. L.) 239; *State* v. *White,* 68 N. C. 158; *State* v. *Haynes,* 71 N. C. 84; *State* v. *Bishop,* 73 N. C. 44, 1 Am. Crim. Rep. 594; *State* v. *Fletcher,* 24 Or. 295, 300, 33 Pac. 575; *Wright* v. *State,* 9 Yerg. 344; *Rhea* v. *State,* 10 Yerg. 260; *Sible* v. *State,* 3 Heisk. 137; *Peck* v. *State,* 86 Tenn. 259, 6 S. W. 389; *State* v. *Totten,* 72 Vt. 73, 47 Atl. 105; *Reavis* v. *State,* 6 Wyo. 240, 44 Pac. 62.

accused are always to be received (unless rendered untrustworthy by improper inducement), ought not longer to prevail. If the direct confessions of the accused are to be received, then the direct statements of third persons ought to be received.[3]

The doctrine of confessions never had any rightful foundation in the hearsay exceptions to the rule of evidence; for, notwithstanding the ingenious and plausible explanation of those writers who seem to feel that they must account, upon principles of logic, for the anomalies in the law, extrajudicial confessions are, and must always remain, hearsay evidence, pure and simple. If A goes to B, an officer, claiming that C has committed an offense, what A says to B out of the presence of C is so purely hearsay that no court would admit it. The fact that A accuses himself to B, as having committed the crime, is no less hearsay when B attempts to state the fact as it was stated to him. No court ought to receive B's statement under any condition. But the fact exists, and, if it can be accounted for at all, it is most logically found in that exception to the rule of evidence which admits statements against interest but makes a farcical exception as to such admissions in penal cases. The rule exists, but there is a fortunate tendency, so to limit and restrain the modern confession that it will, at least, have the semblance of testimonial trustworthiness, rather than, as now used, a convenient means of evading investigation into the facts on the part of the prosecution, and submitting the accused to the law prevalent in the oriental nations, that the accused ought to establish his own innocence.

§ 622e. Reasons for exclusion.—The distrust attaching to confessions is based on experience. In every situation involving a stress on the physical or mental well-being, the natural impulses dominate the reasoning faculties. Any alternative that promises relief from a present intolerable situation is ac-

[3] Wigmore, Ev. § 1477.

cepted without regard to consequences. We can reason that under given conditions it is natural to act in a certain way. The logic may be impregnable, but the practical results are in striking contrast to the theoretical deductions. We may reason that a man of mature years, having due regard for his financial credit and honor, will act with great caution and deliberation before placing himself in financial danger, yet, under a sudden and unexpected stress, the same man will consent to conditions that he knows are financially ruinous, merely as a relief from the sudden stress. A physician may promise ultimate relief from disease, as a condition for ceasing the use of drugs that give a temporary relief, but the promise of an ultimate benefit has no weight as against the stress of the prevailing condition. These common experiences are universal. Such being the fact as to financial or physical conditions, in desperate situations the action taken is more destructive. When the primary feelings are stirred, the reasoning faculties are practically suspended. This arises wherever an innocent person is suddenly accused of an offense involving reputation, life, or liberty. In such a situation he will choose any risk that may exist in an untrue confession, hoping for some fortuitous deliverance when the future situation connected with such false confession may become acute, and accept it as a present relief. Under a promise of relief, such a person will choose to make a false confession as the speediest way to make his freedom certain. Under a threat he will confess, as the speediest way out of a probable injury. Here, then, there is no certainty of obtaining the only element that is of value, to wit, trustworthy testimony. Testimonial worthlessness, then, is the underlying and fundamental principle on which confessions are rejected.[1]

[1] Gilbert, Ev. 137; *Rex* v. *Warickshall,* 1 Leach, C. L. 263; 6 Car. & P. 353, note; *Reg.* v. *Scott,* Dears. & B. C. C. 58, 25 L. J. Mag. Cas. N. S. 128, 2 Jur. N. S. 1096, 4 Week. Rep. 777, 7 Cox, C. C. 164;

The question then arises, Was the situation such that there was a reasonable probability that the accused would make a false confession? If so, the confession must be excluded.[2]

However differently it may be expressed, herein is the crucial test, and all safeguards with which courts have sought to surround confession testimony tend to secure such an accurate history of the testimony, with regard to the conditions sur-

Reg. v. *Mansfield,* 14 Cox, C. C. 639; *Reg.* v. *Doyle,* 12 Ont. Rep. 354; *Pennsylvania* v. *Dillon,* 4 Dall. 116, 1 L. ed. 765; *State* v. *Vaigneur,* 5 Rich. L. 400; Sel. Crim. Trials, at Old Bailey, 1 App. 23, 24; *Com.* v. *Morey,* 1 Gray, 462; *People* v. *Thoms,* 3 Park. Crim. Rep. 268; *Beery* v. *United States,* 2 Colo. 210; *People* v. *Wolcott,* 51 Mich. 615, 17 N. W. 78; *Com.* v. *Myers,* 160 Mass. 530, 532, 36 N. E. 481; *State* v. *Willis,* 71 Conn. 293, 41 Atl. 820; *State* v. *Novak,* 109 Iowa, 717, 79 N. W. 465; *Reg.* v. *Baldry,* 2 Den. C. C. 432, 446, 21 L. J. Mag. Cas. N. S. 130, 16 Jur. 599, 5 Cox, C. C. 523; *Garrard* v. *State,* 50 Miss. 151; *Cornwall* v. *State,* 91 Ga. 277, 283, 18 S. E. 154; *Bullock* v. *State,* 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; Starkie, Ev. 1, 52; Joy, Confessions, 51; Appleton, Ev. chap. 11, p. 174.

[2] *Rex* v. *Court,* 7 Car. & P. 486; *Rex* v. *Thomas,* 7 Car. & P. 346; *Reg.* v. *Holmes,* 1 Car. & K. 248, 1 Cox, C. C. 9; *Reg.* v. *Hornbrook,* 1 Cox, C. C. 54; *Reg.* v. *Garner,* 1 Den. C. C. 331, 3 New Sess. Cas. 329, Temple & M. 7, 2 Car. & K. 920, 18 L. J. Mag. Cas. N. S. 1, 12 Jur. 944, 3 Cox, C. C. 175; *Reg.* v. *Reason,* 12 Cox, C. C. 229; *State* v. *Kirby,* 1 Strobh. L. 387; *Fife* v. *Com.* 29 Pa. 437; *United States* v. *Stone,* 8 Fed. 232, 241, 256; *Bechham* v. *State,* 100 Ala. 15, 17, 14 So. 859; *Reg.* v. *Baldry,* 2 Den. C. C. 430, 444, 21 L. J. Mag. Cas. N. S. 130, 16 Jur. 599, 5 Cox, C. C. 523; *Reg.* v. *Gillis,* 11 Cox, C. C. 73, 14 Week. Rep. 845; *Carroll* v. *State,* 23 Ala. 38, 58 Am. Dec. 282; *Young* v. *State,* 68 Ala. 575; *Williams* v. *State,* 63 Ark. 527, 39 S. W. 709; Swift, Ev. (Conn.) 131; *Com.* v. *Knapp,* 9 Pick. 503, 20 Am. Dec. 491; *Com.* v. *Tuckerman,* 10 Gray, 191; *Com.* v. *Cuffee,* 108 Mass. 288; *State* v. *Staley,* 14 Minn. 113, Gil. 75; *Frank* v. *State,* 39 Miss. 711; *State* v. *Patterson,* 73 Mo. 706; *State* v. *Phelps,* 74 Mo. 128; *State* v. *Anderson,* 96 Mo. 249, 9 S. W. 636; *State* v. *Carrick,* 16 Nev. 128; *People* v. *McGloin,* 91 N. Y. 246; *State* v. *Mitchell,* 61 N. C. (Phill. L.) 449; *Price* v. *State,* 18 Ohio St. 419; *State* v. *Motley,* 7 Rich. L. 337; *Deathridge* v. *State,* 1 Sneed, 79; *United States* v. *Graff,* 14 Blatchf. 387, Fed. Cas. No. 15,244; *Hopt* v. *Utah,* 110 U. S. 585, 28 L. ed. 267, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Smith* v. *Com.* 10 Gratt. 737; *Shifflet* v. *Com.* 14 Gratt. 661, 665; *State* v. *Walker,* 34 Vt. 302.

rounding the confession, that there is no reasonable probability that the confession is a false one.

When the test results in establishing a true confession, or in rejecting a false confession, it has completely accomplished its purpose.

The entire case law of confessions is thus simply codified into two essential elements: First, a confession is a direct acknowledgment of guilt of the offense charged; second, that the confession is a true one.

That these are the fundamental principles that courts seek to apply is evident from the following cases, where, it is clear that the ultimate fact to be established is the truth of the confession.[3]

[3] *State* v. *Gianfala,* 113 La. 463, 37 So. 30; *State* v. *Leuth,* 5 Ohio C. C. 94, 3 Ohio C. D. 48; *Pennsylvania* v. *Dillon,* 4 Dall. 116, 1 L. ed. 765; *Rice* v. *State,* 3 Heisk. 215; *Com.* v. *Cullen,* 111 Mass. 435; *State* v. *Havelin,* 6 La. Ann. 167; *State* v. *Hopkirk,* 84 Mo. 278; *United States* v. *Stone,* 8 Fed. 232; *Beckham* v. *State,* 100 Ala. 15, 14 So. 859; *People* v. *Smith,* 3 How. Pr. 226; *Roesel* v. *State,* 62 N. J. L. 216, 41 Atl. 408; *Rice* v. *State,* 22 Tex. App. 654, 3 S. W. 791; *Bullock* v. *State,* 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *People* v. *Wentz,* 37 N. Y. 304; *Com.* v. *Cuffee,* 108 Mass. 285; *Com.* v. *Knapp,* 9 Pick. 496, 20 Am. Dec. 491; *State* v. *Willis,* 71 Conn. 293, 41 Atl. 820; *State* v. *Jonas,* 6 La. Ann. 695; *Com.* v. *Myers,* 160 Mass. 530, 36 N. E. 481; *People* v. *Wolcott,* 51 Mich. 612, 17 N. W. 78; *Cady* v. *State,* 44 Miss. 332; *State* v. *Johnny,* 29 Nev. 203, 87 Pac. 3; *State* v. *DeHart,* 38 Mont. 211, 99 Pac. 438; *O'Brien* v. *People,* 48 Barb. 274; *State* v. *Roberts,* 12 N. C. (1 Dev. L.) 259; *State* v. *Vey,* 21 S. D. 612, 114 N. W. 719; *State* v. *Landers,* 21 S. D. 606, 114 N. W. 717; *Reg.* v. *Thompson* [1893] 2 Q. B. 12, 62 L. J. Mag. Cas. N. S. 93, 5 Reports, 392, 69 L. T. N. S. 22, 41 Week. Rep. 525, 17 Cox, C. C. 641, 57 J. P. 312; *State* v. *Strong,* 12 Ohio S. & C. P. Dec. 698; *Rex* v. *Radford,* cited in note to *Rex* v. *Gilham,* 1 Moody, C. C. 186; *State* v. *Woodward,* 182 Mo. 391, 103 Am. St. Rep. 646, 81 S. W. 857; *Cortez* v. *State,* 47 Tex. Crim. Rep. 10, 83 S. W. 812; *State* v. *Gilbert,* 2 La. Ann. 245; *State* v. *Fields,* Peck (Tenn.) 140; *State* v. *Carrick,* 16 Nev. 120; *Rex* v. *Radford* cited in note to *Reg.* v. *Moore,* 2 Lead. Crim. Cas. (Bennett & H.) 187; *Rex* v. *Day,* 2 Cox, C. C. 209; *Reg.* v. *Fleming,* Armstrong, M. & O. 330, cited in *Bram* v. *United States,* 168 U. S. 553, 42 L. ed. 577, 18 Sup. Ct. Rep. 183, 10 Am. Crim.

§ 622f. Method of obtaining.—The familiar principle, that arresting officers have no power or authority other than to arrest and safely keep a person charged with an offense until the matter can be inquired of in the decent and orderly fashion prescribed by law, has never prevailed in practice. The arresting officer has always assumed that it was within his power to institute a summary inquisition, and to extort from the party suspected a statement that would confirm his suspicion. As early as 1628 King Charles I., desirous of knowing whether or not the accused could be put to the rack, was answered by all the justices that "he could not, by the law, be tortured by the rack, for no such punishment is known or allowed by our law." [1] Yet it is clear that torture was resorted to as late as 1640,[2] and in Scotland as late as 1676.[3] When the justices answered King Charles I., that punishment by the rack was not known to, or allowed by, the law, they may have spoken correctly on the ground that they did not judicially know of such punishment, but, as men, they must have known that punishment by the rack was of common occurrence.

The principle in the 1500's and 1600's was get a confession from the prisoner. The principle still prevails. The method of obtaining the confession in those years does not differ from the method used to-day, except in the physical means employed. In the year 1902, in the state of Mississippi, to extort a confession, a prisoner was confined in a sweat box 5 or 6 feet by 8 in size, carefully blanketed to exclude all light and air.[4] If the governor of the state had asked the opinion of the Missis-

Rep. 547; *Reg.* v. *Scott,* Dears. & B. C. C. 58, 25 L. J. Mag. Cas. N. S. 128, 2 Jur. N. S. 1096, 4 Week. Rep. 777, 7 Cox, C. C. 164.

[1] *Felton's Trial,* 3 How. St. Tr. 371.

[2] Judicial Use of Torture, 11 Harvard L. Rev. 293.

[3] Mitchel's Trial, 6 How. St. Tr. 1207.

[4] *Ammons* v. *State,* 18 L.R.A. (N.S.) 768.

An elaborate note to this case treats at length, with a full review of the authorities, the question when confession is voluntary.

sippi judges as to whether or not a prisoner ought to be tortured, the answer would have been that no such punishment was known or allowed by the law of the state. Technically, the answer would be correct. Practically, any police officer can recite instances showing that such torture not only prevails, but is commended by the police system in every city, as a proper process of elimination. It was stated by Mr. Justice Brown, of the United States Supreme Court,[5] that, "if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, is so painfully evident in many of the earlier state trials that it made the system so odious as to give rise to a demand for its total abolition."

It was the iniquity of this system that caused the American colonists to incorporate as a part of their fundamental law that no person could be compelled to accuse himself. Yet, notwithstanding the constitutional safeguards, the inquisition still prevails, and is as fruitful of results to-day as it has ever been since its establishment. The situation was so acute in one of the western states, and public opinion became so aroused, that in 1909 the general assembly of the state of Colorado passed an act making the coercion of prisoners, on the part of any person having authority to arrest or to detain in custody, by threats, either in words or physical act, or by beatings, a felony.[6] The continuity of the system is shown in

[5] *Brown* v. *Walker,* 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

[6] Colo. Sess. Laws, 1909, p. 468. Under the general practice of consolidating large cities into a city and county, the offices of chief of police of the city and sheriff of the county are frequently merged in one person. Under this merger it is obvious that, under the police system, the arresting officers perform with complete immunity all the functions of the court in mak-

the fact that a confession is adduced in practically every case in which an information is filed or an indictment found.

ing a more or less temporary disposition of the criminal classes. When a crime is committed there is a general arrest of all suspected or known criminals, and, by processes more or less severe, the numbers are eliminated until the one who is guilty is actually determined upon. When such criminal has confessed, he is taken before the court for sentence, the severity and length of his sentence depending upon the attitude of the police towards the accused. The question of trial is not considered. This, of course, has to do generally with petty property crimes. In the more serious offenses the party suspected is arrested, he is placed on his inquisition before the chief of police, and a statement is obtained. The testimonial worthlessness of such a statement is obvious. If the confession made is not to the liking of the system, or if it in any way questions the sagacity of the officers, another inquisition is generally more successful, success being measured by an approach to what the system considers the confession ought to be. Where the office of the district attorney is in political harmony with the police system, the district attorney is generally invited to be present as an inquisitor. If the accused suggests that he has witnesses, these are in turn arrested, and an inquisition made of them. When a statement is obtained, the accused is then remanded to jail, when, for the first time, he is permitted to see and confer with counsel regarding his defense. If the police system is favorably impressed, or feels that there are extenuating circumstances, the accused may, by the favor of the police, obtain a fair trial. Under the American system, however, the presiding judges are generally in political harmony with the police system, and that presentation of a defense is regarded by the trial judges as a somewhat irritating invasion of a status that has been fixed by the system. This condition is well known, and is universally prevalent. It arises entirely from an assumption of authority and an acquiescence in the subversion of authority by the courts. The submerged classes are helpless, because their freedom depends entirely upon the aid that they can render to the system.

This great and momentous matter arises out of the fact that arresting officers are allowed to assume functions that belong exclusively to the courts. The remedy is plain. A statute making it a felony to do aught with a prisoner than to arrest and immediately convey the prisoner to the proper jail, and making it a felony for any person, under any authority, to seek to extract a statement, would quickly rid the community of this menace to human liberty. But it is far more easy for the prosecuting officers to make the prisoner himself furnish evi-

§ 622g. True confession not excluded because involuntary.—Under the fundamental principle of exclusion, namely, that the only confession that can be excluded is the

dence, than to make an investigation, hence the practice will continue to prevail until it is extirpated by some radical measure.

The system is as prevalent in England as it is in America; but there the judges, having a tenure of office independent of the political system, have sought to ameliorate the oppressive conditions by refusing to allow in evidence any confesions made in response to the inquisition of arresting officers. This attitude is fully illustrated in the expressions from the following cases, which were considered to be sufficient inducement to exclude the confession:

"It would be better for you to confess." *Rex* v. *Griffin,* Russ, & R. C. C. 151 (1809).

"You are under suspicion of this, and you had better tell all you know." *Rex* v. *Kingston,* 4 Car. & P. 387 (1830).

"You had better tell the truth or it will lie upon you, and the man go free." *Rex* v. *Enoch,* 5 Car. & P. 539 (1833).

"It is no use for you to deny it, for there is the man and boy who will swear they saw you do it." *Rex* v. *Mills,* 6 Car. & P. 146 (1833).

"There is no doubt thou wilt be found guilty, it will be better for you if you will confess." *Sherrington's Case,* 2 Lewin, C. C. 123 (1838).

"You had better split, and not suffer for all of them." *Rex* v. *Thomas,* 6 Car. & P. 353 (1833).

"It will be a good deal worse for you if you do not, and it will be better for you if you do confess." *Rex* v. *Simpson,* 1 Moody, C. C. 410 (1834).

"If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. [another person suspected and whom the prisoner had charged] is found clear, the guilt will fall on you. Pray, tell me if you did it." *Rex* v. *Upchurch,* 1 Moody, C. C. 465 (1836).

"I dare say you had a hand in it; you may as well tell me all about it." *Reg.* v. *Croydon,* 2 Cox, C. C. 67 (1846).

"It will be better for you to speak out." *Reg.* v. *Garner,* 1 Den. C. C. 329, 3 New Sess. Cas. 329, Temple & M. 7, 2 Car. & K. 920, 18 L. J. Mag. Cas. N. S. 1, 12 Jur. 944, 3 Cox, C. C. 175 (1848).

"You had better tell me about all the corn that is gone; it would be better for you to do so." *Reg.* v. *Rose,* 18 Cox, C. C. 717, 67 L. J. Q. B. N. S. 289, 78 L. T. N. S. 119, 11 Am. Crim. Rep. 275 (1898).

"She had better speak the truth." *Reg.* v. *Moore,* 2 Den. C. C. 523, 3 Car. & K. 153, 21 L. J. Mag. Cas. N. S. 199, 16 Jur. 621, 5 Cox, C. C. 555.

"You had better, as good boys, tell the truth." *Reg.* v. *Reeve,* 12 Cox, C. C. 179, 41 L. J. Mag. Cas.

false confession, it is clear that a true confession cannot be excluded, even where it is admittedly brought forth by torture.

N. S. 92, L. R. 1 C. C. 362, 26 L. T. N. S. 403, 20 Week. Rep. 631.

"I know what has been going on between you; you had better speak the truth." *Reg.* v. *Hatts,* 49 L. T. N. S. 780, 48 J. P. 248.

And, applying the English rule, some American courts have excluded confessions, based upon the following language, used as the inducement to make the confession:

"You have got your foot in it, and somebody else was with you; now, if you did not break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth." *Kelly* v. *State,* 72 Ala. 244 (1882).

"I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way." *People* v. *Thompson,* 84 Cal. 598, 605, 24 Pac. 384 (1890).

"It will be better for you to make a full disclosure." *People* v. *Barric,* 49 Cal. 342, 1 Am. Crim. Rep. 178.

"If you do so it will go easy with you; it will be better for you to confess; the door of mercy is open and that of justice closed." *Beery* v. *United States,* 2 Colo. 186, 188, 203 (1893).

"The suspicion is general against you, and you had as well tell all about it, the prosecution will be no greater; I don't expect to do anything with you; I am going to send you home to your mother." *State* v. *Bostick,* 4 Harr. (Del.) 563 (1845).

"Edmund, if you know anything, it may be best for you to tell it; Edmund, if you know anything, go and tell it, and it may be best for you." *Green* v. *State,* 88 Ga. 516, 30 Am. St. Rep. 167, 15 S. E. 10 (1891).

"It will go better with you to tell where the money is, all I want is my money, and if you will tell me where it is, I will not prosecute you hard." *Rector* v. *Com.* 80 Ky. 468 (1882).

"It will be better for you to tell the truth and have no more trouble about it." *Biscoe* v. *State,* 67 Md. 6, 8 Atl. 571 (1887).

"You had better own up; I was in the place when you took it; we have got you down fine; this is not the first you have taken, we have got other things against you nearly as good as this." *Com.* v. *Nott,* 135 Mass. 269 (1883).

"You had better tell the truth." *Com.* v. *Myers,* 160 Mass. 530, 36 N. E. 481 (1894).

"It will be better for you to confess." *People* v. *Wolcott,* 51 Mich. 612, 17 N. W. 78 (1883).

"If you are guilty, you had better own it." *State* v. *York,* 37 N. H. 175 (1858).

"The best you can do is to own up; it will be better for you." *People* v. *Phillips,* 42 N. Y. 200 (1870).

The difficulty, however, is in determining that the confession so made is actually the true confession, or the truth that it is sought to establish. Hence the rule that, if a confession is involuntary, it is false, courts generally preferring to contravene the fundamental principle of excluding only false confessions by substituting a general rule of exclusion, based en-

"I believe you are guilty; if you are you had better say so; if you are not, you had better say that." *State* v. *Whitfield,* 70 N. C. 356 (1874).

"If you are guilty, I would advise you to make an honest confession; it might be easier for you. It is plain against you." *State* v. *Drake,* 113 N. C. 624, 18 S. E. 166 (1893).

"You had as well tell all about it." *Vaughan* v. *Com.* 17 Gratt. 576 (1867).

"You had better tell the truth; you had better tell about it." *Com.* v. *Preece,* 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107 (1885).

"It would be better for him to go back and tell Captain Plummer all about it; that he thought he would withdraw it, or ease it as light as he possibly could; that he thought that Captain Plummer would help him out of it, if he would give his evidence against the other two, for the very reason that Plummer had told Kelly he would do so. And he thought he would do so for Underwood." *Territory* v. *Underwood,* 8 Mont. 131, 19 Pac. 398 (1888).

"Perhaps it will be much easier for you before a court or jury." *State* v. *Jay,* 116 Iowa, 265-268, 89 N. W. 1070, 12 Am. Crim. Rep. 93.

"Tom, this is mighty bad; they have got the 'dead wood' on you, and you will be convicted. . . . You are very young to be in such a difficulty as this; there must have been someone with you who was older, and I, if in your place, would tell who it was; it is not right for you to suffer the whole penalty and let some one who is guiltier go free; that it might go lighter with you." *Newman* v. *State,* 49 Ala. 9, 1 Am. Crim. Rep. 173.

"If you burnt the barn, you had better tell me of it." *People* v. *Smith,* 3 How. Pr. 226.

"Better tell the truth; the white folks are going to break somebody's neck." *Miller* v. *State,* 94 Ga. 1, 21 S. E. 128.

"An honest confession is good for the soul." *Matthews* v. *State,* 9 Lea, 128, 42 Am. Rep. 667.

"That the best he [the prisoner] could do was to own up; that this would be better for him." *Phillips* v. *People,* 57 Barb. 362.

"It would be better for you to tell the truth." "That it would be best for him to do what was right." *Ammons* v. *State,* 80 Miss. 592, 18 L.R.A.(N.S.) 768, 92 Am. St. Rep. 607, 32 So. 9, 12 Am. Crim. Rep. 82.

tirely upon the voluntary or involuntary character of the confession, holding that the involuntary character renders it untrustworthy. "No confession of guilt should be heard in evidence unless made voluntarily; for if made under the influence of either hope or fear there is no test of its truthfulness." [1]

§ 622h. **Practice on admission.**—When it becomes necessary, in the course of a prosecution, to offer a certain class of evidence, and the proposing counsel knows that its admission will be disputed, and that therefore a ruling of the trial judge will be required before the evidence is properly admissible, a careful regard for orderly procedure demands that the details of the offer should not be stated in the hearing of the jury. This caution in no way impugns the intelligence or the impartiality of the jurors, but only seeks to safeguard the accused against the trial of the charge upon irrelevant testimony. The jurors, lacking the experience and training necessary to distinguish between relevant and irrelevant evidence, may take as true and relevant the evidence sought to be offered, even though it should be excluded by the judge. This general rule is often violated, innocently enough perhaps, but with most serious results, where the proposing counsel makes a preliminary statement to the trial judge as to the evidence which he desires to offer, or shows it in the questions put to the witnesses. It has always been the practice, in such exigencies, for the proposing counsel to present the offer in writing, without reading it aloud, to the trial judge and the opposing counsel, and, if argument is desired, to afford the court a chance to excuse the jury before making an oral statement and an argument upon the same.[1] The same general rule should

[1] *State* v. *Whitfield*, 70 N. C. 356; *Sampson* v. *State*, 54 Ala. 243; *Redd* v. *State*, 69 Ala. 259; *State* v. *Potter*, 18 Conn. 177; *Young* v. *Com.* 8 Bush, 370; *Com.* v. *Tuckerman*, 10 Gray, 190; *Brown* v. *State*, 32 Miss. 450; *State* v. *Cowan*, 29 N. C. (7 Ired. L.) 244.

[1] *Scripps* v. *Reilly*, 38 Mich. 10; *Porter* v. *Throop*, 47 Mich. 313, 11

govern the putting of questions to witnesses. Commenting on the repeated putting of improper questions to the defendant, the supreme court of Michigan says: "Had the defendant declined to answer them, an unfavorable influence upon the minds of the jury must inevitably have been produced. "A list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it and there is no other evidence." [2]

These rules should be applied with great strictness when the offer concerns confession evidence.[3] Such evidence is of a class that its very designation indicates its momentous importance, and any wilful disregard of this rule, or any effort to get such evidence before the jury, by innuendo or indirection, and before the trial judge has had opportunity to pass upon its relevancy and admissibility, should be visited with the severest judicial censure.

§ 622j. Burden of proof on admissibility; character of evidence.—It is the duty of the trial judge to determine the voluntary or involuntary character of the confession evidence at the time it is offered.[1] In accordance with the funda-

N. W. 174; *People* v. *Abell,* 113 Mich. 80, 71 N. W. 509; *State* v. *Rose,* 178 Mo. 25, 76 S. W. 1003; *Leahy* v. *State,* 31 Neb. 566, 48 N. W. 390; *State* v. *Moore,* 104 N. C. 744, 10 S. E. 183.

[2] *Gale* v. *People,* 26 Mich. 157; *People* v. *Wells,* 100 Cal. 459, 34 Pac. 1078.

[3] *Mose* v. *State,* 36 Ala. 211; *State* v. *Gruff,* 68 N. J. L. 287, 53 Atl. 88; *Kirk* v. *Territory,* 10 Okla. 46, 60 Pac. 797; *Harrold* v. *Territory,* 18 Okla. 395, 10 L.R.A.(N.S.) 604, 89 Pac. 202, 11 A. & E. Ann. Cas. 818; *State* v. *Stebbins,* 188 Mo. 387, 87 S. W. 460; *Griner* v. *State,* 121 Ga. 614, 49 S. E. 700; *Ellis* v. *State,* 65 Miss. 44, 7 Am. St. Rep. 634, 3 So. 188; *Jackson* v. *State,* 83 Ala. 76, 3 So. 847.

[1] *Bonner* v. *State,* 55 Ala. 242; *People* v. *Ah How,* 34 Cal. 218; *Holland* v. *State,* 39 Fla. 178, 22 So. 298; *Simon* v. *State,* 5 Fla. 285; *Biscoe* v. *State,* 67 Md. 6, 8 Atl. 571; *Com.* v. *Culver,* 126 Mass. 464, 3 Am. Crim. Rep. 81; *Ellis* v.

mental principle underlying criminal procedure, that the state must establish the offense charged, beyond a reasonable doubt, the burden of proof showing that no improper inducement existed when the confession was made, falls upon the state.[2] At

State, 65 Miss. 44, 7 Am. St. Rep. 634, 3 So. 188; *Williams* v. *State,* 72 Miss. 117, 16 So. 296; *State* v. *Rush,* 95 Mo. 199, 8 S. W. 221; *People* v. *Fox,* 50 Hun, 604, 20 N. Y. S. R. 316, 3 N. Y. Supp. 359.

[2] United States.— *Hopt* v. *Utah,* 110 U. S. 587, 28 L. ed. 267, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 411; *Harrold* v. *Oklahoma,* 94 C. C. A. 415, 169 Fed. 47, 17 A. & E. Ann. Cas. 868; *Sorenson* v. *United States,* 74 C. C. A. 468, 143 Fed. 820.

Alabama.—*Meinaka* v. *State,* 55 Ala. 47; *Miller* v. *State,* 40 Ala. 58; *Banks* v. *State,* 84 Ala. 430, 4 So. 382; *McAlpine* v. *State,* 117 Ala. 93, 23 So. 130; *Bradford* v. *State,* 104 Ala. 68, 53 Am. St. Rep. 24, 16 So. 107; *Campbell* v. *State,* 150 Ala. 70, 43 So. 743; *Johnson* v. *State,* 59 Ala. 37, 3 Am. Crim. Rep. 256; *Curry* v. *State,* 120 Ala. 366, 25 So. 237; *Bonner* v. *State,* 55 Ala. 242; *Jackson* v. *State,* 83 Ala. 76, 3 So. 847; *Gilmore* v. *State,* 126 Ala. 20, 28 So. 595; *State* v. *Stallings,* 142 Ala. 112, 38 So. 261.

Arkansas.—*Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123.

California.—*People* v. *Soto,* 49 Cal. 67; *People* v. *Castro,* 125 Cal. 521, 58 Pac. 133.

Maryland.—*Watts* v. *State,* 99 Md. 30, 57 Atl. 542.

Georgia.—*Eberhart* v. *State,* 47 Ga. 608.

Louisiana.—*State* v. *Davis,* 34 La. Ann. 352; *State* v. *Johnson,* 30 La. Ann. 881.

Mississippi.—*Ellis* v. *State,* 65 Miss. 44, 7 Am. St. Rep. 634, 3 So. 188; *Peter* v. *State,* 4 Smedes & M. 31; *Williams* v. *State,* 72 Miss. 117, 16 So. 296.

New Jersey.—*State* v. *Young,* 67 N. J. L. 223, 51 Atl. 939.

Oregon.—*State* v. *Wintzingerode,* 9 Or. 153.

South Dakota.—*State* v. *Allison,* — S. D. —, 124 N. W. 747.

Texas.—*Walker* v. *State,* 7 Tex. App. 245, 32 Am. Rep. 595; *Greer* v. *State,* 31 Tex. 129; *Cain* v. *State,* 18 Tex. 390.

Virginia.—*Thompson* v. *Com.* 20 Gratt. 731.

England.—*Rex* v. *Thompson,* 1 Leach, C. L. 338; *Reg.* v. *Warringham,* 2 Den. C. C. 447, note, 15 Jur. 318; *Reg.* v. *Thompson* [1893] 2 Q. B. 12, 18, 62 L. J. Mag. Cas. N. S. 93, 5 Reports, 392, 69 L. T. N. S. 22, 41 Week. Rep. 525, 17 Cox, C. C. 641, 57 J. P. 312.

In a few states confessions are regarded as prima facie admissible, and the accused is required to show that improper inducement existed. *Hauk* v. *State,* 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128; *Com.* v. *Sego,* 125 Mass. 213; *Com.* v. *Culver,* 126 Mass. 464, 3 Am. Crim.

the same time, in determining the question of admissibility, the judge ought to hear the evidence of the accused upon the issue of the voluntary character[3] of the confession, as the accused is always entitled to prove the facts and circumstances under which it was made,[4] and the proper time to do this is when the confession testimony is being heard by the judge.

Oral confessions may be proved by anyone by whom they were heard, the same as any other fact;[5] where the confession

Rep. 81; *Rufer* v. *State*, 25 Ohio St. 469.

[3] *Com.* v. *Culver*, 126 Mass. 464, 3 Am. Crim. Rep. 81; *People* v. *Fox*, 121 N. Y. 449, 24 N. E. 923; *Zuckerman* v. *People*, 213 Ill. 114, 72 N. E. 741.

[4] England.—*Rex* v. *Clewes*, 4 Car. & P. 221.

Alabama.—*Spence* v. *State*, 17 Ala. 192; *Williams* v. *State*, 103 Ala. 33, 15 So. 662; *Jackson* v. *State*, 83 Ala. 76, 3 So. 847.

California.—*People* v. *Soto*, 49 Cal. 67; *People* v. *Miller*, 135 Cal. 69, 67 Pac. 12, 12 Am. Crim. Rep. 183.

Georgia.—*Adams* v. *State*, 129 Ga. 248, 17 L.R.A.(N.S.) 468, 58 S. E. 822, 12 A. & E. Ann. Cas. 158.

Indiana.—*Palmer* v. *State*, 136 Ind. 393, 36 N. E. 130.

Illinois.—*Zuckerman* v. *People*, 213 Ill. 114, 72 N. E. 741.

Iowa.—*State* v. *Fidment*, 35 Iowa, 541.

Louisiana.—*State* v. *Platte*, 34 La. Ann. 1061; *State* v. *Miller*, 42 La. Ann. 1186, 21 Am. St. Rep. 418, 8 So. 309.

Massachusetts.—*Com* v. *Culver*, 126 Mass. 464, 3 Am. Crim. Rep. 81.

Mississippi.—*Serpentine* v. *State*, 1 How. (Miss.) 256.

Missouri.—*State* v. *Rush*, 95 Mo. 199, 8 S. W. 221; *State* v. *Kinder*, 96 Mo. 548, 10 S. W. 77; *State* v. *Brooks*, 220 Mo. 74, 119 S. W. 353.

Nebraska.—*Willis* v. *State*, 43 Neb. 102, 61 N. W. 254.

New Jersey.—*State* v. *Hill*, 65 N. J. L. 626, 47 Atl. 814, 12 Am. Crim. Rep. 191; *State* v. *Young*, 67 N. J. L. 223, 51 Atl. 939.

Nevada.—*State* v. *Williams*, 31 Nev. 360, 102 Pac. 974.

New York.—*People* v. *Fox*, 50 Hun, 604, 20 N. Y. S. R. 316, 3 N. Y. Supp. 359.

Ohio.—*Lefevre* v. *State*, 50 Ohio St. 584, 35 N. E. 52; *Rufer* v. *State*, 25 Ohio St. 464.

Pennsylvania.—*Com.* v. *Van Horn*, 188 Pa. 143, 41 Atl. 469.

Tennessee.—*Maples* v. *State*, 3 Heisk. 408.

Utah.—*State* v. *Wells*, 35 Utah 400, 136 Am. St. Rep. 1059, 100 Pac. 681, 19 A. & E. Ann. Cas. 631

[5] *Alston* v. *State*, 41 Tex. 39; *State* v. *Gossett*, 9 Rich. L. 428; *Coffman* v. *Com.* 10 Bush, 495, 3 Am. Crim. Rep. 293; *Clough* v. *State*, 7 Neb. 320; *Stevens* v. *State* — Tex. Crim. Rep. —, 38 S. W.

is in writing it must be proved by the production of the writing, with proof of its execution, as in other cases of documentary evidence.[6] When the confession is taken in writing before a magistrate, it may be proved by parol testimony, upon proper proof of the loss of the writing.[7] Where the confession is written down by another, and signed by accused, he

167; *State* v. *Schmidt*, 136 Mo. 644, 38 S. W. 719; *People* v. *Cokahnour*, 120 Cal. 253, 52 Pac. 505; *Com.* v. *Epps*, 193 Pa. 512, 44 Atl. 570, 12 Am. Crim. Rep. 185; *State* v. *Green*, 48 S. C. 138, 26 S. E. 234; *Com.* v. *Storti*, 177 Mass. 339, 58 N. E. 1021.

A verified transcript of a confession taken in shorthand is admissible. See *Lowe* v. *State*, 125 Ga. 55, 53 S. E. 1038.

[6] United States.—*United States* v. *Williams*, 103 Fed. 938.

Alabama.—*Bracken* v. *State*, 111 Ala. 68, 56 Am. St. Rep. 23, 20 So. 636.

California.—*People* v. *Martinez*, 66 Cal. 278, 5 Pac. 261; *People* v. *Cokahnour*, 120 Cal. 253, 52 Pac. 505; *People* v. *Silvers*, 6 Cal. App. 69, 92 Pac. 506.

Delaware.—*State* v. *Vincent*, Houst. Crim. Rep. (Del.) 11.

Iowa.—See *State* v. *Usher*, 126 Iowa, 287, 102 N. W. 101; *State* v. *Busse*, 127 Iowa, 318, 100 N. W. 536.

Illinois.—See *Wistrand* v. *People*, 218 Ill. 323, 75 N. E. 891.

Louisiana.—*State* v. *Demarestz*, 41 La. Ann. 617, 6 So. 136.

Massachusetts.—*Com.* v. *King*, 8 Gray, 501.

Mississippi.—*Peter* v. *State*, 4 Smedes & M. 31; *Hightower* v. *State*, 58 Miss. 636; *Wright* v. *State*, 50 Miss. 332, 1 Am. Crim. Rep. 191; *Powell* v. *State*, — Miss. —, 23 So. 266; *Wright* v. *State*, 82 Miss. 421, 34 So. 4 (contra).

South Carolina.—*State* v. *Branham*, 13 S. C. 389.

Texas.—*Luera* v. *State*, — Tex. Crim. Rep. —, 32 S. W. 898; *Hurst* v. *State*, — Tex. Crim. Rep. —, 40 S. W. 264; *Willioms* v. *State*, 38 Tex. Crim. Rep. 128, 41 S. W. 645; *Powell* v. *State*, 37 Tex. 348; *Brez* v. *State*, 39 Tex. 95; *Grimsinger* v. *State*, 44 Tex. Crim. Rep. 1, 69 S. W. 583; *Knuckles* v. *State*, 55 Tex. Crim. Rep. 6, 114 S. W. 825; *Calloway* v. *State*, 55 Tex. Crim. Rep. 262, 116 S. W. 575. See *Askew* v. *State*, — Tex. Crim. Rep. —, 127 S. W. 1037.

[7] *Peter* v. *State*, 4 Smedes & M. 31; *Guy* v. *State*, 9 Tex. App. 161; *Hightower* v. *State*, 58 Miss. 636; *Patton* v. *Freeman*, 1 N. J. L. 114; *State* v. *Matthews*, 66 N. C. 106; *State* v. *Vincent*, Houst. Crim. Rep. (Del.) 11; *Wright* v. *State*, 50 Miss. 332, 1 Am. Crim. Rep. 191; *Williams* v. *State*, 38 Tex. Crim. Rep. 128, 41 S. W. 645; *Powell* v. *State*, — Miss. —, 23 So. 266; *People* v. *Cokahnour*, 120 Cal. 253, 52 Pac. 505; *State* v. *Harman*, 3 Harr. (Del.) 567.

adopts the language as his own,[8] but it must be written by him or signed by him to make it his confession.[9] The exact words of the confession need not be proved, but the substance must be given,[10] and the alleged confession must be offered in its entirety, including all that was said relating to the fact in dispute;[11] and the accused, at the same time, may prove,

[8] *Com.* v. *Coy,* 157 Mass. 200, 32 N. E. 4. See *State* v. *Brown,* 1 Mo. App. 86.

[9] *Austine* v. *People,* 51 Ill. 236; *State* v. *Harman,* 3 Harr. (Del.) 567.

[10] *State* v. *Hopkirk,* 84 Mo. 278; *State* v. *Madison,* 47 La. Ann. 30, 16 So. 566; *State* v. *Desroches,* 48 La. Ann. 428, 19 So. 250; *Brister* v. *State,* 26 Ala. 107; *Fertig* v. *State,* 100 Wis. 301, 75 N. W. 960; *Green* v. *Com.* 26 Ky. L. Rep. 1221, 83 S. W. 638; *Green* v. *State,* 96 Md. 384, 54 Atl. 104, 12 Am. Crim. Rep. 149; *State* v. *Berberick,* 38 Mont. 423, 100 Pac. 209, 16 A. & E. Ann. Cas. 1077; *State* v. *Lu Sing,* 34 Mont. 31, 85 Pac. 521, 9 A. & E. Ann. Cas. 344; *People* v. *Giro,* 197 N. Y. 152, 90 N. E. 432.

[11] England.—*Rex* v. *Clewes,* 4 Car. & P. 221; *Rex* v. *Hearne,* 4 Car. & P. 215.

Florida.—*Daniels* v. *State,* 57 Fla. 1, 48 So. 747.

United States.—*United States* v. *Prior,* 5 Cranch, C. C. 37, Fed. Cas. No. 16,092; *United States* v. *Long,* 30 Fed. 678; *United States* v. *Smith,* Fed. Cas. No. 16,342a.

Alabama.—*William* v. *State,* 39 Ala. 532; *Levison* v. *State,* 54 Ala. 520; *Strickland* v. *State,* 151 Ala. 31, 44 So. 90.

Arkansas.—*Frazier* v. *State,* 42 Ark. 70; *Williams* v. *State,* 69 Ark. 599, 65 S. W. 103, 12 Am. Crim Rep. 110.

California.—*People* v. *Gelabert,* 39 Cal. 663; *People* v. *Navis,* 3 Cal. 106.

Delaware.—*State* v. *Smith,* 9 Houst. (Del.) 588, 33 Atl. 441; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137.

Georgia.—*Woolfolk* v. *State,* 85 Ga. 69, 11 S. E. 814; *Wall* v. *State,* 5 Ga. App. 305, 63 S. E. 27.

Illinois.—*Waller* v. *People,* 175 Ill. 221, 51 N. E. 900; *Burnett* v. *People,* 204 Ill. 208, 66 L.R.A. 304, 98 Am. St. Rep. 206, 68 N. E. 505.

Iowa.—*State* v. *Novak,* 109 Iowa, 717, 79 N. W. 465; *State* v. *Neubauer,* 145 Iowa, 337, 124 N. W. 312.

Kansas.—*State* v. *Sorter,* 52 Kan. 531, 34 Pac. 1036.

Kentucky.—*Hart* v. *Com.* 22 Ky. L. Rep. 1183, 60 S. W. 298; *Herron* v. *Com.* 23 Ky. L. Rep. 782, 64 S. W. 432.

Louisiana.—*State* v. *Johnson,* 47 La. Ann. 1225, 17 So. 789.

Mississippi.—*Coon* v. *State,* 13 Smedes & M. 246; *McCann* v. *State,* 13 Smedes & M. 471.

Missouri.—*State* v. *Hollenscheit,* 61 Mo. 302; *State* v. *McKenzie,* 144 Mo. 40, 45 S. W. 1117; *State* v. *Coats,* 174 Mo. 396, 74 S. W. 864:

in explanation, the whole of what was said that may tend to modify or refute the confession.[12]

§ 622k. Burden of proof; presumptions.—While the great weight of authority is that the prosecution offering the confession must show that it was voluntarily made, nevertheless a number of courts regard a confession as prima facie admissible, or, in other words, indulge the presumption that confessions are prima facie voluntary. This appears to be the ruling in Indiana,[1] Maine,[2] Michigan,[3] Missouri,[4] Ohio,[5]

State v. *Myers,* 198 Mo. 225, 94 S. W. 242.

Nebraska.—*Walrath* v. *State,* 8 Neb. 80.

Nevada.—*State* v. *Buster,* 23 Nev. 346, 47 Pac. 194.

New York.—*People* v. *Rulloff,* 3 Park. Crim. Rep. 401; *People* v. *Thomis,* 76 App. Div. 243, 78 N. Y. Supp. 578.

Ohio.—*State* v. *Knapp,* 70 Ohio St. 380, 71 N. E. 705, 1 A. & E. Ann. Cas. 819.

Texas.—*Powell* v. *State,* 37 Tex. 348; *Riley* v. *State,* 4 Tex. App. 538; *McKinney* v. *State,* 48 Tex. Crim. Rep. 402, 88 S. W. 1012; *Follis* v. *State,* 51 Tex. Crim. Rep. 186, 101 S. W. 242.

Vermont.—*State* v. *McDonnell,* 32 Vt. 491.

Virginia.—*Brown* v. *Com.* 9 Leigh, 633, 33 Am. Dec. 263.

Wisconsin.—*Fertig* v. *State,* 100 Wis. 301, 75 N. W. 960; *Emery* v. *State,* 92 Wis. 146, 65 N. W. 848; *Rounds* v. *State,* 57 Wis. 45, 14 N. W. 865.

[12] *Chambers* v. *State,* 26 Ala. 59; *Parke* v. *State,* 48 Ala. 266; *People* v. *Yeaton,* 75 Cal. 415, 17 Pac. 544; *Woolfolk* v. *State,* 85 Ga. 69, 11 S. E. 814; *Daniels* v. *State,* 78 Ga. 98, 6 Am. St. Rep. 238; *Diehl* v. *State,* 157 Ind. 549, 62 N. E. 51; *Coffman* v. *Com.* 10 Bush, 495, 1 Am. Crim. Rep. 293; *Berry* v. *Com.* 10 Bush, 15, 1 Am. Crim. Rep. 272; *Hart* v. *Com.* 22 Ky. L. Rep. 1183, 60 S. W. 298; *Herron* v. *Com,* 23 Ky. L. Rep. 782, 64 S. W. 432; *State* v. *Johnson,* 47 La. Ann. 1225, 17 So. 789; *State* v. *McKenzie,* 144 Mo. 40, 45 S. W. 1117; *State* v. *Buster,* 23 Nev. 346, 47 Pac. 194; *Jones* v. *State,* 13 Tex. 168, 62 Am. Dec. 550.

[1] *Brown* v. *State,* 71 Ind. 470; *Hauk* v. *State,* 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Thurman* v. *State,* 169 Ind. 240, 82 N. E. 64; *State* v. *Laughlin,* 171 Ind. 66, 84 N. E. 756.

[2] *State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128; *State* v. *Bowe,* 61 Me. 171.

[3] *People* v. *Barker,* 60 Mich. 279, 1 Am. St. Rep. 501, 27 N. W. 539.

[4] *State* v. *Patterson,* 73 Mo. 695; *State* v. *Spaugh,* 200 Mo. 571, 98 S. W. 55; *State* v. *Armstrong,* 203 Mo. 554, 102 S. W. 503; *State* v. *Jones,* 171 Mo. 401, 94 Am. St. Rep. 786, 71 S. W. 680.

[5] *Rufer* v. *State,* 25 Ohio St. 464.

Massachusetts,[6] and North Carolina.[7] It is difficult to determine from these rulings whether or not the trial judge can properly indulge the presumption in favor of the voluntary character of the confession. If these rulings mean that the confession is to be taken as prima facie voluntary, then the burden of proof, to show that no improper inducement existed, is upon the accused. This, then, would modify the general rule that the burden is on the prosecution to show the voluntary character of the confession. In Ohio it is stated in terms, "Confessions are presumed to be voluntary until the contrary is shown," [8] and, under such a ruling, the burden of showing the alleged improper inducement falls upon the accused. In Massachusetts the court says that in the absence of all evidence the presumption is that a confession is voluntary.[9] This ruling would seem to indicate that in Massachusetts preliminary evidence of the voluntary character of the confession is not required. In North Carolina it is said that the confession is to be taken as prima facie voluntary, and admissible in evidence, unless the accused alleges and shows facts authorizing a legal inference to the contrary.[10] If a rule can be deduced from these decisions, it is that no showing is required on the part of the state, until evidence appears of, or the accused proves, an alleged inducement. In Alabama, however, all confessions are presumed to be involuntary, and in that state proof of their voluntary character falls upon the prosecution.[11] In Maryland it is held that the rule is well settled that the burden is upon the prosecution to show

[6] *Com.* v. *Culver,* 126 Mass. 464, 3 Am. Crim. Rep. 81.

[7] *State* v. *Sanders,* 84 N. C. 728.

[8] *Rufer* v. *State,* 25 Ohio St. 464.

[9] *Com.* v. *Culver,* 126 Mass. 464, 3 Am. Crim. Rep. 81; *Com.* v. *Sego,* 125 Mass. 210.

[10] *State* v. *Sanders,* 84 N. C. 728.

[11] *Redd* v. *State,* 69 Ala. 255; *Banks* v. *State,* 84 Ala. 430, 4 So. 382; *Bradford* v. *State,* 104 Ala. 68, 53 Am. St. Rep. 24, 16 So. 107; *State* v. *Stallings,* 142 Ala. 112, 38 So. 261; *Campbell* v. *State,* 150 Ala. 70, 43 So. 743.

affirmatively that the confession proposed was free from any improper inducement,[12] and in Louisiana the prosecution must affirmatively show that the confession is voluntary,[13] these rulings declaring in terms the prevailing rule.

Under the fundamental principle of criminal law, that the burden of proof is upon the state to establish the guilt of the accused beyond a reasonable doubt, confession evidence, being in the nature of self-crimination, offered by the state, its voluntary character should be first affirmatively shown, and the exception, by way of presumption, cannot prevail.

§ 622l. Discretion of judge; quantum of proof.—Under the general rule recognized by a preponderating weight of authority, the trial judge determines the question of the character of the confession. The question is, of course, one of mixed law and fact, and when applied to confessions does not differ from other questions of mixed law and fact which a trial judge is constantly called upon to decide. No rule can be formulated that would comprehend the cases, for each case rests upon a state of facts which does not exist in any other particular case. There is no precise formula of words addressed to an accused by any other person that would exclude the confession, and no precise formula of words addressed to the accused by any person that could give a voluntary character to the confession. All that can be said, then, is that the presiding judge, aided by his legal learning and experience upon the bench, must determine for himself the weight of the circumstance that admits or excludes the confession in a concrete case.[1]

[12] *Nicholson* v. *State,* 38 Md. 140.

[13] *State* v. *Johnson,* 30 La. Ann. 881.

[1] *State* v. *Branham,* 13 S. C. 389; *Com.* v. *Morey,* 1 Gray, 461; *Bram* v. *United States,* 168 U. S. 533, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *State* v. *Workman,* 15 S. C. 540; *State* v. *Houston,* 76 N. C. 256; *Com.* v. *Tuckerman,* 10 Gray, 173; *Laughlin* v. *Com.* 18 Ky. L. Rep. 640, 37 S. W. 590;

While the final effect of the exercise of this discretion is a question that concerns appellate procedure rather than evidence, nevertheless there ought to be accorded to the finding of the trial judge a conclusive effect, measured, as in other cases, by the following principles:

First, where there is a conflict of evidence, the ruling of the trial court should be final on the question of admissibility.[2]

Second, where there is no conflict in the evidence, and the question presented is what constitutes an improper inducement, it is a question of law, subject to review.[3]

The general rule, then, as to the exercise of the court's discretion, upon the question of the admissibility of confession evidence, is that the finding as to facts is final, and not subject to review except in a case of mistake or abuse of discretion, but the finding on the question of law is always open to review in the appellate court. The various phases of these rulings will be found in the following cases.[4]

Johnson v. *State,* 1 Ga. App. 129, 57 S. E. 934; *Hopt* v. *Utah,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *United States* v. *Nott,* 1 McLean, 499, Fed. Cas. No. 15,900; *State* v. *Vey,* 21 S. D. 612, 114 N. W. 719; *State* v. *Landers,* 21 S. D. 606, 114 N. W. 717; *Nicholson* v. *State,* 38 Md. 140; *Com.* v. *Sheets,* 197 Pa. 69, 46 Atl. 753; *Com.* v. *Phillips,* 26 Ky. L. Rep. 543, 82 S. W. 286; *Cady* v. *State,* 44 Miss. 332; *Banks* v. *State,* 93 Miss. 700, 47 So. 437.

[2] *Fincher* v. *People,* 26 Colo. 169, 56 Pac. 902; *State* v. *Gorham,* 67 Vt. 365, 31 Atl. 845, 10 Am. Crim. Rep. 25. See *State* v. *Monich,* 74 N. J. L. 522, 64 Atl. 1016.

[3] *State* v. *Vann,* 82 N. C. 632; *Holland* v. *State,* 39 Fla. 178, 22 So. 298. See *Hintz* v. *State,* 125 Wis. 405, 104 N. W. 110; *Roszczyniala* v. *State,* 125 Wis. 414, 104 N. W. 113.

[4] *Runnels* v. *State,* 28 Ark. 121; *Williams* v. *State,* 63 Ark. 527, 39 S. W. 709; *State* v. *Willis,* 71 Conn. 293, 41 Atl. 820; *State* v. *Cross,* 72 Conn. 722, 46 Atl. 148, 12 Am. Crim. Rep. 175; *Hardy* v. *United States,* 3 App. D. C. 35, 46; *Travers* v. *United States,* 6 App. D. C. 450; *Bartley* v. *People,* 156 Ill. 234, 40 N. E. 831; *State* v. *Storms,* 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610; *State* v. *Edwards,* 106 La. 674, 31 So. 308; *State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128; *Roesel* v. *State,* 62 N. J. L. 216, 41 Atl. 408; *State* v. *Davis,* 63 N. C. 580; *State* v. *Page,* 127 N. C. 512, 37 S. E. 66; *Fife* v.

§ 623. Confessions, strictly speaking, are not evidence.—It must be observed that an extrajudicial confession is an acknowledgment of guilt by the accused, and in itself is the statement of a fact. It is not proof that a particular thing took place, nor is it a waiver, by the accused, of his legal right to have the fact technically proved. A, for instance, is shown to have said that certain facts, implicating him, actually occurred. If this statement was offered as evidence of such facts, it is purely hearsay and inadmissible. It is not the less hearsay because A accuses himself, because in the extrajudicial confession you cannot dispense with the proof. If a reason must be assigned for the admission of hearsay testimony, it finds its basis in the rule that admissions against interest constitute a well-recognized exception to the rule.

§ 624. A confession must relate to past or present conditions.—A confession, to have the effect of conceding, either wholly or prima facie, the case of the prosecution, must relate to a past or present state of facts. If I say, "I did a particular thing," this may be treated as a confession. If I say, "I will do this thing in the future," this is not a confession, unless, with other evidence, it implies a past or present act. Relevancy to past or existing conditions is, therefore, an essential requisite of the admissibility of a confession.[1]

§ 625. Extrajudicial confessions prima facie proof only.—An extrajudicial confession forms but a prima facie case against the party by whom it is made.[1] Such confessions

Com. 29 Pa. 437; *State* v. *Derrick*, 44 S. C. 344, 22 S. E. 338; *State* v. *Cannon*, 49 S. C. 550, 27 S. E. 526; *Connors* v. *State*, 95 Wis. 77, 69 N. W. 981; *State* v. *Rogoway*, 45 Or. 601, 78 Pac. 987, 81 Pac. 234, 2 A. & E. Ann. Cas. 431.

[1] *State* v. *Cox*, 65 Mo. 29.

[1] Mascard. i. C. No. 26; Endemann, 137. See Wharton, Ev. § 1077.

are not conclusive proof of that which they state;[2] it may be proved that they were uttered in ignorance, or levity, or mistake;[3] and hence they are, at the best, to be regarded as only cumulative proof, which affords but a precarious support, and on which, when uncorroborated, a verdict cannot be permitted to rest. This is eminently the case where there is any suspicion from the nature of things attachable to the confession, as is the case with admissions of adultery;[4] or where the party against whom it is offered made it under a mistake of fact.[5] Whenever such a mistake is proved, the confession is to be disregarded.[6] And the same rule applies to an admission of an act technically void. Thus on an indictment for setting fire to a ship, it was held that the prosecutor could not make use of an admission by the prisoner that certain persons were owners, if it appeared that the requisites of the shipping act had not been complied with.[7] It has also been held that an admission of a marriage, which turned out to be void, cannot be used against a defendant charged with bigamy.[8]

§ 626. Intention a necessary basis to a confession.— Extrajudicial confessions may be adduced, either as admis-

[2] See *State* v. *Brown*, 1 Mo. App. 86; *Ray* v. *State*, 50 Ala. 104.

[3] Post, §§ 634–636.

[4] Post, § 637; *Lyon* v. *Lyon*, 62 Barb. 138; *Prince* v. *Prince*, 25 N. J. Eq. 310; *Evans* v. *Evans*, 41 Cal. 103; *Mathews* v. *Mathews*, 41 Tex. 331.

[5] See *People* v. *Velarde*, 59 Cal. 457.

[6] See cases cited post, § 634. Compare *Wheeling's Case*, 1 Leach, C. L. 311, note; *Heane* v. *Rogers*, 9 Barn. & C. 577, 4 Mann. & R. 486, 7 L. J. K. B. 285; *Newton* v. *Belcher*, 12 Q. B. 921, 18 L. J. Q. B. N. S. 53, 13 Jur. 253, 6 Eng. Ry. & C. Cas. 38; *Newton* v. *Liddiard*, 12 Q. B. 927, 18 L. J. Q. B. N. S. 53, 6 Eng. Ry. & C. Cas. 42; *Atty.-Gen.* v. *Stephens*, 1 Kay & J. 748, 3 Eq. Rep. 1072, 24 L. J. Ch. N. S. 694, 1 Jur. N. S. 1039, 3 Week. Rep. 649; *Hall* v. *Huse*, 10 Mass. 39; *State* v. *Welch*, 7 Port. (Ala.) 463; *State* v. *Brown*, 1 Mo. App. 86. See, however, *Blackburn* v. *Com.* 12 Bush, 181.

[7] *Rex* v. *Philp*, 1 Moody, C. C. 271.

[8] 3 Starkie, Ev. 1187.

sions of guilt, or as admissions of isolated facts from which guilt may be inferred. When offered for the former purpose, they have no weight unless they were made intentionally and in sincerity;[1] and hence it is admissible, in order to impugn a confession, to show that it was made as a joke. We must also remember that an alleged confession may have been only a brag, understood by the parties to be such at the time,[2] or may have been uttered in order to make a sensation. If so, it cannot be made the basis on which a conviction can be sustained, since on its face its want of truthfulness appears. To the credibility of a confession of guilt, therefore, it is necessary that there should be an *animus confitendi*, or intention to speak the truth as to the specific charge of guilt. Such intention, however, is not essential to attach credibility to admissions of particular facts, in themselves indifferent, but which go to make up a case on which guilt is assumed to rest.[3] It is a part of the case against a defendant, for instance, that he rode a specific distance in a given time. It is admissible to put in evidence against him his admissions that on other occasions his horse had a speed which, it might afterwards have been urged, would have enabled him to make the time in question. And it is not necessary to the admissibility of such statements that it should be proved that they were made with any particular intention.[4] In fact, the more undesigned and fortuitous they appear to have been, the more likely they are to be true.[5] Hence we may conclude that designedness is one of the conditions of the credibility of a

[1] *Ray* v. *State*, 50 Ala. 104.

[2] See *Hamilton* v. *Reg.* 9 Q. B. 270, 16 L. J. Mag. Cas. N. S. 9, 10 Jur. 1028, 2 Cox, C. C. 11; *State* v. *Estes*, 46 Me. 150; *People* v. *Crissie*, 4 Denio, 525; *State* v. *Phifer*, 65 N. C. 321. See post, § 627.

[3] *Fraser* v. *State*, 55 Ga. 325, 1 Am. Crim. Rep. 315; *State* v. *Lewis*, 45 Iowa, 20.

[4] *Fraser* v. *State*, 55 Ga. 325, 1 Am. Crim. Rep. 315; supra, § 625.

[5] *Linnehan* v. *Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Ettinger* v. *Com.* 98 Pa. 338.

confession of the conclusion of guilt; while undesignedness enhances the weight of admissions of incidental facts from which the conclusion of guilt is drawn. A man cannot be convicted of forgery on an inadvertent statement made by him, not in response to any particular charge, that he was a forger. But his conviction may properly be rested on a series of inadvertent acts on his part not meant as confessions; *e. g.*, writings or other matters showing an identity of penmanship with that of the alleged forgery, and the materials for forgery which he may have exposed.

§ 627. Self-disserving confession of guilt.—The credibility of a self-disserving confession of guilt, therefore, as distinguished from incidental admissions of facts, is a question of fact resting on the presumption that no prudent man would declare an untruth to his own disadvantage.[1] *Quum legibus nostris dictum sit, quæcunque quis pro se dixerit aut scripserit, ea nihil ipsi prodesse, neque creditoribus præjudicare.*[2] *Exemplo perniciosum est, ut ei scripturæ credatur, qua unusquisque sibi adnotatione propria debitorem constituit. Unde neque fiscum neque alium quemlibet ex suis subnotationibus debiti probationem præbere posse oportet.*[3] Hence, *contra se dicere* is essential to constitute a credible confession of guilt. Self-love, as it is justly argued, will hinder a prudent man from falsehoods that would disgrace him.[4] Yet we must remember that this proposition applies mainly to matters of pecuniary interest. When we come to questions of pedigree, of status, and of marriage, different influences come in which render the tests just given of but little weight. In matters of

[1] *Com.* v. *Galligan*, 113 Mass. 202; *Com.* v. *Sanborn*, 116 Mass. 61; *Blackburn* v. *Com.* 12 Bush, 181; *Eiland* v. *State*, 52 Ala. 322. And see *Brown* v. *Com.* 76 Pa. 319, noticed post, §§ 629, 650.

[2] Hesse, 29.

[3] L. 7, C. 4, 19.

[4] Hesse, ut supra, 29, citing further I. 26, § 2; D. xvi. 3.

pedigree, in particular, a statement which one man would shrink from as discreditable, another would advance with pride. Nor can we forget that pecuniary interest may sometimes be overbalanced by other more powerful passions. A villain may try to make a point by falsely confessing adultery with a woman whom he desires to humble;[5] while a person craving notoriety may take satisfaction in intimating his complicity in merely imaginary crimes.[6] Even among prudent men, a little obvious interest, against which a party makes an admission, may be greatly overbalanced by a superior secret interest, of which nobody knows but the declarant. The truthfulness, therefore, of an apparently self-disserving statement is a presumption of fact, depending upon all the circumstances of the case. We must inquire whether the statement was really self-disserving; and even if it were so, in a business sense, we must remember that it may be discredited by showing that it was made under mistake, or from a desire on the declarant's part to produce a sensation, or to avoid a disclosure of a fact with which the admission is inconsistent. Incidental admissions of facts on which the prosecution's case depends become the more reliable in proportion to their undesignedness. But to the credibility of confessions of guilt it is essential that they should have been made with a sincere intention of telling the truth.[7]

§ 628. Theoretically, a confession is deducted; an admission inducted.—While to a confession of guilt, inten-

[5] *Shillito's Case* noticed in 21 Alb. L. J. 163, Feb. 28, 1880.

[6] Jeaffreson, Real Lord Byron, Am. ed. 64.

[7] 1 Cockburn's Memorials, pp. 141 et seq.; *Angus's Case*, Burnett, Crim. Law, 575. See 3 Wharton & S. Med. Jur. § 874; Cotton Mather's Magnalia Christi Americana, bk. 6, chap. 7; Governor Hutchinson's History of Massachusetts, vol. 2, pp. 15, 63; 5 State Tr. pp. 647, 682; Upham's Lectures on the Salem Witchcraft, Boston, 1831; Best, Ev. 9th ed. p. 839; N. Y. Med. Leg. Soc. (N. Y. 1872, pp. 318–331.)

tion pointed to a particular charge is necessary, such is not the case with the incidental admission of isolated facts, which derive their peculiar reliability from their inadvertence. Another distinction is now to be considered. A confession of guilt is of no weight unless it is a short-hand admission of facts; an admission of an incidental fact is of no weight unless it affords a basis for an induction of guilt. The first is inoperative unless, as an answer to a particular offense charged, it implies a specification which is sufficiently exact to sustain a conviction. The second is inoperative unless it is supported collaterally by a series of other facts from which guilt may be cumulatively inferred. The first is, "I am guilty of this," and this implies an admission of all the acts constituting guilt. The second is, "Such an act, part of a complicated web of circumstances, is true;" and this involves the examination of all other relevant circumstances.[1] Relevancy, in the first case, is sustained by deductive reasoning: Whosoever is guilty of the acts making up the result; in the second case, by inductive reasoning: Whosoever did the component acts is guilty of the result. As to the first, we must remember that the party confessing may himself have reasoned falsely. He may have shot a man already dead, for instance, and may therefore, by assuming a false premise, confess a murder which he did not commit. As to the second, we must remember that we may reason falsely.[2] The inculpatory facts admitted by the accused may be true, and yet we may be in error in supposing they are grounds from which his guilt may be rightly inferred.[3]

§ 629. Identification of accused.—A confession may be brought specifically home to the party charged with making

[1] See *Com.* v. *Allen*, 128 Mass. 46, 35 Am. Rep. 356; *State* v. *Howard*, 82 N. C. 623.

[2] See supra, § 378; post, § 635.

[3] See *Haynie* v. *State*, 2 Tex. App. 168.

it, and, independently of the cases in which parties are induced through fear to make statements which are not really their own, we may easily conceive of cases of forged confessions, or confessions by one man imputed by mistake to another. The person alleged to have confessed, therefore, must be identified as the party to whom the confession is charged. But the identification may be by voice as well as by face. Thus, it has been held in Pennsylvania that a prisoner could testify to a confession from another prisoner through a soil pipe, the identification of the speaker being by the voice alone.[1]

§ 630. Medium through which the confession is transmitted.—The imperfection of the medium through which an oral confession is transmitted must also be considered in weighing the confession. Aside from the considerations based on the infirmity of memory, we must recollect that there are influences peculiarly likely to affect witnesses as to confessions. Partisan sympathy, preconceived prejudice, the desire to detect an offender, especially in cases of heinous crime, are apt in such cases to have distinctive force. In any view, we must remember that the accuracy of the witness testifying to the confession is a question of fact for the jury.[1]

§ 631. General rule as to admissibility.—Subject to the qualifications we have just noticed, the rule is firmly established that a free and voluntary confession, either of an offense as specifically charged, or of a fact from which such offense can be inferred, whether made before or after apprehension, and whether in writing or in unwritten words or by signs, is admissible when offered against the accused, no matter where or to whom it was made.[1]

[1] *Brown* v. *Com.* 76 Pa. 319; post, § 803.

[1] See *Com.* v. *Gallighan,* 113 Mass. 202; supra, § 378.

[1] *Rex* v. *Lambe,* 2 Leach, C. L. 552; 2 Hawk. P. C. chap. 46; *Com.* v. *Sanborn,* 116 Mass. 61; *State* v. *Brown,* 48 Iowa, 382; *Williams* v.

§ 631a. Definition of "voluntary" as applied to confessions.—While the fundamental principle of exclusion is that the confession may be false, and therefore untrustworthy, the determination of the nature of the confession is comprehended in the word "voluntary." Having reference now to the exact application of the principle of exclusion, it does not matter how the confession is obtained if the confession is a true one. Thus, if the accused was severely beaten or tortured, and he made a confession which was true as a matter of fact, such confession would be admissible in evidence. But it is so abhorrent to the senses that any person should be made to disclose anything, by threats or by punishment, that courts proceed solely upon the question of the voluntary character of the confession, and assume that confessions which are not voluntary are not true, but are false and hence inadmissible.

Some criticism has been made of the use of the word "voluntary," [1] claiming that all confessions must be voluntary, because it is the voluntary act of the accused that causes him to speak. Technically, this is true, in the sense that when the convict walked on the scaffold, and that when Queen Mary signed her death warrant, it was a voluntary act, because the actual physical character of the act was a compliance with the meaning of the word "voluntary." It would not, however, be claimed that, because of the physical expression of the act of speaking, or of the act of walking upon the scaffold, or of signing the death warrant, it was a free exercise of the will. Hence, the term "voluntary," as used in the development of the law of confessions, means that the accused speaks of his free will and accord, without inducement of any kind, and with a full and complete knowledge of the nature and consequences of the confession, and when the speaking is so free from influences affecting the will of the accused, at the

State, 10 Tex. App. 526; *Kennon* v. *State*, 11 Tex. App. 356.

[1] Wigmore, Ev. § 824.

time the confession was made, that it renders it admissible in evidence against him.[2]

§ 632. Admissibility distinguished from sufficiency.—The question of the admissibility of the confession is to be determined by the court,[1] as any other question of the relevancy and competency of evidence. The general rule controlling admissibility is that the confession is free from any improper inducement, but the sufficiency of the confession, as evidence to sustain the charge, is a question that goes to its weight and credibility, and hence always a question for the jury.[2]

§ 633. Corpus delicti and corroboration.—The term *corpus delicti* is so invariably associated with homicide only, that its existence as a part of the proof of every crime is frequently ignored. Hence, in dealing with corroboration of confessions, courts use a rather loose phrasing, such as, "there should be some proof that a crime has been committed," or "there should be some circumstance corroborating or fortifying the confession,[1] which phrases indicate that the *corpus delicti,* "the body of the crime," "the proof of the crime," or however else it may be expressed, must be shown by evidence independent of the confession. That this is an essential is found in the statement of the general rule, that, to warrant a conviction upon an extrajudicial confession of the accused, there must be independent evidence to establish the *corpus*

[2] *State* v. *Willis,* 71 Conn. 293. 41 Atl. 820; *State* v. *Lukens,* 6 Ohio N. P. 363, 9 Ohio S. & C. P. Dec. 349; *State* v. *Rorie,* 74 N. C. 148; *State* v. *Roberts,* 12 N. C. (1 Dev. L.) 259.

For note as to when confession is voluntary, see 18 L.R.A.(N.S.) 768.

[1] Post, §§ 689, 689a.

[2] Post, § 689b.

[1] *Bergan* v. *People,* 17 Ill. 426, 65 Am. Dec. 672; *Matthews* v. *State,* 55 Ala. 187, 28 Am. Rep. 698.

delicti of the crime,[2] and the rule is also expressed in many statutory enactments.[3]

[2] Wills, Circumstantial Ev. § 6; 1 Greenl. Ev. § 316; *State* v. *Davidson,* 30 Vt. 377, 73 Am. Dec. 312; *Com.* v. *McCann,* 97 Mass. 580; *Com.* v. *Smith,* 119 Mass. 305; *People* v. *Hennessey,* 15 Wend. 147; *People* v. *Badgley,* 16 Wend. 53; *Ruloff* v. *People,* 18 N. Y. 179; s. c. 3 Park. Crim. Rep. 401; *People* v. *Bennett,* 49 N. Y. 137; *Com.* v. *Pettit,* 8 Phila. 608; *Com.* v. *Hanlon,* 3 Brewst. (Pa.) 461; *Smith* v. *Com.* 21 Gratt. 809; *State* v. *Long,* 2 N. C. (1 Hayw.) 455; *State* v. *Cowan,* 29 N. C. (7 Ired. L.) 239; *Earp* v. *State,* 55 Ga. 136, 1 Am. Crim. Rep. 171; *Daniel* v. *State,* 63 Ga. 339; *Matthews* v. *State,* 55 Ala. 187, 28 Am. Rep. 698; *Johnson* v. *State,* 59 Ala. 37, 3 Am. Crim. Rep. 256; *Keithler* v. *State,* 10 Smedes & M. 229; *Stringfellow* v. *State,* 26 Miss. 157, 59 Am. Dec. 247; *Jenkins* v. *State,* 41 Miss. 582; *Lee* v. *State,* 45 Miss. 114; *Heard* v. *State,* 59 Miss. 545; *Robinson* v. *State,* 12 Mo. 592; *State* v. *Scott,* 39 Mo. 424; *State* v. *German,* 54 Mo. 526, 14 Am. Rep. 481; *Dixon* v. *State,* 13 Fla. 636; *Bergen* v. *People,* 17 Ill. 426, 65 Am. Dec. 672; *May* v. *People,* 92 Ill. 343; *South* v. *People,* 98 Ill. 261; *Williams* v. *People,* 101 Ill. 382; *People* v. *Lane,* 49 Mich. 340, 13 N. W. 622; *State* v. *Keeler,* 28 Iowa, 553; *State* v. *Knowles,* 48 Iowa, 598; *State* v. *Laliyer,* 4 Minn. 368, Gil. 277; *People* v. *Jones,* 31 Cal. 565; *People* v. *Ah How,* 34 Cal. 218; *People* v. *Thrall,* 50 Cal. 415; *Hill* v. *State,* 11 Tex. App. 132; *Lovelady* v. *State,* 14 Tex. App. 546. See *Young* v. *State,* 68 Ala. 569; *Territory* v. *McClin,* 1 Mont. 394; *Priest* v. *State,* 10 Neb. 393, 6 N. W. 468. See *State* v. *Guild,* 10 N. J. L. 165, 18 Am. Dec. 404; *State* v. *Carrick,* 16 Nev. 120; *Rice* v. *State,* 47 Ala. 38; *Moses* v. *State,* 58 Ala. 117; *State* v. *Kring,* 74 Mo. 612; *State* v. *Patterson,* 73 Mo. 695; *Cunningham* v. *Com.* 9 Bush. 149; *State* v. *Grear,* 29 Minn. 221, 13 N. W. 140; *United States* v. *Bloomgart,* 2 Ben. 356, Fed. Cas. No. 14,612. See *Reg.* v. *Sutcliffe,* 4 Cox, C. C. 270; 3 Wharton & S. Med. Jur. 4th ed. 1884, §§ 776, et seq.; *Meisenheimer* v. *State,* 73 Ark. 407, 84 S. W. 494; *Hubbard* v. *State,* 77 Ark. 126, 91 S. W. 11; *Melton* v. *State,* 43 Ark. 367; *Holsenbake* v. *State,* 45 Ga. 43, 56; *People* v. *Jones,* 31 Cal. 565; *Roberts* v. *People,* 11 Colo. 213, 17 Pac. 637; *Lambright* v. *State,* 34 Fla. 565, 16 So. 582, 9 Am. Crim. Rep. 383; *Holland* v. *State,* 39 Fla. 178, 22 So. 298; *State* v. *Aaron,* 4 N. J. L. 232, 7 Am. Dec. 592; *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404. See *United States* v. *Williams,* 1 Cliff. 5, Fed. Cas. No. 16,707; *Flower* v. *United States,* 53 C. C. A. 271, 116 Fed. 241; *Joiner* v. *State,* 119 Ga. 315, 46 S. E. 412; *Owen* v. *State,* 119 Ga. 304, 46 S. E. 433; *Morgan* v. *State,* 120 Ga. 499, 48 S. E. 238; *May* v. *People,* 92 Ill. 343; *Johnson* v. *People,* 197 Ill. 48, 64 N. E. 286; *Griffiths* v. *State,* 163 Ind. 555, 72 N. E. 563; *Leftridge* v. *United*

It has been loosely stated in a large number of cases that "the accused may be convicted on his own uncorroborated extrajudicial confession, the *corpus delicti* being proved by other evidence." [4] This is the equivalent of saying that a man may be convicted on his own uncorroborated confession, which is corroborated by other evidence. What the courts apparently mean to express is, that A makes an extrajudicial confession of a crime; others produce independent proof of the fact of the crime having been committed, or the *corpus delicti* of the crime. This independent proof is the corroboration, but it is misleading to say that the confession is uncorroborated, merely because the proof of the crime is established by independent evidence.

States, 6 Ind. Terr. 305, 97 S. W. 1018; *State* v. *Westcott,* 130 Iowa, 1, 104 N. W. 341; *State* v. *Dubois,* 54 Iowa, 363, 6 N. W. 578; *Cunningham* v. *Com.* 9 Bush, 149. See *Patterson* v. *Com.* 86 Ky. 313, 5 S. W. 387; *Wigginton* v. *Com.* 92 Ky. 282, 17 S. W. 634. See *Dugan* v. *Com.* 102 Ky. 241, 43 S. W. 418; *State* v. *Knowles,* 185 Mo. 141, 83 S. W. 1083; *Blacker* v. *State,* 74 Neb. 671, 121 Am. St. Rep. 751, 105 N. W. 302; *People* v. *Deacons,* 109 N. Y. 374, 16 N. E. 676; *People* v. *White,* 176 N. Y. 331, 68 N. E. 630; *Re Kelly,* 28 Nev. 491, 83 Pac. 223; *State* v. *Marselle,* 43 Wash. 273, 86 Pac. 586; *State* v. *Jenkins,* 2 Tyler (Vt.) 377; *Early* v. *Com.* 86 Va. 921, 11 S. E. 795; *Wolf* v. *Com.* 30 Gratt. 833.

For note as to proof of *corpus delicti* for purpose of corroborating confession, see 68 L.R.A. 68, 73.

[3] Ark. Stat. 1894, § 2231; Ga. Code, 1895, § 1005; Ind. Rev. Stat. 1897, § 1893; Iowa Code, 1897. § 5491; Ky. Crim. Code, 1895, § 240; Wash. Code & Stat. 1897, § 6942; Minn. Gen. Stat. 1894, § 5766; N. Y. Crim. Code, 1881, § 395; Or. Crim. Code, 1892, § 1368.

[4] *Mose* v. *State,* 36 Ala. 211; *People* v. *Carlson,* 8 Cal. App. 730, 97 Pac. 827; *Brown* v. *State,* 44 Fla. 28, 32 So. 107; *Mitchell* v. *State,* 45 Fla. 76, 33 So. 1009; *Wimberley* v. *State,* 105 Ga. 188, 31 S. E. 162; *Bartley* v. *People,* 156 Ill. 234, 40 N. E. 831; *State* v. *Wortman,* 78 Kan. 847, 98 Pac. 217; *Dugan* v. *Com.* 102 Ky. 241, 43 S. W. 418; *Com.* v. *Smith,* 119 Mass. 305; *State* v. *Grear,* 29 Minn. 221, 13 N. W. 140; *Sam* v. *State,* 33 Miss. 347; *Spears* v. *State,* 92 Miss. 613, 16 L.R.A (N.S.) 285, 46 So. 166; *State* v. *Patterson,* 73 Mo. 695; *Sullivan* v. *State,* 58 Neb. 796, 79 N. W. 721; *Williams* v. *State,* 12 Lea, 211.

§ 634. **Sufficiency of corroboration.**—The sufficiency of a corroboration of a confession must depend on the circumstances of each case, always having in view, however, that the essentials of the crime must be established beyond a reasonable doubt.[1] In a trial in Mississippi the circumstances attending the death of the deceased, and the condition of the body, indicated poisoning by stramonium, which is obtained from the jimson weed; but the same symptoms are caused by congestion of the brain, stomach, or heart, and it was properly held by the court that a confession of the accused that he had given the deceased jimson weed was not sufficient to warrant a conviction, the *corpus delicti* not being fully proved.[2] Here, it seems that two causes might intervene to produce the same effect,—one, congestion, the other poison,—and, in the absence of direct proof, a reasonable doubt existed. On the other hand, a boy of fourteen was on trial for the murder of a girl nine years old. He confessed that he whipped her for telling a lie on him; that the whipping took place near a spring; that when she cursed him he got a rail and knocked her on the head. The body was found near the spring, with the skull fractured, and nearby were the switches and a broken rail stained with blood. It was held that these facts sufficiently corroborated the confession and warranted the conviction.[3] In the latter case it was beyond the range of probability that two causes could have intervened to produce the same effect, so that no reasonable doubt could exist of the truth of the confession, after finding the body in the place, under the conditions, and with the weapons used.

The following cases illustrate the various rulings as to the quantum of proof to corroborate the confession.[4] As to the

[1] *Gray* v. *Com.* 101 Pa. 380, 47 Am. Rep. 733.

[2] *Pitts* v. *State,* 43 Miss. 472.

[3] *Paul* v. *State,* 65 Ga. 152.

[4] *White* v. *State,* 49 Ala. 344; *Ryan* v. *State,* 100 Ala. 94, 14 So. 868; *People* v. *Jones,* 123 Cal. 65, 55 Pac. 698; *Simon* v. *State,* 5 Fla.

corpus delicti, the evidence need not be direct, but it may be established by circumstances corroborating the confession,[5] and the confession itself may be considered, together with all the other evidence, to establish the fact that a crime was committed.[6]

285; *Johnson* v. *State,* 86 Ga. 90, 12 S. E. 471, 13 S. E. 282; *Westbrook* v. *State,* 91 Ga. 11, 16 S. E. 100; *Bergen* v. *People,* 17 Ill. 426, 65 Am. Dec. 672; *Gore* v. *People,* 162 Ill. 259, 44 N. E. 500; *State* v. *Dooley,* 89 Iowa, 584, 57 N. W. 414; *Wigginton* v. *Com.* 92 Ky. 282, 17 S. W. 634; *Greenwade* v. *Com.* 11 Ky. L. Rep. 340, 12 S. W. 131; *State* v. *New,* 22 Minn. 76; *Heard* v. *State,* 59 Miss. 545; *State* v. *Meyers,* 99 Mo. 107, 12 S. W. 516; *Territory* v. *Farrell,* 6 Mont. 12, 9 Pac. 536; *Sullivan* v. *State,* 58 Neb. 796, 79 N. W. 721; *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404; *Gahagan* v. *People,* 1 Park. Crim. Rep. 378; *People* v. *Rulloff,* 3 Park. Crim. Rep. 401; *Com.* v. *Shaffer,* 178 Pa. 409, 35 Atl. 924; *State* v. *Jacobs,* 21 R. I. 259, 43 Atl. 31; *Williams* v. *State,* 12 Lea, 211; *Fields* v. *State,* 41 Tex. 25; *Tidwell* v. *State,* 40 Tex. Crim. Rep. 38, 47 S. W. 466, 48 S. W. 184; *State* v. *Jenkins,* 2 Tyler (Vt.) 377; *Henderson* v. *Com.* 98 Va. 794, 34 S. E. 881; *Laughlin* v. *Com.* 18 Ky. L. Rep. 640, 37 S. W. 590; *Davis* v. *State,* 105 Ga. 808, 32 S. E. 158.

[5] *Roberts* v. *People,* 11 Colo. 213, 17 Pac. 637; *Davis* v. *State,* 141 Ala. 62, 37 So. 676; *Holland* v. *State,* 39 Fla. 178, 22 So. 298; *Meisenheimer* v. *State,* 73 Ark. 407, 84 S W. 494; *State* v. *Minor,* 106 Iowa, 642, 77 N. W. 330; *Sanders* v. *State,* 118 Ga. 329, 45 S. E. 365; *Laughlin* v. *Com.* 18 Ky. L. Rep. 640, 37 S. W. 590; *State* v. *Coats,* 174 Mo. 396, 74 S. W. 864; *State* v. *Patterson,* 73 Mo. 695; *Cohoe* v. *State,* 82 Neb. 744, 118 N. W. 1088; *People* v. *Rulloff,* 3 Park. Crim. Rep. 401; *Shires* v. *State,* 2 Okla. Crim. Rep. 89, 99 Pac. 1100; *Com.* v. *Johnson,* 162 Pa. 63, 29 Atl. 280; *State* v. *Mowry,* 21 R. I. 376, 43 Atl. 871; *State* v. *Knapp,* 70 Ohio St. 380, 71 N. E. 705, 1 A. & E. Ann. Cas. 819; *Jackson* v. *State,* 29 Tex. App. 458, 16 S. W. 247; *Gallegos* v. *State,* 48 Tex. Crim. Rep. 58, 85 S. W. 1150; *State* v. *Gates,* 28 Wash. 689, 69 Pac. 385.

[6] *State* v. *Jacobs,* 21 R. I. 259, 43 Atl. 31; *Bradford* v. *State,* 146 Ala. 150, 41 So. 471; *Meisenheimer* v. *State,* 73 Ark. 407, 84 S. W. 494; *People* v. *Jones,* 123 Cal. 65, 55 Pac. 698; *Gantling* v. *State,* 41 Fla. 587, 26 So. 737; *State* v. *Icenbice,* 126 Iowa, 16, 101 N. W. 273; *State* v. *Westcott,* 130 Iowa, 1, 104 N. W. 341; *Holland* v. *Com.* 26 Ky. L. Rep. 790, 82 S. W. 596; *State* v. *Banusik,* — N. J. L. —, 64 Atl. 994; *People* v. *Brasch,* 193 N. Y. 46, 85 N. E. 809; *State* v. *Rogoway,* 45 Or. 601, 78 Pac. 987, 81 Pac. 234, 2 A. & E. Ann. Cas. 431; *Ex parte Patterson,* 50 Tex. Crim. Rep. 271, 95 S. W. 1061; *Bradshaw* v. *State,* 49

§ 635. Credibility of confessions.—All testimony submitted under exceptions to the fundamental rules of evidence should be deliberately and searchingly tested. There are no classes of evidence that invite the distrust of the courts, to a serious extent, except dying declarations and confessions. Dying declarations are rendered uncertain by the medium through which they must be proved. No surrounding circumstances can be more distressing than those attending death from violence. The primal passions aroused, the frenzy for revenge, the intolerable grief of the friends of the dying man, all tend to render the testimony unreliable and often utterly at variance with the facts as they existed. The same is true, in a great measure, of confessions. As is well asked and answered by one authoritative author, "But how do they get to believe in the fact of a confession having been made? Always, and necessarily, by somebody's testimony. And what is our experience of that sort of testimony on which we are asked to believe that a confession was made? A varying and sometimes discouraging experience. Paid informers, treacherous associates, angry victims, and overzealous officers of the law,—these are the persons through whom an alleged confession is often, perhaps oftenest, presented; and it is at this stage that our suspicions are aroused and our caution stimulated." [1] Based on experience, different courts have described them as the highest and most satisfactory proof of guilt,[2] down the gamut of qualifying adjectives, until confessions have been called the weakest and most suspicious of all testimony.[3]

Tex. Crim. Rep. 165, 94 S. W. 223; *Sowles* v. *State*, 52 Tex. Crim. Rep. 17, 105 S. W. 178; *State* v. *Blay*, 77 Vt. 56, 58 Atl. 794.

[1] Wigmore, Ev. § 866.

[2] *Rex* v. *Lambe*, 2 Leach, C. L. 552; *Mortimer* v. *Mortimer*, 2 Hagg. Consist. Rep. 315; 1 Starkie, Ev. p. 52; *Columbia* v. *Harrison*, 2 Mill, Const. 215; Swift, Ev. 133; *Com.* v. *Knapp*, 9 Pick. 507, 20 Am. Dec. 491; *State* v. *Brown*, 48 Iowa, 384; *Hopt* v. *Utah*, 110 U. S. 584, 28 L. ed. 266, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

[3] Fost. C. L. chap. 3, § 8; 1 Burn's J. P. p. 566; *Williams* v. *Williams*, 1 Hagg. Consist. Rep. 304; Bl. Com.

The general distrust of confessions is evidenced by the strict rule regarding corroboration, and by statutory enactments forbidding convictions unless so corroborated.[4] In the language of Mr. Justice Foster: "Proof may be too easily procured; words are often misreported,—whether through ignorance, inattention, or malice, it mattereth not to the defendant; he is equally affected in either case; and they are extremely liable to misconstruction; and all this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, confronted."

Nothing so convinces as a confession which we believe to be true. Nothing is so uncertain as the testimony offered to prove the confession. The trustworthiness of the proof of the confession is the vexing question. Until the matter is controlled by statute, the only safeguard is to exact the fullest testimony, and that of the highest testimonial value, transmitted through an intelligent medium capable of correctly observing and honestly narrating the facts as they exist.

In attempting to frame rules, the text writer is twice removed from the forum of trial. First, the case is handled by the direct appellate court from a printed record. The human factor is entirely absent. Impressed only by the record, the court deduces a rule. Then the text writer, comparing and analyzing a number of cases on the same point, seeks to point out, at a second remove from the trial, a controlling principle.

But the trial attorney, face to face with the human factors as expressed in the living words; familiar with the ramifications of political and system influence, with interlaced political interests,—is well aware that convictions are sought in all cases, with no thought of protecting the innocent,[5] but as

bk. 4, p. 357; Coke, P. C. chap. 104, p. 1232.

[4] Supra, § 633, note 3.

[5] Underhill, Crim. Ev. 2d ed. § 146, p. 278.

questions of expediency that must correspond with and prove the correctness of the theory of the prosecution and the sagacity of the arresting officers. Their analogy, the dying declaration, is at least based upon necessity and solemnity; but the confession has not this foundation, for it is based upon expediency, and as a ready means of proof, avoiding the necessity for investigation. As the accused, when called upon to state whether or not he has anything to say as to why sentence should not be passed upon him, has never yet been able to say anything that would convince the court of his innocence, so the accused, when face to face with an extrajudicial confession, can never say anything to convince the court nor jury against its truth. In view of the untrustworthy medium through which the extrajudicial confession is conveyed to the court, the trial judge, in the absence of the jury, should not admit in evidence any confession which does not persuade him, not as a judge but as an impartial juror, that it is true beyond a reasonable doubt, and exists as a fact upon which he himself would act in the serious concerns of life. With this persuasion the testimony establishing the confession, and the confession itself, may be submitted to the jury. Otherwise, confessions of guilt will only serve to add to the list of those convictions which result in the punishment of innocent men.[6]

§ 636. Mental capacity at the time of confession.—It is obvious that, if the confession itself is to have any testi-

[6] *Perry's Case,* 14 How. St. Tr. 1312; Wharton, Crim. Law, 6th ed. § 683; *Hubert's Trial,* 6 How. St. Tr. 807; *Woods Case* (Life of Sir S. Romilly) vol. 2, 3d ed. 142; *Sharpe's Case,* Am. Reg. Chronicle, p. 74; *Boorn's Case,* 5 Law Rep. 195; 1 Greenl. Ev. 214; *Trailor's Case,* 4 West. L. J. 25; Laman's Life of Lincoln. See *State* v. *West,* 1 Houst. Crim. Rep. (Del.) 371; Abercrombie, Intellect. Powers, 12th ed. 222. See 10 Cobbett, Parliamentary History of England, p. 283.

monial value, it must be shown to have been made under conditions where there was the normal exercise of all the faculties, and that the declarant fully comprehended the effect of his confession. Hence, it is admissible, in order to affect the credibility of the confession, to show that the declarant was drunk,[1] or insane,[2] at the time. The court should look to the circumstances under which the confession is alleged to have been made, and to consider the strength or weakness of the accused's intellect, his knowledge, or his ignorance;[3] whether or not the accused realized the import of his act;[4] and the age, character, and situation of the accused, as well as all other circumstances bearing upon the question of whether or not there existed a condition or inducement that might lead to a false confession.[5]

A confession made by a feeble-minded person, charged with murder, is not convincing proof of his guilt.[6] A confession of arson, made by a weak-minded person under arrest, in an office with bolted doors, and in the presence of those hostile to him, was not a voluntary confession.[7] Where a man is not entirely sane, but the circumstances under which he is placed are of such a nature as to deprive him of the free exercise of his faculties, his confession, unless corroborated, is of little or no weight. Where a confession had been admitted in evidence, and it was afterwards shown that it was

[1] Supra, § 384a; post, §§ 675, 676.

[2] *State* v. *Feltes,* 51 Iowa, 495, 1 N. W. 755; post, § 676. See also note in 18 L.R.A. 788.

[3] *Spears* v. *State,* 2 Ohio St. 583; *Porter* v. *State,* 55 Ala. 95.

[4] *Cady* v. *State,* 44 Miss. 332.

[5] *State* v. *Squires,* 48 N. H. 364; *Biscoe* v. *State,* 67 Md. 6, 8 Atl. 571; *Newman* v. *State,* 49 Ala. 9, 1 Am. Crim. Rep. 173; *Williams* v. *State,* 69 Ark. 599, 65 S. W. 103, 12 Am. Crim. Rep. 110; *Hudson* v. *Com.* 2 Duv. 531; *Thomas* v. *State,* 35 Tex. Crim. Rep. 178, 32 S. W. 771; *Maxwell* v. *State,* — Miss. —, 40 So. 615; *Gallaher* v. *State,* 40 Tex. Crim. Rep. 296, 50 S. W. 388, 11 Am. Crim. Rep. 207. See *People* v. *Howes,* 81 Mich. 396, 45 N. W. 961; *State* v. *Albert,* 50 La. Ann. 481, 23 So. 609.

[6] *Butler* v. *Com.* 2 Duv. 435.

[7] *Flagg* v. *People,* 40 Mich. 706, 3 Am. Crim. Rep. 70.

made by the accused in jail, shortly after the homicide, to a newspaper reporter who called upon him when he was in a nervous condition, suffering from a shock, and was told it would be to his advantage to give a correct statement of the affair, the confession so admitted should have been withdrawn from the jury.[8] A partial loss of the faculties, for any reason, while not rendering a confession wholly involuntary, affects its weight, and this should be considered by the jury,[9] but where such a condition is brought about by a person to obtain a confession, for instance, as where a sheriff had furnished an accused with liquor, such conduct is unjustifiable, and the confession must be excluded.[10]

§ 636a. Incomplete control of faculties at time of confession.—On the fundamental principle of exclusion, that where the confession is false it must be rejected, and where it is procured through improper inducement, there is every reason to believe it testimonially worthless, it is essential to consider whether or not the declarant had full control of the mental faculties.[1] The general rule is that a disturbed con-

[8] *Watts* v. *State,* 99 Md. 30, 57 Atl. 542.

[9] *People* v. *Kent,* 41 Misc. 191, 17 N. Y. Crim. Rep. 461, 83 N. Y. Supp. 948; *State* v. *Berry,* 50 La. Ann. 1309, 24 So. 329.

[10] *McNutt* v. *State,* 68 Neb. 207, 94 N. W. 143, 14 Am. Crim. Rep. 127.

[1] *Hoober* v. *State,* 81 Ala. 51, 1 So. 574; *Washington* v. *State,* 53 Ala. 29; *Peck* v. *State,* 147 Ala. 100, 41 So. 759; *People* v. *Thompson,* 84 Cal. 598, 24 Pac. 384; *State* v. *Potter,* 18 Conn. 166; *State* v. *Mason,* 4 Idaho, 543, 43 Pac. 63; *Biscoe* v. *State,* 67 Md. 6, 8 Atl. 571; *Watts* v. *State,* 99 Md. 30, 57 Atl. 542; *Flagg* v. *People,* 40 Mich. 706, 3 Am. Crim. Rep. 70; *State* v. *Smith,* 72 Miss. 420, 18 So. 482; *Hamilton* v. *State,* 77 Miss. 675, 27 So. 606; *State* v. *Church,* 199 Mo. 605, 632, 98 S. W. 16. See *Green* v. *State,* 96 Md. 384, 54 Atl. 104, 12 Am. Crim. Rep. 149; *Com.* v. *Sheets,* 197 Pa. 69, 46 Atl. 753; *Deathridge* v. *State,* 1 Sneed, 75; *Grayson* v. *State,* 40 Tex. Crim. Rep. 573, 51 S. W. 246; *Dinah* v. *State,* 39 Ala. 359; *State* v. *Feltes,* 51 Iowa, 495, 1 N. W. 755; *State* v. *Berry,* 50 La. Ann. 1309, 24 So. 329; *State* v. *Haworth,* 24 Utah, 398, 68 Pac. 155; *McCabe*

dition of the mental faculties is not a ground for exclusion,[2] but should be considered as affecting the trustworthy character of the confession; and this, like every other principle of limitation, varies with the circumstances of each case.[3] Thus, that the accused was not in full possession of his faculties, by reason of a bullet wound in his head, does not affect the question of admissibility;[4] where accused killed a woman and then attempted suicide, and was suffering greatly from the shock, but on the day the confession was made by him his mind was in a normal condition, there was no reason for withholding the confession from the jury on account of the accused's mental condition;[5] that accused made a confession under great excitement is not ground to exclude it.[6] It has been very correctly stated that the excitement or mental disturbance mentioned in the cases just cited is that which springs from the accused's own apprehension, due to the situation in which he finds himself, but if the excitement or mental disturbance is directly produced from extraneous pressure, exerted for the purpose of forcing a confession, it would, no doubt, be held that the acknowledgment of guilt is involuntary.[7]

§ 637. Confessions in marital crimes.—In addition to the considerations first mentioned, there are peculiar reasons

v. *Com.* 3 Sadler (Pa.) 426, 8 Atl. 45.

As to effect of mental condition of accused at time of confession, see note in 18 L.R.A. 788.

[2] *McDonald* v. *State,* 55 Tex. Crim. Rep. 208, 116 S. W. 47.

[3] See note 1.

[4] *People* v. *Miller,* 135 Cal. 69, 67 Pac. 12, 12 Am. Crim. Rep. 183.

[5] *Green* v. *State,* 96 Md. 384, 54 Atl. 104, 12 Am. Crim. Rep. 149.

[6] *People* v. *Cokahnour,* 120 Cal. 253, 52 Pac. 505; *State* v. *Pamelia,* 122 La. 207, 47 So. 508; *State* v. *Jones,* 47 La. Ann. 1524, 18 So. 515; *Young* v. *State,* 90 Md. 579, 45 Atl. 531; *Carlisle* v. *State,* 37 Tex. Crim. Rep. 108, 38 S. W. 991; *Herndon* v. *State,* 50 Tex. Crim. Rep. 552, 99 S. W. 558; *State* v. *Leuth,* 5 Ohio C. C. 94, 3 Ohio C. D. 48; *State* v. *Crank,* 2 Bail. L. 66, 23 Am. Dec. 117. See also note in 18 L.R.A. 790.

[7] Note by H. C. S. to *Ammons* v. *State,* 18 L.R.A.(N.S.) 790.

for applying a close criticism to confessions of adultery. Such confessions may be a convenient mode of getting rid of the marriage tie, or may be induced by a desire to injure another, or to gratify a base vanity, and may be made, therefore, without solid foundation. Hence such confessions, unless corroborated, are not usually regarded as ground for divorce.[1] But the confessions so made may be used as proof of facts in issue. Thus, in an indictment charging a father with living in adultery with his daughter, his confession that she is his daughter is admissible,[2] and such a confession is proper evidence to prove the fact of the marriage of one of the parties.[3]

II. Judicial Confessions.

§ 638. Conclusiveness of.—A judicial confession, as we have seen,[1] is a plea of guilty made by an accused in a fit state of mind to plead, before a court competent to try and determine the offense charged. Such a confession, to be conclusive, must be on an issue made by an indictment or information and a plea to the same. It is not conclusive if it is made in an *ex parte* proceeding,[2] but is conclusive when formally made on the issue, unless shown to have been made by mistake, or to have been secured by fraud.[3] A judicial confession, being a plea of guilty, is competent as evidence in another prosecution against the accused,[4] and a plea of guilty before an

[1] See Wharton, Ev. § 1220; also supra, § 627; *Summerbell* v. *Summerbell,* 37 N. J. Eq. 603.

[2] *Morgan* v. *State,* 11 Ala. 289.

[3] *State* v. *McDonald,* 25 Mo. 176.

[1] Supra, § 622c.

[2] See Wharton, Ev. § 1078.

[3] *Marsh* v. *Mitchell,* 26 N. J. Eq. 497; *Com.* v. *Jackson,* 2 Va. Cas. 501; *Gridley* v. *Conner,* 4 La. Ann. 416; *Denton* v. *Erwin,* 5 La. Ann. 18; *Edson* v. *Freret Bros.* 11 La. Ann. 710. See *State* v. *Colvin,* 11 Humph. 599, 54 Am. Dec. 58.

[4] *Beason* v. *State,* 43 Tex. Crim. Rep. 442, 69 L.R.A. 193, 67 S. W. 96; *State* v. *La Rose,* 71 N. H. 435, 52 Atl. 943; *Parker* v. *Couture,* 63 Vt. 449, 21 Atl. 1102. See *Yeska* v. *Swendrzynski,* 133 Wis. 475, 113 N. W. 959.

examining magistrate is admissible on the final trial in its evidentiary character as a confession.[5] The accused has a right to enter a plea of guilty, and, unless the statute provide to the contrary, the court is bound to accept it, even in capital cases.[6] Where no such statute prevails, the accused may be convicted and sentence passed upon him.[7]

On the tender of such a plea, the burden of proof is on the prosecution to show to the court that the plea was voluntary and the accused understood its effect. Like any other confession, it must be shown to be voluntary, that is, that it is uninfluenced by any improper inducement, and that it is not the result of a misunderstanding.[8] The conclusiveness of the plea is based upon its free and voluntary character, arising from a consciousness of guilt, but where it is entered from any other motive courts should allow it to be withdrawn on request, and a plea of not guilty substituted in its place.[9] Thus, where the accused enters a plea to the wrong indictment;[10] or is a foreigner, unacquainted with judicial proceedings;[11] or where the accused believed, from a remark of the judge, that he would receive the minimum sentence;[12] or where there is a doubt as to the sanity of the accused;[13] or where he pleads

[5] *Com.* v. *Brown,* 150 Mass. 330, 23 N. E. 49; *Rice* v. *State,* 22 Tex. Crim. Rep. 654, 3 S. W. 791; *Alston* v. *State,* 41 Tex. 39; *State* v. *Briggs,* 68 Iowa, 416, 27 N. W. 358; *Rector* v. *Com.* 80 Ky. 468; *Green* v. *State,* 40 Fla. 474, 24 So. 537, 11 Am. Crim. Rep. 253.

[6] *State* v. *Branner,* 149 N. C. 559, 63 S. E. 169.

[7] *Dantz* v. *State,* 87 Ind. 398; *Com.* v. *Brown,* 150 Mass. 330, 23 N. E. 49; *Sellers* v. *People,* 6 Ill. 183; *State* v. *Cowan,* 29 N. C. (7 Ired. L.) 239; *State* v. *Branner,* 149 N. C. 559, 63 S. E. 169.

[8] *Gardner* v. *People,* 106 Ill. 76; *Monahan* v. *State,* 135 Ind. 216, 34 N. E. 967; *State* v. *Yates,* 52 Kan. 566, 35 Pac. 209; *Green* v. *Com.* 12 Allen, 155; *State* v. *Stephens,* 71 Mo. 535; *Swang* v. *State,* 2 Coldw. 212, 88 Am. Dec. 593; *O'Brien* v. *State,* — Tex. Crim. Rep. —, 35 S. W. 666.

[9] *People* v. *McCrory,* 41 Cal. 458.

[10] *Davis* v. *State,* 20 Ga. 674.

[11] *Gardner* v. *People,* 106 Ill. 76.

[12] *State* v. *Stephens,* 71 Mo. 535.

[13] *Com.* v. *Battis,* 1 Mass. 95; *Burton* v. *State,* 33 Tex. Crim. Rep. 138, 25 S. W. 782; *People* v. *Scott,*

under fear and intimidation,[14] a refusal to allow the plea to be withdrawn is a reversible error. In some states it is provided that, on the tender of such a plea, before pronouncing sentence the court must investigate and satisfy itself of the voluntary and uninfluenced character of the plea,[15] and such a statute must be strictly observed, with a view of protecting the accused against the extortion of such a plea through ignorance or by false promises.[16] In addition to a careful investigation into the circumstances surrounding the plea, the court ought always to hear evidence to determine the degree of punishment,[17] and in some jurisdictions such a procedure is properly held to be obligatory.[18]

When a judicial confession is made by way of a plea of guilty, it admits only the facts charged in the indictment, and while such a plea waives formal defects in the indictment,[19] a judgment on a plea of guilty, where no legal crime is actually averred in the indictment,[20] or where the crime to which the plea is made is not the crime charged in the indictment,[21] such judgment will be reversed. No court ought to accept a judicial confession as final until a most searching investiga-

59 Cal. 341; *Deloach* v. *State*, 77 Miss. 691, 27 So. 618; *McKevitt* v. *People*, 208 Ill. 460, 70 N. E. 693.

[14] *Sanders* v. *State*, 85 Ind. 318, 44 Am. Rep. 29.

[15] *People* v. *Lepper*, 51 Mich. 196, 16 N. W. 377; *People* v. *Lewis*, 51 Mich. 172, 16 N. W. 326.

[16] *People* v. *Lepper*, 51 Mich. 196, 199, 16 N. W. 377; *Coleman* v. *State*, 35 Tex. Crim. Rep. 404, 33 S. W. 1083; *Frosh* v. *State*, 11 Tex. App. 280; *Saunders* v. *State*, 10 Tex. App. 336, 339; *Henning* v. *People*, 40 Mich. 733; *People* v. *Lewis*, 51 Mich. 172, 16 N. W. 326.

[17] *State* v. *Branner*, 149 N. C. 559, 63 S. E. 169.

[18] See *Arrano* v. *People*, 24 Colo. 233, 49 Pac. 271; *Smith* v. *People*, 32 Colo. 251, 75 Pac. 914.

[19] *Carper* v. *State*, 27 Ohio St. 572.

[20] *Crow* v. *State*, 6 Tex. 334, 335; *Fletcher* v. *State*, 12 Ark. 169; *Patrick* v. *State*, 17 Wyo. 260, 129 Am. St. Rep. 1109, 98 Pac. 588: *Com.* v. *Kennedy*, 131 Mass. 584; *Boody* v. *People*, 43 Mich. 34, 4 N. W. 549; *State* v. *Levy*, 119 Mo. 434, 24 S. W. 1026; *Moore* v. *State*, 53 Neb. 831, 74 N. W. 319

[21] *State* v. *Queen*, 91 N. C. 659.

tion has been made into all the conditions and surrounding circumstances.[22]

Where a plea of guilty is withdrawn by the permission of the court, it is not binding as a confession, nor can it be

[22] It would appear on a first reflection that justice could not be otherwise than fully administered where an accused, in answer to a charge or information, makes a judicial confession by way of a plea of guilty of the offense, and this would be true in fact if the accused had been merely arrested and safely detained until the coming on of his trial. But in a great number of cases the fact exists that the accused has been subjected to a very searching inquisition during the intervening period, and in many instances comes into court a victim of false promises. It is not a pleasant commentary that the petty officers and keepers in charge of the jail gain the confidence of prisoners and direct them as to what they shall do when they come into court, often stating that, being officers, they are influential with the prosecution and the judge, and upon a plea of guilty can secure a minimum jail sentence, or even a fine, when the charge is felony. Under such promises, prisoners go into court and express a desire to plead guilty. The court, believing such a plea results from a consciousness of guilt, and feeling that the accused is entitled to consideration because he has saved the expense and time of a trial to the county, and has frankly confessed his fault, is inclined to accept the plea and impose the minimum penitentiary punishment. The accused, firmly convinced by what has been told him, that he will receive only a fine or a jail sentence, starts back in terror to find himself conclusively pronounced a felon and a convict, and that the eagerness of the petty officer to earn the transportation and mileage incident to conveying him to prison has deliberately sacrificed him to his petty greed. These incidents have occurred even where a careful and judicious prosecuting attorney has warned the prisoner of the power of the court, and that he may expect a sentence according to the nature of the offense; but the accused, trusting in what he believes to be the sure promises of those who have advised him, still persists in his plea until too late, and then the protest of a convict is utterly unavailing. This unfortunate condition arises from the fact that petty crimes and poverty crimes are so great in congested centers of population that the criminal classes are considered properly at the disposition of those who have charge of their detention, and it has become a "business" to misuse the power given, and this, too, when both court and prosecution are entirely innocent of the wrong so shamelessly inflicted.

used as evidence.[23] Where a plea is prepared for the accused by his attorneys, but rejected by the court, the admissions in such plea cannot be used as a confession,[24] nor can a plea of guilty be used as a confession where it is made by a person incompetent to make such plea, for instance, as in the case of infancy.[25]

§ 639. Plea in abatement as a judicial confession.—In criminal pleading, a plea of abatement binds the party making it to the allegations it contains, and unless it be withdrawn, these allegations cannot be repudiated by him.[1] When a plea of abatement is decided against a defendant, in this country the defendant is usually permitted to plead over.[2]

§ 640. Admissions by pleadings.—So far as concerns the particular prosecution in which the plea is entered, it may be held that whenever a material averment well pleaded is passed over by the adverse party without denial, whether this be by pleading in confession and avoidance, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of trial before the jury, conceded.[1] "It

[23] *Reg.* v. *Brown,* 17 L. J. Mag. Cas. N. S. 143; *State* v. *Cotton,* 24 N. H. 143; *State* v. *Salge,* 2 Nev. 321; supra, § 615.

[24] *Com.* v. *Lannan,* 13 Allen, 563.

[25] *Reg.* v. *Stone,* 1 Fost. & F. 311; *Reg.* v. *Simmonds,* 4 Cox, C. C. 277.

[1] 2 Hale, P. C. 176, 238; Burn, Indictment, ix; *State* v. *Dresser,* 54 Me. 569; *Com.* v. *Gale,* 11 Gray, 320; *Lewis* v. *State,* 1 Head, 329; *Com.* v. *Farrell,* 105 Mass. 189. See supra, §§ 94, 582.

[2] *United States* v. *Williams,* 1 Dill. 485, Fed. Cas. No. 16,716; *Rex* v. *Johnson,* 6 East, 583, 2 Smith, 591, 8 Revised Rep. 550; *Rex* v. *Gibson,* 8 East, 107; *Reg.* v. *Duffy,* 4 Cox, C. C. 190. See Wharton, Crim. Pl. & Pr. §§ 433, et seq.

[1] Taylor, Ev. § 748, citing Stephen, Pl. 248; *Jones* v. *Brown,* 1 Bing. N. C. 484; *De Gaillon* v. *L'Aigle,* 1 Bos. & P. 368; *Prowse* v. *European & A. Steam Shipping Co.* 13 Moore, P. C. 484. See also *State* v. *Homer,* 40 Me. 438; *Coffin* v. *Knott.* 2 G. Greene, 582, 52 Am. Dec. 537.

is a fundamental rule in pleading, that a material fact asserted on one side, and not denied on the other, is admitted." [2]

§ 641. Answers under oath, as admissions.—An answer under oath is to be regarded as admissible against the party making it, in all independent suits in which it is relevant,[1] and so of a written admission of facts made voluntarily in order to obtain a continuance,[2] and so of a schedule in bankrupt proceedings.[3] And a plea entered by a party in another suit is also collaterally admissible against him as a prima facie case,[4] though it is otherwise if the defendant was incapable, by infancy, of binding himself by a plea.[5]

§ 642. Admissions in court process.—What has been said of pleading equally applies to process. A party issuing process prima facie admits the facts which such process assumes.[1]

III. Written Confessions.

§ 643. Generally.—A written statement by a defendant, when prepared deliberately and seriously, is not only admissible in evidence against him, but is of weight proportioned to its solemnity and pertinency.[1] Thus on a trial of an indictment for the malicious burning of a building, the voluntary

[2] *Simmons* v. *Jenkins*, 76 Ill. 479, citing *Dana* v. *Bryant*, 6 Ill. 104; *Pearl* v. *Wellman*, 8 Ill. 311; *Briggs* v. *Dorr*, 19 Johns. 95; *Jack* v. *Martin*, 12 Wend. 316; *Raymond* v. *Wheeler*, 9 Cow. 295.

[1] Wharton, Ev. § 1116; supra, § 615.

[2] *Gonzales* v. *State*, 12 Tex. App. 657. But see *Powers* v. *State*, 87 Ind. 144.

[3] *Abbott* v. *People*, 75 N. Y. 602

[4] *State* v. *Homer*, 40 Me. 438.

[5] *Reg.* v. *Simmonds*, 4 Cox, C. C. 277; *Reg.* v. *Stone*, 1 Fost. & F. 311. See supra, § 615.

[1] See cases in Wharton, Ev. § 1118; supra, §§ 610–12.

[1] Wharton, Ev. § 1122; *Abbott* v. *People*, 75 N. Y. 602; *Dubose* v. *State*, 13 Tex. App. 418.

testimony of the defendant before a fire inquest, reduced to writing and signed by him, makes a strong case against him;[2] and so of the bank books of a bank, kept by the defendant, an officer of the bank, in the course of his business.[3]

Written confessions have no higher evidentiary value than oral confessions, but, as the fundamental object of proof of a confession is to render it trustworthy, the written confession, as just stated, when deliberately and seriously made, has a weight in proportion to the solemnity of its character. But where there is evidence of haste and inaccuracy, the written confession should be established by rigid proof. Thus, an accused charged with murder confessed to an officer, the confession being taken in shorthand and afterwards written out in typewriting and signed before a magistrate. When offered in evidence, such written statements contained a number of interlineations made with a pen, all of which were inculpatory, and some of them relating to the degree of the offense, and of a character rendering it doubtful as to whether or not the language was that of the defendant; and it was held error warranting a reversal of the conviction and a new trial, to admit such confession in evidence, in the absence of satisfactory evidence showing when and by whom the interlineations were made.[4]

It is not necessary to the admissibility of a written confession that it contain the questions asked, to which the statement is an answer;[5] nor is it necessary that it should be signed by the accused.[6] It is not necessary that it should be in a language understood by the accused, if, in such case, it is

[2] *Com.* v. *Bradford,* 126 Mass. 42.

[3] *Humphrey* v. *People,* 18 Hun, 393.

[4] *United States* v. *Williams,* 103 Fed. 938.

[5] *State* v. *Brinte,* 4 Penn. (Del.) 551, 58 Atl. 258.

[6] *State* v. *Haworth,* 24 Utah, 398, 68 Pac. 155. See *State* v. *Eaton,* 3 Harr. (Del.) 554. See *State* v. *Johnson,* 5 Harr. (Del.) 507.

translated carefully into a language he does understand, sentence by sentence, in his presence and hearing, and where it is admitted by the accused that he understands it and that it is correct.[7]

§ 644. **Letters.**—A letter written by the defendant, when self-disserving, is prima facie evidence against him;[1] though in such case the confession, to be operative, must be distinctly to a point material to the issue.[2] It is not necessary to the admissibility of such a letter that it should be signed; if traceable to the writer, and if involving a self-disserving admission of any kind, this is enough.[3] Nor is it an objection that a letter stands by itself, since a letter containing a particular confession may come in alone;[4] nor is it necessary, when a letter is thus independent in its character, that the whole pertinent correspondence should be put in.[5] Nor is it fatal to the admissibility of such letter that it was in answer to a letter meant as a trap.[6]

On the other hand, letters of third parties are inadmissible when hearsay.[7] Hence a letter addressed to a party cannot

[7] *State* v. *Demareste,* 41 La. Ann. 617, 6 So. 136. See *State* v. *Berberick,* 38 Mont. 423, 100 Pac. 209, 16 A. & E. Ann. Cas. 1077; *People* v. *Giro,* 197 N. Y. 152, 90 N. E. 432.

[1] *Longfellow* v. *Williams,* Peake, N. P. Add. Cas. 225; *Rose* v. *Cunynghame,* 11 Ves. Jr. 550; *Gibson* v. *Holland,* L. R. 1. C. P. 1, 1 Harr. & R. 1, 35 L. J. C. P. N. S. 5, 11 Jur. N. S. 1022, 13 L. T. N. S. 293, 14 Week. Rep. 86; *Wilkins* v. *Burton,* 5 Vt. 76; *Robertson* v. *Ephraim,* 18 Tex. 118.

[2] *Betts* v. *Farmers' Loan & T. Co.* 21 Wis. 81, 91 Am. Dec. 460.

[3] *Bartlett* v. *Mayo,* 33 Me. 518.

[4] *North Berwick Co.* v. *New England F. & M. Ins. Co.* 52 Me. 336; *Newton* v. *Price,* 41 Ga. 186; *Wiggin* v. *Boston & A. R. Co.* 120 Mass. 201. See post, § 688.

[5] Wharton, Ev. § 618; supra, § 521; post, § 688.

[6] *Rex* v. *Derrington,* 2 Car. & P. 418; *Re 3,109 Cases of Champagne,* 1 Ben. 241, Fed. Cas. No. 14,012; *Com.* v. *Knapp,* 10 Pick. 496, 20 Am. Dec. 534; *Com.* v. *Tuckerman,* 10 Gray, 173; *Price* v. *State,* 18 Ohio St. 418; post, § 670.

[7] *Williams* v. *Manning,* 41 How. Pr. 454; *Wolstenholme* v. *Wolstenholme,* 3 Lans. 457; *Rosenstock* v.

be admitted against him [8] unless it be proved that he received it and acted on it,[9] or in some way invited it.[10]

§ 645. Telegrams.—Telegrams, under the same restrictions as those which have been noticed as appertaining to letters, may be also treated as constituting admissions on the part of the person by whom they are sent.[1] Duly proved, they may be treated as self-disserving admissions, which, so far as concerns the party from whom they emanate, are subject to the usual incidents of such admissions.[2] In order, however, to charge a party with a telegram, the original draft, in the handwriting of the party or his agent, must be produced.[3] But a sender may be regarded as the employer of the telegraph company in such a sense as to make the message sent and delivered by the company primary evidence.[4]

§ 645a. Magistrate's report.—Where written confessions which are made before a coroner or a committing magistrate are controlled by statute, their admissibility is measured

Tormey, 32 Md. 169, 3 Am. Rep. 125; *Underwood* v. *Linton,* 44 Ind. 72; *Livingston* v. *Iowa Midland R. Co.* 35 Iowa, 555.

[8] *Payne* v. *Com.* 31 Gratt. 855.

[9] See *Medway* v. *United States,* 6 Ct. Cl. 421; *Oakley* v. *State,* 135 Ala. 15, 33 So. 23.

[10] *Reg.* v. *Cooper,* L. R. 1 Q. B. Div. 19, 45 L. J. Mag. Cas. N. S 15, 33 L. T. N. S. 754, 24 Week. Rep. 279, 13 Cox, C. C. 123.

[1] See supra, § 521.

[2] *Com.* v. *Jeffries,* 7 Allen, 548, 83 Am. Dec. 712; *Beach* v. *Raritan & D. B. R. Co.* 37 N. Y. 457; *Taylor* v. *The Robert Campbell,* 20 Mo. 254; *Wells* v. *Milwaukee & St. P. R. Co.* 30 Wis. 605. See *Coupland* v. *Arrowsmith,* 18 L. T. N. S. 75; *Henkel* v. *Pape,* L. R. 6 Exch. 7, 40 L. J. Exch. N. S. 15, 23 L. T. N. S. 419, 19 Week. Rep. 106; *Verdin* v. *Robertson,* 10 Sc. Sess. Cas. 3d series, 35; 20 Alb. L. J. 39.

[3] *Durkee* v. *Vermont C. R. Co.* 29 Vt. 127; *Benford* v. *Sanner,* 40 Pa. 9, 80 Am. Dec. 545; *Matteson* v. *Noyes,* 25 Ill. 591; *Williams* v. *Brickell,* 37 Miss. 682, 75 Am. Dec. 88; supra, §§ 162, 521.

[4] *Durkee* v. *Vermont C. R. Co.* 29 Vt. 127; supra, §§ 162, 521. See *Reg.* v. *Cooper,* L. R. 1 Q. B. Div. 19, 45 L. J. Mag. Cas. N. S. 15, 33 L. T. N. S. 754, 24 Week. Rep. 279, 13 Cox, C. C. 123; post, § 682.

by compliance with the statute. But where not so controlled, the writing so made may be used, even where it is not admissible as a final statement: First, like any other memorandum to aid and refresh the memory;[1] second, where signed by the accused it becomes his by adoption, and even an oral acknowledgment of the correctness of the statement is sufficient.[2] However, such written confession before the magistrate does not exclude parol proof of the same confession,[3] and, where the accused has made a written confession, parol evidence of confessions on other occasions is admissible.[4]

§ 645b. Parol evidence of written confession; when admissible.—Where the prisoner voluntarily confesses before an examining magistrate, and where it is the duty of the latter to take the examination in writing, when such is done, the writing alone, if producible, is evidence of the confession, and the writing cannot be varied by parol proof.[1]

[1] *Layer's Trial,* 16 How. St. Tr. 192; *Reg.* v. *Troop,* 30 N. S. 339. See *Marx* v. *Hart,* 166 Mo. 503, 89 Am. St. Rep. 715, 66 S. W. 260.

[2] *Rex* v. *Lambe,* 2 Leach, C. L. 3d ed. 625; *Rex* v. *Thomas,* 2 Leach. C. L. 3d ed. 727. See *Foster's Case,* 1 Lewin, C. C. 46.

[3] *State* v. *Eaton,* 3 Harr. (Del.) 554; *State* v. *Johnson,* 5 Harr. (Del.) 507; *State* v. *Smith,* 9 Houst. (Del.) 588, 33 Atl. 441; *Wright* v. *State,* 50 Miss. 332, 1 Am. Crim. Rep. 191; *State* v. *Irwin,* 2 N. C. (Hayw.) 112; *State* v. *Leuth,* 5 Ohio C. C. 94, 3 Ohio C. D. 48.

[4] *State* v. *Wells,* 1 N. J. L. 424, 1 Am. Dec. 211; *Com.* v. *Dower,* 4 Allen, 297. See *Bailey* v. *State,* 26 Tex. App. 706, 9 S. W. 270.

[1] Supra, §§ 643, 645a; 1 Leach, C. L. 309; Fost. C. L. 255; Roscoe. Crim. Ev. 60; *Rex.* v. *Walter,* 7 Car. & P. 267; *Reg.* v. *Morse,* 8 Car. & P. 605; *Reg.* v. *Bond,* 4 Cox, C. C. 231, 4 New. Sess. Cas. 143. Temple & M. 242, 1 Den. C. C. 517, 3 Car. & K. 337, 19 L. J. Mag. Cas. N. S. 138, 14 Jur. 399; *State* v. *Vincent,* Houst. Crim. Rep. (Del.) 11; *State* v. *Brister,* Houst. Crim. Rep. (Del.) 150; *Robinson* v. *State,* 87 Ind. 292; *State* v. *Branham,* 13 S. C. 389; *State* v. *Parish,* 44 N. C. (Busbee, L.) 239; *State* v. *Irwin,* 2 N. C. (1 Hayw.) 113; *Cicero* v. *State,* 54 Ga. 156; *Wright* v. *State,* 50 Miss. 332, 1 Am. Crim. Rep. 191. See *State* v. *Rover,* 13 Nev. 17.

Parol evidence, however, of a confession made during an examination before a magistrate, is admissible, although it was taken down in writing by the magistrate, if from informality the written examination is not admissible.[2] When the official record is lost, its contents may be proved by parol.[3] An examination, though informal, may be used to refresh the memory of a witness who was present and took it down.[4]

Statements collateral to the examination are not excluded by the examination;[5] nor does a subsequent examination necessarily exclude a prior oral confession.[6]

In Maine it is held that parol evidence of a confession made in a written examination is admissible.[7]

IV. Admissibility of Confessions as Determined by Threats or Promises.

§ 645c. Voluntary character of confessions.—As will be hereafter more fully shown,[1] the question of the voluntary or involuntary character of the confession is the distinct and controlling issue on the question of admissibility. It is not

[2] Supra, §§ 643, 645; *Rex* v. *Bell*, 5 Car. & P. 162; *Rex* v. *Fearshire*, 1 Leach, C. L. 202; *Rex* v. *Reed*, Moody & M. 403; *State* v. *Vincent*, Houst. Crim. Rep. (Del.) 11; *State* v. *Brister*, Houst. Crim. Rep. (Del.) 150; *Brown* v. *State*, 71 Ind. 470; *State* v. *Parish*, 44 N. C. (Busbee, L.) 239. See *People* v. *Taylor*, 59 Cal. 640.

[3] Supra, §§ 643, 645a; *Hightower* v. *State*, 58 Miss. 636.

[4] Supra, §§ 643, 645a; *Rex* v. *Tellicote*, 2 Starkie, 483; *Foster's Case*, 1 Lewin, C. C. 46; *Hirst's Case*, 1 Lewin, C. C. 46; *Rex* v. *Pressly*, 6 Car. & P. 183; *Rex* v. *Jones*, Car. Crim. Law, 13; *Rex* v. *Watkins*, 4 Car. & P. 550, note a; *Rex* v. *Thomas*, 2 Leach, C. L. 637; *Rex* v. *Jacobs*, 1 Leach, C. L. 310; *Fisher's Case*, 1 Leach, C. L. 310, 311.

[5] Supra, §§ 643, 645a; *Rex* v. *Bell*, 5 Car. & P. 162; *Rex* v. *Spilsbury*, 7 Car. & P. 188; *Rowland* v. *Ashby*, Ryan & M. 231; *Leach* v. *Simpson*, 5 Mees. & W. 312, 7 Dowl. P. C. 513, 3 Jur. 654; *Rex* v. *Harris*, 1 Moody, C. C. 338; Roscoe, Crim. Ev. 8th ed. 59.

[6] Supra, §§ 643, 645a; *Rex* v. *Carty*, Macnally, Ev. p. 45.

[7] Supra, §§ 643, 645a; *State* v. *Bowe*, 61 Me. 171.

[1] Post, § 674a.

the confession itself that is the serious question for the court, but the controlling factor is the history and character of the testimony through which it is sought to establish the confession. If, on the incoming of such proof, the confession is shown beyond a reasonable doubt to be voluntary and free from improper inducement, then it is always admitted, but, where it is shown to be involuntary, or that improper inducement existed, it ought always to be excluded. It has been observed [2] that, in some states, courts indulge the presumption that a confession is prima facie voluntary, but the accused always has the right to show the fact, and thus rebut the presumption, and on the incoming of such proof the court is compelled to weigh the evidence against the presumption, as carefully as in the case where the primary burden is upon the state to show the voluntary character of the confession.[3]

§ 646. Confession excluded because of threats.—Not only is it an indictable offense to apply torture to another for the purpose of extorting a confession;[1] but all confessions so induced will be rejected, if offered to prove a case of guilt.[2]

[2] Supra, § 622k.

[3] As to when confession is voluntary, see note in 18 L.R.A. (N.S.) 768.

[1] *State* v. *Hobbs*, 2 Tyler (Vt.) 380; *State* v. *Lawson*, 61 N. C (Phill. L.) 47; *Brister* v. *State*, 26 Ala. 107.

[2] Post, § 661; *United States* v. *Natt*, 1 McLean, 499, Fed. Cas. No. 15,900; *Flagg* v. *People*, 40 Mich. 706, 3 Am. Crim. Rep. 70; *Berry* v. *State*, 10 Ga. 511; *Butler* v. *Com.* 2 Duv. 435; *Jae* v. *State*, 38 Ala. 422; *Serpentine* v. *State*, 1 How. (Miss.) 256; *Frank* v. *State*, 39 Miss. 705; *Hector* v. *State*, 2 Mo. 166, 22 Am. Dec. 454; *McGlothlin* v. *State*, 2 Coldw. 223; *Com.* v. *Cuffee*, 108 Mass. 285; *Greer* v. *State*, 31 Tex. 129; *State* v. *Clarissa*, 11 Ala. 57; *Spence* v. *State*, 17 Ala. 197; *Wyatt* v. *State*, 25 Ala. 12; *Brister* v. *State*, 26 Ala. 107, 129; *Van Buren* v. *State*, 24 Miss. 512; *Young* v. *State*, 68 Ala. 576; *Redd* v. *State*, 69 Ala. 258; *Hunt* v. *State*, 135 Ala. 1, 33 So. 329; *Miller* v. *People*, 39 Ill. 457; *Taylor* v. *Com.* 19 Ky. L. Rep. 836, 42 S. W. 1125; *Dugan* v. *Com.* 102 Ky. 241, 43 S. W. 418; *State* v. *Revells*, 34 La. Ann. 384, 44 Am. Rep. 436; *State* v. *Young*, 52 La. Ann. 478, 27 So. 50, 12 Am. Crim. Rep. 154; *Peter* v. *State*, 4 Smedes & M. 36;

And even when violence is not used, the mere threat to apply it in any shape works a similar exclusion. Hence, a confession will not be received if it appear, in the opinion of the court, to have been influenced by threats of physicial punishment of any kind, or of any kind of pecuniary or other temporal penalty.[3] The general rule is that confessions induced by putting the accused in fear are involuntary, and must be excluded without regard to the theory of exclusion which may control the court; that is, first, where they are excluded upon the theory that no man ought to be required to give evidence against himself; or, second, the theory which makes trustworthiness the test of admissibility.[3a]

But what threats or acts will induce the fear that will vitiate and render involuntary the confession depends upon the circumstances of the concrete case before the court. It is clear that, to escape physical consequences, the accused will "utter what his tormentors desire to hear,—a confession." Thus,

Williams v. *State,* 72 Miss. 117, 16 So. 296; *Mackmasters* v. *State,* 82 Miss. 459, 34 So. 156, 12 Am. Crim. Rep. 119; *State* v. *Moore,* 160 Mo. 443, 61 S. W. 199; *Territory* v. *McClin,* 1 Mont. 396; *State* v. *Dildy,* 72 N. C. 327; *State* v. *Drake,* 82 N. C. 593; *Deathridge* v. *State,* 1 Sneed, 76; *Warren* v. *State,* 29 Tex. 369; *Barnes* v. *State,* 36 Tex. 356; *Thompson* v. *Com.* 20 Gratt. 731; *Edmonson* v. *State,* 72 Ark. 585, 82 S. W. 203; *Beckham* v. *State,* 100 Ala. 15, 14 So. 859; *State* v. *Brittain,* 117 N. C. 783, 23 S. E. 433.

[3] *State* v. *Grant,* 22 Me. 171; *State* v. *Phelps,* 11 Vt. 116, 34 Am. Dec. 672; *Com.* v. *Chabbock,* 1 Mass. 144; *Com.* v. *Drake,* 15 Mass. 161; *Com.* v. *Knapp,* 9 Pick. 496, 20 Am. Dec. 491; *People* v. *Ward,* 15 Wend. 231; *People* v. *Rankin,* 2 Wheeler, C. C. 467; *State* v. *Brick,* 2 Harr. (Del.) 530; *Moore* v. *Com.* 2 Leigh, 701; *Smith* v. *Com.* 10 Gratt. 734; *Brown* v. *People,* 91 Ill. 506; *Stephen* v. *State,* 11 Ga. 225; *Earp* v. *State,* 55 Ga. 136, 1 Am. Crim. Rep. 171; *Rector* v. *Com.* 80 Ky. 468; *Deathridge* v. *State,* 1 Sneed, 75; *Boyd* v. *State,* 2 Humph. 39; *Ann* v. *State,* 11 Humph. 159; *Self* v. *State,* 6 Baxt. 244; *Garrard* v. *State,* 50 Miss. 147; *Hector* v. *State,* 2 Mo. 166, 22 Am. Dec. 454; *Runnels* v. *State,* 28 Ark. 121; *Barnes* v. *State,* 36 Tex. 356; *Territory* v. *McClin,* 1 Mont. 394; *Beery* v. *United States,* 2 Colo. 186.

[3a] As to admissibility of confession induced by fear, see note in 18 L.R.A.(N.S.) 804.

where the prosecutor, a strong, vigorous man, the former master of the accused, charged him with stealing, telling him it would be better for him to own up, although at the same time perfunctorily stating that he would make no promises, the accusation was held to be of such a nature as to produce fear, and render the confession involuntary.[4] A confession made while undergoing corporal punishment is inadmissible.[5] Confessions obtained by mob violence are always held involuntary, and hence inadmissible.[6] But the violence that will render a confession involuntary must be directed to the purpose of extorting a confession, and not merely violence that may be necessary to arrest and detain the accused. Thus, where the accused was running away, and was ordered to throw up his hands, by one who pretended to have a weapon, and, on obeying the command, he was seized by the collar and roughly handled, a confession made thereupon was not inspired by such fear or violence as to render it involuntary;[7] nor where

[4] *State* v. *Brackman*, 46 Mo. 566. See *Bram* v. *United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547.

[5] *State* v. *Gilbert*, 2 La. Ann. 245; *Brown* v. *State*, 26 Tex. App. 308, 9 S. W. 613; *Hector* v. *State*, 2 Mo. 166, 22 Am. Dec. 454; *Joe* v. *State*, 38 Ala. 422; *State* v. *Lawson*, 61 N. C. (Phill. L.) 47; *Serpentine* v. *State*, 1 How. (Miss.) 256.

[6] *Flagg* v. *People*, 40 Mich. 706, 3 Am. Crim. Rep. 70; *Self* v. *State*, 6 Baxt. 244; *Strady* v. *State*, 5 Coldw. 300; *Miller* v. *People*, 39 Ill. 457; *State* v. *Young*, 52 La. Ann. 478, 27 So. 50, 12 Am. Crim. Rep. 154; *Jackson* v. *State*, 50 Tex. Crim. Rep. 302, 97 S. W. 312; *Whitley* v. *State*, 78 Miss. 255, 53 L.R.A. 402, 28 So. 852, 12 Am. Crim. Rep. 122; *Williams* v. *State*, 72 Miss. 117, 16 So. 296; *Wigginton* v. *Com.* 92 Ky. 287, 17 S. W. 634; *Thompson* v. *Com.* 20 Gratt. 724; *Warren* v. *State*, 29 Tex. 369; *Young* v. *State*, 68 Ala. 569; *Green* v. *Com.* 26 Ky. L. Rep. 1221, 83 S. W. 638; *State* v. *Revells*, 34 La. Ann. 381, 44 Am. Rep. 436; *State* v. *Gianfala*, 113 La. 463, 37 So. 30; *State* v. *Parish*, 78 N. C. 492; *Irwin* v. *State*, 54 Ga. 39; *Allen* v. *State*, 4 Ga. App. 458, 61 S. E. 840; *State* v. *Drake*, 82 N. C. 592; *State* v. *Dildy*, 72 N. C. 325. See *State* v. *Houston*, 76 N. C. 256; *State* v. *Moore*, 160 Mo. 443, 61 S. W. 199; *Edmonson* v. *State*, 72 Ark. 585, 82 S. W. 203.

[7] *Anderson* v. *State*, 133 Wis. 601, 114 N. W. 112.

violence was used to stop accused from preventing an accomplice from making a confession;[8] nor where an assault was committed on accused for the purpose of disarming him, to prevent him from injuring another, not not for the purpose of eliciting a confession, the confession not being made until later.[9]

While mob violence will render a confession involuntary, it is not every assemblage of men that will serve to put the accused in fear. Thus, where some fifty persons had gathered around the officer having the accused in charge, the officer declaring that he would protect the accused, and where there was no manifestation by the crowd against the accused, such circumstances did not render the confession involuntary;[10] nor where the accused was a prisoner in a calaboose surrounded by a crowd of men, a confession made at the time was not thereby rendered involuntary;[11] nor where the accused was put aboard a train, and a large crowd of armed men were assembled at the depot, and there was some talk of lynching, and he afterwards made a confession in the jail, when he was in no danger of personal violence, and there was no demonstration, such surroundings did not make the confession involuntary;[12] nor is the presence of a crowd about a jail or place where accused is confined, where no demonstrations are made, a circumstance that renders a confession then made involuntary.[13]

[8] *Andrews* v. *People,* 33 Colo. 193, 108 Am. St. Rep. 76, 79 Pac. 1031.

[9] *Connors* v. *State,* 95 Wis. 77, 69 N. W. 981.

[10] *People* v. *Miller,* 135 Cal. 69, 67 Pac. 12, 12 Am. Crim. Rep. 183.

[11] *Hilburn* v. *State,* 121 Ga. 344, 49 S. E. 318.

[12] *Shepherd* v. *State,* 31 Neb. 389, 47 N. W. 1118.

[13] *State* v. *Reddick,* 7 Kan. 143; *State* v. *Ingram,* 16 Kan. 14; *Cady* v. *State,* 44 Miss. 332, overruled in *Williams* v. *State,* 72 Miss. 117, 16 So. 296; *Territory* v. *Emilio,* 14 N. M. 147, 89 Pac. 239; *State* v. *Efler,* 85 N. C. 585; *State* v. *Daniels,* 134 N. C. 641, 46 S. E. 743; *Dugan* v. *Com.* 102 Ky. 241, 43 S. W. 418; *State* v. *Anderson,* 96 Mo. 241, 9 S. W. 636; *State* v. *McKenzie,* 144

Fear of death will not render a confession involuntary,[14] nor fear of legal consequences which will probably result in legal punishment.[15]

§ 646a. Threats; sweat-box confessions.—Confessions obtained through the sweat box of the police system render a confession involuntary. Thus, keeping a prisoner in a dark cell known as the sweat box, visiting him daily, and asking him whether he is ready to confess, and promising better quarters if he does confess, constitutes an extortion of an involuntary confession;[1] or, where the accused was confined in the sweat box and the exhortation was constantly made that it would be better to tell the truth, the custom being to let him out when he confessed what the police "thought he ought to," was extorting an involuntary confession;[2] and, likewise, where a con-

Mo. 40, 45 S. W. 1117; *Honeycutt* v. *State*, 8 Baxt. 371; *Stevens* v. *State*, 138 Ala. 71, 35 So. 122; *State* v. *Howard*, 92 N. C. 772; *De Arman* v. *State*, 71 Ala. 351.

While the rule is clear that where the violence is exerted for the purpose of extorting a confession, such confession is involuntary, and where the violence is incidental, and not for the purpose of extorting a confession, the confession is voluntary, there are decisions where, if the facts are expressed correctly in the printed report, the courts are not justified in holding the confession involuntary. *State* v. *Coella*, 3 Wash. 99, 28 Pac. 23; *State* v. *Houston*, 76 N. C. 256; *Liner* v. *State*, 124 Ala. 1, 27 So. 438; *Mose* v. *State*, 36 Ala. 211.

[14] *State* v. *Gorham*, 67 Vt. 365, 31 Atl. 845, 10 Am. Crim. Rep. 25; *Jackson* v. *State*, 49 Tex. Crim. Rep. 215, 91 S. W. 788.

[15] *Com.* v. *Mitchell*, 117 Mass. 431; *Com.* v. *Preece*, 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107; *Allen* v. *State*, 12 Tex. App. 190; *Territory* v. *Emilio*, 14 N. M. 147, 89 Pac. 239; *Gentry* v. *State*, 24 Tex. App. 80, 5 S. W. 660; *Neeley* v. *State*, 27 Tex. App. 324, 11 S. W. 376; *State* v. *Johnny*, 29 Nev. 203, 87 Pac. 3; *State* v. *Storms*, 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610; *People* v. *Thoms*, 3 Park. Crim. Rep. 256; *Honeycutt* v. *State*, 8 Baxt. 371.

[1] *State* v. *McCullum*, 18 Wash. 394, 51 Pac. 1044.

[2] *Ammons* v. *State*, 80 Miss. 592, 92 Am. St. Rep. 607, 32 So. 9, 12 Am. Crim. Rep. 82, and note thereto in 18 L.R.A.(N.S.) 768, as to when confession is voluntary. See *State* v. *Auguste*, 50 La. Ann. 488, 23 So. 612.

fession was extorted by the violence of the sheriff.[3] However, mere solitary confinement will not render the confession involuntary. It is when such confinement is used as a means of punishment, with a promise to better the condition, as a result of the confession. The entire history of judicial systems in all ages is that the privilege to cross-examine a person results in the assumption that the questioner has the right to extort the answer that will sustain his assumption of guilt.[4]

§ 646b. Threats; adjuration.—Adjurations, unaccompanied by a threat or promise, are not sufficient to render a confession involuntary.[1] Hence the following, addressed to the accused, were held not to render the confession inadmissible as being obtained through threats: "Now remember, if you know the parties you had better tell me. I would not suffer for anyone else;" [1a] and the following: "Tell the truth about the whole matter, and keep nothing back;" [2] "We have got you this time. We have traced you around until we are satisfied you have got the cow;" [3] "The more lies told in such cases, the deeper one gets in the mud;" [4] "I am satisfied that there are other receivers whom we have not discovered. I should like to have you make a clean breast of it;" [5] "It is no use for you to deny the crime." [6] But where the adjuration

[3] *State* v. *Albert*, 50 La. Ann. 481, 23 So. 609. See *State* v. *Robertson*, 111 La. 35, 35 So. 375.

[4] Wigmore, Ev. § 2251; Underhill, Crim. Ev. 2d ed. § 146; 1 Greenl. Ev. § 219; *Priest* v. *State*, 10 Neb. 393, 2 N. W. 468; *Coffee* v. *State*, 25 Fla. 501, 512, 23 Am. St. Rep. 525, 6 So. 493.

[1] As to effect of advice or exhortation on admissibility of confession, see note in 18 L.R.A.(N.S.) 812.

[1a] *State* v. *Alphonse*, 34 La. Ann. 9.

[2] *Hauk* v. *State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

[3] *Com.* v. *Whittemore*, 11 Gray, 201.

[4] *Com.* v. *Mitchell*, 117 Mass. 431.

[5] *Com.* v. *Sego*, 125 Mass. 210.

[6] *Territory* v. *McKern*, 3 Idaho, 15, 26 Pac. 123; *State* v. *Freeman*, 12 Ind. 100; *People* v. *McCallam*, 3 N. Y. Crim. Rep 189; *People* v. *McCallam*, 103 N. Y. 587, 9 N. E 502.

is accompanied by an inducement, either by way of threat or promise, it renders the confession inadmissible. Thus, on a promise to accused that if he would tell where the money was he would not "prosecute him heavy;" [7] "We have got other things against you nearly as good as this;" [8] "If you do not tell all you know about the business you will be put in the dark room and hanged," [9]—such expressions excluding the confession as being involuntary.

§ 646c. Threats to prosecute.—Courts are not at all agreed upon the question of whether or not a threat to prosecute is sufficient to render a confession involuntary. On the principle that putting the accused in fear, and the desire to escape consequences, tends to render the confession untrustworthy, it would seem that the desire to escape a present prosecution would also tend to the same effect. Thus, telling a man that he will be put in charge of the police was held to render the confession involuntary; [1] saying to a man, "If you do not tell me who your partner was, I will commit you to prison as soon as we can get to Newcastle," was held to be a threat rendering the confession involuntary.[2] But almost similar threats have been held not sufficient to render the confession involuntary; [3] thus, where a party overhearing a threat came forward and made a statement, it was held that a threat made against one could not affect the admissibility of a con-

[7] *Rector* v. *Com.* 80 Ky. 468.

[8] *Com.* v. *Nott,* 135 Mass. 269.

[9] *People* v. *Rankin,* 2 Wheeler, C. C. 467.

[1] *Reg.* v. *Luckhurst,* 6 Cox, C. C. 243, Dears. C. C. 245, 2 C. L. R. 129, 23 L. J. Mag. Cas. N. S. 18, 17 Jur. 1082, 2 Week. Rep. 97; *Johnson* v. *State,* 76 Ga. 76; *Rex* v. *Thompson,* 1 Leach, C. L. 291; *Reg.* v. *Hearn,* Car. & M. 109; *Beckham* v. *State,* 100 Ala. 15, 14 So. 859.

[2] *Rex* v. *Parrott,* 4 Car. & P. 570.

[3] *State* v. *Nash,* 45 La. Ann. 974, 13 So. 265; *State* v. *Vicknair,* 52 La. Ann. 1921, 28 So. 273; *Allen* v. *State,* 12 Tex. App. 190; *Young* v. *State,* 50 Ark. 501, 8 S. W. 828; *Bohanan* v. *State,* 92 Ga. 28, 18 S. E. 302; *United States* v. *Nott,* 1 McLean, 499, Fed. Cas. No. 15,900

fession made by another,[4] and a threat to bring a civil action against accused for the value of the property alleged to be stolen will not render a resulting confession involuntary.[5]

§ 646d. Character of threats that render a confession involuntary.—It is obvious that, where the confession follows immediately upon the threat being made, it is induced by the threat, and the confession partakes of a nature that will avoid the punishment. This is clearly illustrated in a case where the chief of police testified that the accused had confessed that he had entered the house for the purpose of larceny, and accused then testified that the chief said to him that he might get his neck broken or go to the penitentiary, and that it would be better to say that he went to the house to get money for his supper, and the accused then said that if it would do him any good he would say so.[1] Here it is clear that the confession made was not the truth, but was made in accordance with the suggestion contained in the threat.

There is no particular form of words that constitutes a threat that would put the accused in fear, and hence each case must depend on the facts and surrounding circumstances disclosed by the testimony, so that the rule must be broadly stated that threats that put the accused in fear are those that tend to elicit an untrustworthy confession.[2]

[4] *Reg.* v. *Jacobs,* 4 Cox, C. C. 54.

[5] *Cropper* v. *United States,* Morris (Iowa) 259.

[1] *Maxwell* v. *State,* — Miss. —, 40 So. 615.

[2] *United States* v. *Pumphreys,* 1 Cranch, C. C. 74, Fed. Cas. No. 16,097; *Hoober* v. *State,* 81 Ala. 51, 1 So. 574; *Edmonson* v. *State,* 72 Ark. 585, 82 S. W. 203; *People* v. *Ah How,* 34 Cal. 218; *Simon* v. *State,* 5 Fla. 285; *Daniels* v. *State,* 78 Ga. 98, 6 Am. St. Rep. 238; *State* v. *Mason,* 4 Idaho, 543, 43 Pac. 63; *Smith* v. *State,* 10 Ind. 106; *State* v. *Chambers,* 39 Iowa, 179; *State* v. *Willing,* 129 Iowa, 72, 105 N. W. 355; *Wigginton* v. *Com.* 92 Ky. 282, 17 S. W. 634; *State* v. *Albert,* 50 La. Ann. 481, 23 So. 609; *People* v. *Stewart,* 75 Mich. 21, 42 N. W. 662; *Whitley* v. *State,* 78 Miss. 255, 53 L.R.A. 402, 28 So. 852, 12 Am. Crim. Rep. 122; *Max-*

§ 646e. Promise in general.—Promises to the accused, to be kept in case a confession is made, are generally considered an inducement that renders the confession involuntary, but, to be a controlling inducement, the promise must be positive; it must hold out such a benefit to the accused as would be likely to induce him to give a false confession.[1]

Mitigation of punishment, such as stating to the accused that it will go lighter with him if he owns up and pleads guilty, is regarded as sufficient to render the confession involuntary.[2]

A promise of secrecy cannot be held an inducing promise, as, on the assurance of secrecy, the accused would incline rather to state the truth than a falsehood.[3]

well v. *State*, — Miss. —, 40 So. 615; *State* v. *Jones*, 54 Mo. 478; *State* v. *Crowson*, 98 N. C. 595, 4 S. E. 143; *State* v. *Fields*, Peck (Tenn.) 140; *Clayton* v. *State*, 31 Tex. Crim. Rep. 489, 21 S. W. 255; *Jackson* v. *State*, 50 Tex. Crim. Rep. 302, 97 S. W. 312; *State* v. *McCullum*, 18 Wash. 394, 51 Pac. 1044.

[1] *Neeley* v. *State*, 27 Tex. App. 324, 11 S. W. 376; *Cannada* v. *State*, 29 Tex. App. 537, 16 S. W. 341; *Searcy* v. *State*, 28 Tex. App. 513, 19 Am. St. Rep. 851, 13 S. W. 782; *People* v. *Castro*, 125 Cal. 521, 58 Pac. 133; *People* v. *Gonzales*, 136 Cal. 666, 69 Pac. 487, 12 Am. Crim. Rep. 97; *State* v. *Jackson*, 3 Penn. (Del.) 15, 50 Atl. 270; *Dixon* v. *State*, 113 Ga. 1039, 39 S. E. 846; *Smith* v. *State*, 125 Ga. 252, 54 S. E. 190; *State* v. *Jay*, 116 Iowa, 264, 89 N. W. 1070, 12 Am. Crim. Rep. 93; *Harvey* v. *State*, — Miss. —, 20 So. 837; *Mitchell* v. *State*, — Miss. —, 24 So. 312; *Hamilton* v. *State*, 77 Miss. 675, 27 So. 606. See also note in 18 L.R.A.(N.S.) 820.

[2] *State* v. *Middleton*, 69 S. C. 72, 48 S. E. 35; *McNish* v. *State*, 45 Fla. 83, 110 Am. St. Rep. 65, 34 So. 219, 12 Am. Crim. Rep. 125; *Smith* v. *State*, 125 Ga. 252, 54 S. E. 190; *State* v. *Day*, 55 Vt. 510, 4 Am. Crim. Rep. 104; *Cass's Case*, 1 Leach, C. L. 293; *Johnson* v. *State*, 89 Miss. 773, 42 So. 606; *State* v. *Smith*, 72 Miss. 420, 18 So. 482; *Owen* v. *State*, 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206; *McVeigh* v. *State*, 43 Tex. Crim. Rep. 17, 62 S. W. 757, 12 Am. Crim. Rep. 143; *Newman* v. *State*, 49 Ala. 9, 1 Am. Crim. Rep. 173; *Anderson* v. *State*, 104 Ala. 83, 16 So. 108; *Sorenson* v. *United States*, 74 C. C. A. 468, 143 Fed. 820; *People* v. *Kurtz*, 42 Hun, 340.

[3] *Lawson* v. *State*, — Tex. Crim. Rep. —, 50 S. W. 345; *State* v. *Squires*, 48 N. H. 364; *State* v. *Mitchell*, 61 N. C. (Phill. L.) 447; *Rex* v. *Shaw*, 6 Car. & P. 372; *Mor-*

A promise not to prosecute, or to compromise the matter, or that the "matter would be dropped," or to "tell the truth and that would be the last of it," are such substantial inducements that they are generally deemed to create such a hope of benefit as to render the confession involuntary.[4]

A promise of pardon, generally being made upon a condition of furnishing state's evidence, furnishes such a hope of immunity that a confession induced thereby is generally rejected as involuntary,[5] and where the accused makes such a confession, but afterwards repudiates his agreement, the confession so made cannot be used against him.[6]

It should be observed that the natural result of a threat is to put in fear, and the natural result of a promise is to induce hope. Hence, putting in fear, or holding out hope, is merely stating the results of something that has gone before, but courts frequently express the matter in confusing general terms, by stating that a confession induced by threat or fear or promise or hope is involuntary. The hope which is the result of the promise must be one that will directly benefit the

ris v. *State,* 39 Tex. Crim. Rep. 371, 46 S. W. 253; *Rex* v. *Thomas,* 7 Car. & P. 345.

[4] *Draughn* v. *State,* 76 Miss. 574, 25 So. 153, 11 Am. Crim. Rep. 192; *Boyd* v. *State,* 2 Humph. 39; *Austine* v. *People,* 51 Ill. 236; *State* v. *Hagan,* 54 Mo. 192; *Murphy* v. *State,* 63 Ala. 1; *Rex* v. *Jones,* Russ. & R. C. C. 152; *United States* v. *Nott,* 1 McLean, 499, Fed. Cas. No. 15,900; *Byrd* v. *State,* 68 Ga. 661; *Porter* v. *State,* 55 Ala. 95; *Meadows* v. *State,* 136 Ala. 67, 34 So. 183; *People* v. *Williams,* 133 Cal. 165, 65 Pa. 323; *State* v. *Jay,* 116 Iowa, 264, 89 N. W. 1070, 12 Am. Crim. Rep. 93; *State* v. *Hunter,* 181 Mo. 316, 80 S. W. 955. See *State* v. *Stebbins,* 188 Mo. 387, 87 S. W. 460; *Neeley* v. *State,* 27 Tex. App. 324, 1 S. W. 376.

[5] *Reg.* v. *Boswell,* Car. & M. 584; *Reg.* v. *Blackburn,* 6 Cox, C. C. 333; *Mackmasters* v. *State,* 82 Miss. 459, 34 So. 156, 12 Am. Crim. Rep. 119.

[6] *Reg.* v. *Gillis,* 11 Cox, C. C. 69, 14 Week. Rep. 845; *Lauderdale* v. *State,* 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788, 19 S. W. 679; *Lopez* v. *State,* 12 Tex. App. 27; *Womack* v. *State,* 16 Tex. App. 178; *Neeley* v. *State,* 27 Tex. App. 324, 11 S. W. 376; *R.* v. *Burley,* cited in 2 Starkie, Ev. 13; *State* v. *Moran,* 15 Or. 262, 14 Pac. 419. See *Com.* v. *Knapp,* 10 Pick. 477, 20 Am. Dec. 534.

accused personally, by way of escape, or immunity from punishment for the crime charged.[7] Where the hope is merely the mental hope, or mental belief, of the accused, it is insufficient to render the confession involuntary, because the inducement must come from some extraneous pressure, and be inspired by a third person.[8]

§ 647. Mere adjuration to speak the truth does not exclude.—But a mere adjuration to speak the truth does not vitiate a confession, when neither threats nor promises are applied.[1] Thus when a prisoner under fourteen years of age, charged with murder, was told by a man who was present when he was apprehended, "Now kneel down; I am going to

[7] *Daniels* v. *State,* 78 Ga. 98, 6 Am. St. Rep. 238; *Stone* v. *State,* 105 Ala. 60, 17 So. 114; *Matthews* v. *State,* 9 Lea, 128, 42 Am. Rep. 667; *State* v. *Tatro,* 50 Vt. 483, 3 Am. Crim. Rep. 165; *Com.* v. *Wilson,* 186 Pa. 1, 40 Atl. 283, 11 Am. Crim. Rep. 261; *Frank* v. *State,* 39 Miss. 705; *Com.* v. *Knapp,* 10 Pick. 477, 20 Am. Dec. 534; *State* v. *Moran,* 15 Or. 262, 14 Pac. 419. See *Womack* v. *State,* 16 Tex. App. 178; *Lauderdale* v. *State,* 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788, 19 S. W. 679; *Lopez* v. *State,* 12 Tex. App. 27; *Neeley* v. *State,* 27 Tex. App. 324, 11 S. W. 376; *Cox* v. *People,* 80 N. Y. 500.

[8] *Com.* v. *Knapp,* 9 Pick. 496, 20 Am. Dec. 491; *State* v. *Anderson,* 96 Mo. 241, 9 S. W. 636; *Cady* v. *State,* 44 Miss. 332; *State* v. *Staley,* 14 Minn. 105, Gil. 75; *Wade* v. *State,* 25 Ohio C. C. 279; *Thompson* v. *State,* 19 Tex. App. 593; *Grimsinger* v. *State,* 44 Tex. Crim. Rep. 1, 69 S. W. 583; *Price* v. *State,* 114 Ga. 855, 40 S. E. 1015, 12 Am. Crim. Rep. 203; *Com.* v. *Smith,* 119 Mass. 305; *Hecox* v. *State,* 105 Ga. 625, 31 S. E. 592; *Com.* v. *Sego,* 125 Mass. 210; *Hardy* v. *United States,* 3 App. D. C. 35; *Bohanan* v. *State,* 92 Ga. 28, 18 S. E. 302; *Milner* v. *State,* 124 Ga. 86, 52 S. E. 302; *State* v. *Griffin,* 48 La. Ann. 1409, 20 So. 905; *State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128; *People* v. *Swetland,* 77 Mich. 53, 43 N. W. 779, 8 Am. Crim. Rep. 282; *State* v. *Patrick,* 48 N. C. (3 Jones, L.) 443; *Bruce* v. *State,* — Tex. Crim. Rep. —, 53 S. W. 867; *Hall's Case,* 2 Leach, C. L. 559; *State* v. *Havelin,* 6 La. Ann. 167; *Minton* v. *State,* 99 Ga. 254, 25 S. E. 626.

[1] See post, § 654; *Benson* v. *State,* 119 Ind. 488, 21 N. E. 1109; *Reg.* v. *Sleeman,* 6 Cox, C. C. 245, Dears. C. C. 249, 2 C. L. R. 129, 23 L. J. Mag. Cas. N. S. 19, 17 Jur. 1082, 2 Week. Rep. 97; *Reg.* v. *Jarvis,* L. R. 1 C. C. 96.

ask you a very serious question and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner in consequence made a statement, this was held admissible.[2] So, where the mother of a young lad of eight, who was arrested by the police, said to him and another, "You had better, as good boys, tell the truth," it was held that the confession was admissible.[3] Nor, as it has been held, is it a valid objection that the defendant had been called upon to touch the deceased's body.[4] But where a constable, after having asked the prisoner what he had done with the stolen property, said "You had better not add a lie to the crime of theft," Gaselee, J., refused to receive in evidence a statement thereupon made by the prisoner.[5] The mere fact, however, that the appeal to speak the truth is made by an officer to a party under arrest does not exclude the confession.[6]

§ 648. Representing that concealment is folly does not exclude.—A confession made under the representation of the infamy or folly of a concealment, if without threats or promises, may be received.[1] Yet this should be carefully

[2] *Rex* v. *Wild,* 1 Moody, C. C. 452; *Reg.* v. *Kerr,* 8 Car. & P. 179.

[3] *Reg.* v. *Reeve,* L. R. 1 C. C. 362, 41 L. J. Mag. Cas. N. S. 92, 26 L. T. N. S. 403, 12 Cox, C. C. 179, 20 Week. Rep. 631; 1 Green, Crim. Rep. 398.

See also *Cady* v. *State,* 44 Miss. 333; *Com.* v. *Sego,* 125 Mass. 210.

[4] *People* v. *Johnson,* 2 Wheeler, C. C. 361.

See *State* v. *Storms,* 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610; *Territory* v. *Emilio,* 14 N. M. 147, 89 Pac. 239; *Rex* v. *Gibney,* Jebb, C. C. 15.

[5] *Rex* v. *Shepherd,* 7 Car. & P. 579.

[6] *Rex* v. *Thornton,* 1 Moody, C. C. 27; *Rex* v. *Gibney,* Jebb, C. C. 15; *Reg.* v. *Kerr,* 8 Car. & P. 176; *Reg.* v. *Johnston,* 15 Ir. C. L. L. Rep. 60; *Com.* v. *Holt,* 121 Mass. 61; *Harding* v. *State,* 54 Ind. 359; *Wolf* v. *Com.* 30 Gratt. 833; *State* v. *McLaughlin,* 44 Iowa, 82; *King* v. *State,* 40 Ala. 314; *Davis* v. *State,* 2 Tex. App. 588; *R.* v. *Devlin,* 2 Craw. & D. C. C. (Ir.) 152; Taylor, Ev. § 804.

[1] *Com.* v. *Mitchell,* 117 Mass. 431; *State* v. *Crank,* 2 Bail. L. 66, 23 Am. Dec. 117; *Hawkins* v.

guarded, since if such statements take the shape of a threat, they operate to exclude.

§ 649. Confessions to persons in authority.—Confessions made to persons in authority, such as constables, arresting officers, or to magistrates, are not excluded by the mere fact that they were made to such persons, unless it appears that an improper inducement was made by such authoritative person.[1] But the rule is equally well settled that even a slight inducement held out by such a person renders the confession

State, 7 Mo. 190; *Fouts* v. *State*, 8 Ohio St. 98.

But see *People* v. *Ward*, 15 Wend. 231; *Oakley* v. *Schoonmaker*, 15 Wend. 226; *Cady* v. *State*, 44 Miss. 333; post, § 654.

[1] *Reg.* v. *Baldry*, 12 Eng. L. & Eq. Rep. 59, 5 Cox, C. C. 523, 2 Den. C. C. 430, 21 L. J. Mag. Cas. N. S. 130, 16 Jur. 599; *Com.* v. *Sturtivant*, 117 Mass. 122; *Com.* v. *Smith*, 119 Mass. 305; *Murphy* v. *People*, 63 N. Y. 590; *Wolf* v. *Com.* 30 Gratt. 833; *Aaron* v. *State*, 37 Ala. 106; *State* v. *Carlisle*, 57 Mo. 102; *State* v. *Bruce*, 33 La. Ann. 186; *State* v. *Staley*, 14 Minn. 105, Gil. 75; *State* v. *McLaughlin*, 44 Iowa, 83; *State* v. *Ingram*, 16 Kan. 14.

See supra, § 631; *Perkins* v. *State*, 60 Ala. 7; *Stallings* v. *State*, 47 Ga. 572; *Sullins* v. *State*, 53 Ala. 474; *Com.* v. *Eagan*, 190 Pa. 10, 42 Atl. 374; *Redd* v. *State*, 68 Ala. 492; *People* v. *Wentz*, 37 N. Y. 304; *McElroy* v. *State*, 75 Ala. 9; *Jackson* v. *State*, 69 Ala. 249; *Rex* v. *Ryan*, 9 Ont. L. Rep. 137, 4 A. & E. Ann. Cas. 875; *Re Lewis*, 9 Can. Crim. Cas. 233; *Rex* v. *Todd*, 13 Manitoba L. Rep. 364; *Stevens* v. *State*, 138 Ala. 71, 35 So. 122; *State* v. *Quinn*, 2 Penn. (Del.) 339, 45 Atl. 544; *Fuller* v. *State*, 109 Ga. 809, 35 S. E. 298; *Price* v. *State*, 114 Ga. 855, 40 S. E. 1015, 12 Am. Crim. Rep. 203; *State* v. *Storms*, 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610; *State* v. *Auguste*, 50 La. Ann. 488, 23 So. 612; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *State* v. *Stebbins*, 188 Mo. 387, 87 S. W. 460; *Roesel* v. *State*, 62 N. J. L. 216, 41 Atl. 408; *Brown* v. *State*, 62 N. J. L. 666, 42 Atl. 811; *People* v. *Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51; *State* v. *Daniels*, 134 N. C. 641, 46 S. E. 743; *State* v. *McDaniel*, 39 Or. 161, 65 Pac. 520; *Carmicheal* v. *State*, — Tex. Crim. Rep. —, 54 S. W. 903; *Bain* v. *State*, — Tex. Crim. Rep. —, 74 S. W. 542; *James* v. *State*, 124 Wis. 130, 102 N. W. 320.

For note as to admissibility of confessions made to persons in authority see 18 L.R.A.(N.S.) 843.

involuntary, because the accused would have reason to believe that such person is not only credible, but is in a position to carry the inducement into effect.[2]

§ 650. Persons in authority.—The trustworthiness of a confession depends upon the nature of the inducement held out, and the strength of this inducement depends upon the power of the person offering it. Hence, the class of persons to whom the confession is made is often an important consideration. The earlier decisions limit the controlling inducement to that held out by a person having a legal interest in, or authority in, the arrest and prosecution.[1]

[2] *Reg.* v. *Thompson* [1893] 2 Q. B. 12, 62 L. J. Mag. Cas. N. S. 93, 5 Reports, 392, 69 L. T. N. S. 22, 41 Week. Rep. 525, 17 Cox, C. C. 641, 57 J. P. 312, 8 Eng. Rul. Cas. 90, 9 Am. Crim. Rep. 269; *Rex* v. *Tyler,* 1 Car. & P. 129; *Rex* v. *Spencer,* 7 Car. & P. 776; *Reg.* v. *Taylor,* 8 Car. & P. 733; *Reg.* v. *Moore,* 2 Den. C. C. 522, 3 Car. & K. 153, 21 L. J. Mag. Cas. N. S. 199, 16 Jur. 621, 5 Cox, C. C. 555; *Rex* v. *Gibbons,* 1 Car. & P. 97; *Rex* v. *Slaughter,* 4 Car. & P. 543, note; *Rex* v. *Dunn,* 4 Car. & P. 543; *Smith* v. *Com.* 10 Gratt. 734; *State* v. *Patterson,* 73 Mo. 695; *State* v. *Jones,* 54 Mo. 478; *State* v. *Morgan,* 35 W. Va. 260, 13 S. E. 385; *Com.* v. *Morey,* 1 Gray, 461; *State* v. *Staley,* 14 Minn. 105, Gil. 75; *Com.* v. *Piper,* 120 Mass. 185; *People* v. *Clarke,* 105 Mich. 169, 62 N. W. 1117; *Heldt* v. *State,* 20 Neb. 496, 57 Am. Rep. 835, 30 N. W 626; *Jones* v. *State,* 58 Miss. 349; *Ward* v. *State,* 50 Ala. 120; *Rex* v. *Kamakana,* 3 Haw. 313; *State* v. *York,* 37 N. H. 175; *Spears* v. *State,* 2 Ohio St. 583; *United States* v. *Stone,* 8 Fed. 232; *People* v. *Silvers,* 6 Cal. App. 69, 92 Pac. 506; *Young* v. *Com.* 8 Bush, 366; *State* v. *Cruse,* 74 N. C. 491; *State* v. *Holden,* 42 Minn. 350, 44 N. W. 123; *Cady* v. *State,* 44 Miss. 332; *Roszczyniala* v. *State,* 125 Wis. 414, 104 N. W. 113; *Com.* v. *Tuckerman,* 10 Gray, 173; *Thorn's Case,* 4 N. Y. City Hall Rec. 81; *Reg.* v. *Viau,* Rap. Jud. Quebec, 7 B. R. 362; *Reinoehl* v. *State,* 62 Neb. 619, 87 N. W. 355; *Rice* v. *State,* 22 Tex. App. 654, 3 S. W. 791; *Ulrich* v. *People,* 39 Mich. 245; *Lee* v. *State,* 45 Miss. 114; *State* v. *Fredericks,* 85 Mo. 145; *Miller* v. *State,* 94 Ga. 1, 21 S. E. 128.

[1] *Rex* v. *Row,* Russ. & R. C. C. 153; *Rex* v. *Gibbons,* 1 Car. & P. 97; *Reg.* v. *Taylor,* 8 Car. & P. 734.

See 2 Lewin, C. C. 125, note; *United States* v. *Stone,* 8 Fed. 260.

While the distinctions between a superior and an inferior class are not legally marked in this country, there exists, at the time that a confession is made, a distinct superiority over the accused in the class of persons that may surround him. The familiar illustrations of parent and child, master and servant, officer and prisoner, the injured person and the accused, the employer and employee, serve to mark this distinction, and hence the rule in this country is recognized that the actual state of relations between the accused and the person in apparent authority must always be inquired into with reference to the probable strength of the inducement.[2]

Under the present industrial conditions, the most extensive class of persons in authority is represented by the officers, managers, superintendents, heads of departments, and lesser grades, over the vast number of employees of industrial corporations, which last class looks to its relations with the others in every matter of material concern. Thus, a corporate employee would look to the head of his department with absolute trust and reliance, knowing that such head is powerful enough either to override or to nullify any prosecution, so that a confession made by such a person would be controlled by the inducement.[3]

§ 650a. Particular relations constituting persons in authority.—That the actual relations between the parties, and perhaps the relation as it actually appeared to the ac-

[2] Greenl. Ev. § 224; *Com.* v. *Morey*, 1 Gray, 461; *Murphy* v. *State*, 63 Ala. 3; *Freeman* v. *Brewster*, 93 Ga. 648, 21 S. E. 165; *Ulrich* v. *People*, 39 Mich. 249; *People* v. *Wolcott*, 51 Mich. 614, 17 N. W. 78; *State* v. *Force*, 69 Neb. 162, 95 N. W. 42, 12 Am. Crim. Rep. 160.

[3] *State* v. *Smith*, 72 Miss. 420, 18 So. 482; *Hamilton* v. *State*, 77 Miss. 675, 27 So. 606; *Reg.* v. *Thompson* [1893] 2 Q. B. 12, 62 L. J. Mag. Cas. N. S. 93, 5 Reports, 392, 69 L. T. N. S. 22, 41 Week. Rep. 525, 17 Cox, C. C. 641, 57 J. P. 312, 8 Eng. Rul. Cas. 90, 9 Am. Crim. Rep. 269. See also note in 18 L.R.A. (N.S.) 854.

cused, is the controlling factor, is illustrated in the following instances: An Indian agent appointed by law is, as to the Indians on his reservation, a person in such authority that a confession made to him under inducement is involuntary;[1] an attorney investigating a crime for the purpose of prosecution is a person in authority;[2] where goods were stolen from a partnership, the wife of one partner, to whom a confession was made, was held to be a person in authority;[3] the wife of a police officer, who was employed as a searcher of female prisoners, was held to be a person in authority.[4]

§ 651. Rule in earlier English cases.—In the earlier English cases, the tendency was to exclude confessions induced by promises, irrespective of the condition of the person promising. Thus, confessions have been held inadmissible when they resulted from such statements by prosecutors as the following: "Tell me where the things are, and I will be favorable to you;"[1] or, "You had better say where you got the property;"[2] or, "It would have been better for you if you had told at first;"[3] or, "You had better tell all you know;"[4] or, "I should be obliged to you if you would tell all you know; if you will not, of course we can do nothing."[5] And it is now agreed that any advice to a prisoner by a person in authority, telling him it would be better for him if he confesses, vitiates a confession induced by it.[6] The ad-

[1] *Reg.* v. *Pah-cah-pah-ne-capi,* 4 Can. Crim. Cas. 93.

[2] *Reg.* v. *Croydon,* 2 Cox, C. C. 67.

[3] *Reg.* v. *Warringham,* 2 Den. C. C. 447, note, 15 Jur. 318.

[4] *Reg.* v. *Windsor,* 4 Fost. & F. 360.

[1] *Rex* v. *Cass,* 1 Leach, C. L. 293, note; *Boyd* v. *State,* 2 Humph. 39.

[2] *Rex* v. *Dunn,* 4 Car. & P. 543.

[3] *Rex* v. *Walkley,* 6 Car. & P. 175.

[4] *Rex* v. *Kingston,* 4 Car. & P. 387.

[5] *Rex* v. *Partridge,* 7 Car. & P. 551. But see *Com.* v. *Sego,* 125 Mass 210.

[6] 2 East, P. C. 659; *Reg.* v. *Drew,* 8 Car. & P. 140; *Rex* v. *Richards,* 5 Car. & P. 318; *Rex* v. *Thomas,* 6 Car. & P. 353; *Rex* v. *Jones,* Russ

vice, however, must be made or sanctioned by a person in authority, to justify the exclusion of the confession.[7] It has been doubted whether the principle extends to any other cases; and it has been held that a promise made by an indifferent person, who interfered officiously without any kind of authority, and promised, without the means of performance, cannot be deemed sufficient to produce any effect even on the weakest mind, as an inducement to confess; and accordingly confessions made under such circumstances, to authoritative persons, have been admitted in evidence.[8] In such cases the question is simply whether the influences applied were likely to produce untruth. Authority, however, in this sense, is assumed to belong to a prosecutor, when exercising the power

& R. C. C. 152; *Rex* v. *Parratt*, 4 Car. & P. 570; *Reg.* v. *Garner*, 2 Car. & K. 920, 1 Den. C. C. 329, 3 New Sess. Cas. 329, Temple & M. 7, 18 L. J. Mag. Cas. N. S. 1, 12 Jur. 944, 3 Cox, C. C. 175; *Reg.* v. *Fennell*, L. R. 7 Q. B. Div. 147, 50 L. J. Mag. Cas. N. S. 126, 44 L. T. N. S. 687, 29 Week. Rep. 742, 14 Cox, C. C. 607, 45 J. P. 666; *Reg.* v. *Hatts*, 49 L. T. N. S. 780, 48 J. P. 248; *State* v. *York*, 37 N. H. 175; *Vaughan* v. *Com.* 17 Gratt. 576. See *Hawkins* v. *State*, 7 Mo. 190; post, §§ 672–674; *Reg.* v. *Mansfield*, 14 Cox, C. C. 639; post, § 654; *Com.* v. *Nott*, 135 Mass. 269.

[7] *Rex* v. *Row*, Russ. & R. C. C. 153; *Rex* v. *Gibbons*, 1 Car. & P. 97; *Rex* v. *Hardwich*, 1 Car. & P. 98, note; *Rex* v. *Tyler*, 1 Car. & P. 129; *Rex* v. *Green*, 6 Car. & P. 655; *Reg.* v. *Baldry*, 12 Eng. L. & Eq. Rep. 591, 5 Cox, C. C. 523, 2 Den. C. C. 430, 21 L. J. Mag. Cas. N. S. 130, 16 Jur. 599; *R* v. *Berigan*, 1 Irish Cir. R. 177 (Cork Lent Assizes, 1841); *Reg.* v. *Parker*, 8 Cox, C. C. 465; *Reg.* v. *Hall*, 12 Cox, C. C. 159; *Com.* v. *Tuckerman*, 10 Gray, 173; *Young* v. *Com.* 8 Bush, 366; *State* v. *Kirby*, 1 Strobh. L. 155; *Wilson* v. *State*, 3 Heisk. 232.

Contra, *Reg.* v. *Drew*, 8 Car. & P. 140. Compare *Rex* v. *Parratt*, 4 Car. & P. 570; *Rex* v. *Thompson*, 1 Leach, C. L. 291; *Reg.* v. *Fleming*, Armstrong, M. & O. 330.

[8] *Rex* v. *Hardwick*, 6 Petersd. Abr. 84; *Reg.* v. *Taylor*, 8 Car. & P. 734; *Reg.* v. *Sleeman*, Dears. C. C. 249, 2 C. L. R. 129, 23 L. J. Mag. Cas. N. S. 19, 6 Cox, C. C. 245, 17 Jur. 1082, 2 Week. Rep. 97. Compare *Rex* v. *Gibbons*, 1 Car. & P. 97; *Rex* v. *Tyler*, 1 Car. & P. 129; *Rex* v. *Lingate*, 6 Petersd. Abr. 84; *Rex* v. *Spencer*, 7 Car. & P. 776; *Reg.* v. *Reason*, 12 Cox, C. C. 228; *Reg.* v. *Jones*, 12 Cox, C. C. 241; *United States* v. *Stone*, 8 Fed. 232; *State* v. *Simon*, 50 Mo. 370; *Reg.* v. *Parker*, 9 Week. Rep. 699; Roscoe, Crim. Ev. 44.

of instituting or withholding a prosecution.[9] But even in such case the language used must be such as to leave the impression that the accused, being in custody, would be bettered by a confession, or that he would be punished if he did not confess.[10]

§ 651a. To magistrates, police officers, etc.—In accordance with the well-settled rule, that confessions to persons in authority are treated as involuntary and hence inadmissible, confessions made to magistrates,[1] to prosecuting attorneys,[2] to the prosecutor himself,[3] and to legally authorized police officers,[4] are generally excluded, where inducements are held out by such authoritative persons, not because of the position

[9] *Reg.* v. *Rue,* 34 L. T. N. S. 400; *Reg.* v. *Hatts,* 49 L. T. N. S. 780, 48 J. P. 248; *Deathridge* v. *State,* 1 Sneed, 75; *Heard* v. *State,* 59 Miss. 545; post, § 656.

[10] Post, §§ 672, 673; *Com.* v. *Sego,* 125 Mass. 210. Cited supra, § 647; *Cox* v. *People,* 80 N. Y. 500.

[1] *United States* v. *Cooper,* Fed. Cas. No. 14,864; *United States* v. *Pocklington,* 2 Cranch, C. C. 293, Fed. Cas. No. 16,060; *People* v. *Clarke,* 105 Mich. 169, 62 N. W. 1117; *Biscoe* v. *State,* 67 Md. 6, 8 Atl. 571; *Garrard* v. *State,* 50 Miss. 147; *People* v. *Robertson,* 1 Wheeler, C. C. 66; *Rex* v. *Cooper,* 5 Car. & P. 535; *State* v. *Howard,* 17 N. H. 171. See also note in 18 L.R.A. (N. S.) 848.

[2] *State* v. *Hunter,* 181 Mo. 316, 80 S. W. 955; *People* v. *Clarke,* 105 Mich. 169, 62 N. W. 1117; *People* v. *Silvers,* 6 Cal. App. 69, 92 Pac. 506; *Corley* v. *State,* 50 Ark. 305, 7 S. W. 255; *Simmons* v. *State,* 61 Miss. 243; *Searles* v. *State,* 6 Ohio C. C. 331, 3 Ohio C. D. 478. See also note in 18 L.R.A.(N.S.) 849.

[3] *People* v. *Smith,* 15 Cal. 409; *State* v. *Walker,* 34 Vt. 296; *White* v. *State,* 70 Ark. 24, 65 S. W. 937, 12 Am. Crim. Rep. 86; *Sullivan* v. *State,* 66 Ark. 506, 51 S. W. 828, 11 Am. Crim. Rep. 280; *Rice* v. *State,* 22 Tex. App. 654, 3 S. W. 791; *Reg.* v. *Jackson,* 2 Can. Crim. Cas. 149; *Rector* v. *Com.* 80 Ky. 468. See also note in 18 L.R.A.(N.S.) 849.

[4] *State* v. *Staley,* 14 Minn. 105, Gil. 75; *Ward* v. *State,* 50 Ala. 120; *Com.* v. *Taylor,* 5 Cush, 605; *Bubster* v. *State,* 33 Neb. 663, 50 N. W. 953; *Bram* v. *United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *Rex* v. *Kamakana,* 3 Haw. 313; *State* v. *Cruse,* 74 N. C. 491; *Vaughan* v. *Com.* 17 Gratt. 576; *Roesel* v. *State,* 62 N. J. L. 216, 41 Atl. 408; *State* v. *George,* 15 La. Ann. 145; *State* v. *Bradford,* 156 Mo. 91, 56 S. W. 898; *Page* v. *Com.*

of such persons, but from the fact that inducements coming from such persons are sufficient to render confessions made in consequence thereof involuntary.[5]

§ 652. By servant to master.—The relation of servant and master does not of itself render the confession made in such relation involuntary, and at one time the authorities seemed to uphold the rule that the offense involved must be an offense which directly concerned the master, in which case the inducements were considered such as were likely to lead

27 Gratt. 954; *State* v. *Morgan*, 35 W. Va. 260, 13 S. E. 385; *Nicholson* v. *State*, 38 Md. 140; *Com.* v. *Curtis*, 97 Mass. 574; *Rex* v. *Row*, Russ. & R. C. C. 153; *Green* v. *State*, 88 Ga. 516, 30 Am. St. Rep. 167, 15 S. E. 10; *Com.* v. *Hudson*, 185 Mass. 402, 70 N. E. 436; *Hardin* v. *State*, 66 Ark. 53, 48 S. W. 904; *People* v. *Barric*, 49 Cal. 342, 1 Am. Crim. Rep. 178; *People* v. *Thompson*, 84 Cal. 598, 24 Pac. 384; *State* v. *Willis*, 71 Conn. 293, 41 Atl. 820; *West* v. *United States*, 20 App. D. C. 347, 12 Am. Crim. Rep. 89; *United States* v. *Nardello*, 4 Mackey, 503; *Blalack* v. *State*, 79 Miss. 517, 31 So. 105; *Mackmasters* v. *State*, 82 Miss. 459, 34 So. 156, 12 Am. Crim. Rep. 119; *State* v. *Davis*, 125 N. C. 612, 34 S. E. 198, 12 Am. Crim. Rep. 59; *State* v. *Wintzingerode*, 9 Or. 153; *State* v. *Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864, 54 Atl. 1063; *Earp* v. *State*, 55 Ga. 136, 1 Am Crim. Rep. 171; *Smith* v. *State*, 88 Ga. 627, 15 S. E. 675; *State* v. *Jay*, 116 Iowa, 264, 89 N. W. 1070, 12 Am. Crim. Rep. 93; *Hudson* v. *Com.* 2 Duv. 531; *Collins* v. *Com.* 15 Ky. L. Rep. 691, 25 S. W. 743; *State* v. *Alexander*, 109 La. 557, 33 So. 600, 12 Am. Crim. Rep. 102; *Com.* v. *Taylor*, 5 Cush. 605; *Com.* v. *Nott*, 135 Mass. 269; *Com.* v. *Myers*, 160 Mass. 530, 36 N. E. 481; *Com.* v. *Antaya*, 184 Mass. 326, 68 N. E. 331, 12 Am. Crim. Rep. 135; *Flagg* v. *People*, 40 Mich. 708, 3 Am. Crim. Rep. 70; *People* v. *Wolcott*, 51 Mich. 612, 12 N. W. 78; *People* v. *McCullough*, 81 Mich. 25, 45 N. W. 515; *Ford* v. *State*, 75 Miss. 101, 21 So. 524; *Harvey* v. *State*, — Miss. —, 20 So. 837; *Mitchell* v. *State*, — Miss. —, 24 So. 312; *Couley* v. *State*, 12 Mo. 462; *Territory* v. *Underwood*, 8 Mont. 131, 19 Pac. 398; *Bullock* v. *State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *State* v. *York*, 37 N. H. 175; *People* v. *Phillips*, 42 N. Y. 200; *Vaughan* v. *Com.* 17 Gratt. 576; *Rex* v. *Shepherd*, 7 Car. & P. 579; *Reg.* v. *Bate*, 11 Cox, C. C. 686; *Territory* v. *McClin*, 1 Mont. 394. See also note in 18 L.R.A. (N.S.) 849.

[5] See supra, notes 1–4.

the accused to confess falsely, either from a feeling of dependency, or from the expectation of lighter punishment if the confession was made,[1] but where the offense did not concern the master, mere advice did not exclude;[2] and where, on an indictment for infanticide, the accused was told by her mistress, "she had better speak the truth," the confession was received,[3] because the offense in no way concerned the mistress. However, the limitation that the offense must concern the master does not apply in the later cases, but the fact of dominion and authority should be considered in determining the voluntary character of the confession.[4]

§ 652a. To sundry authorities.—The fact that there is a relation between the parties is not sufficient of itself to exclude a confession made under such relations. Such confessions would be governed entirely, as to their voluntary or involuntary character, by the inducement made. Thus the

[1] *Reg.* v. *Garner,* 2 Car. & K. 920, 3 New. Sess. Cas. 329, 1 Den. C. C. 329, Temple & M. 7, 18 L. J. Mag. Cas. N. S. 1, 12 Jur. 944, 3 Cox, C. C. 175; Joy, Confessions, 23. See also note in 18 L.R.A.(N.S.) 854.

[2] *Com.* v. *Sego,* 125 Mass. 210.

[3] *Reg.* v. *Moore,* 2 Den. C. C. 522, 3 Car. & K. 153, 21 L. J. Mag. Cas. N. S. 199, 16 Jur. 621, 12 Eng. L. & Eq. Rep. 583, 5 Cox, C. C. 555; *Reg.* v. *Rue,* 34 L. T. N. S. 400. See also *Rex* v. *Upchurch,* 1 Moody, C. C. 465; *Reg.* v. *Taylor,* 8 Car. & P. 733; *Reg* v. *Kerr,* 8 Car. & P. 179; *Reg.* v. *Hewett,* Car. & M. 534; *Rex* v. *Parratt,* 4 Car. & P. 570; *Reg.* v. *Warringham,* 15 Jur. 318, 2 Den. C. C. 447, note; *Com.* v. *Morey,* 1 Gray, 462; *Com.* v. *Taylor,* 5 Cush. 608; *Spears* v. *State,* 2 Ohio St. 583; *Reg.* v. *Hearn,* Car. & M. 109; *Reg.* v. *Jarvis,* L. R. 1 C. C. 96; Roscoe, Crim. Ev. 8th ed. 42; *Reg.* v. *Sleeman,* Dears. C. C. 249, 6 Cox, C. C. 245, 2 C. L. R. 129, 23 L. J. Mag. Cas. N. S. 19, 17 Jur. 1082, 2 Week. Rep. 97; *Reg.* v. *Luckhurst,* Dears. C. C. 245, 2 C. L. R. 129, 23 L. J. Mag. Cas. N. S. 18, 17 Jur. 1082, 2 Week. Rep. 97, 6 Cox, C. C. 243; *Smith* v. *Com.* 10 Gratt. 734.

[4] *Hoober* v. *State,* 81 Ala. 51, 1 So. 574; *State* v. *Bostick,* 4 Harr. (Del.) 563; *Hamilton* v. *State,* 77 Miss. 675, 27 So. 606; *State* v. *Whitfield,* 70 N. C. 356; *Wyatt* v. *State,* 25 Ala. 9; *Dinah* v. *State,* 39 Ala. 359; *State* v. *Nelson,* 3 La. Ann. 497.

promise of a private detective, that he would make the prosecution make it easier for the accused is not an inducement offered by a person in authority, within the meaning of the rule;[1] nor is a private detective, hunting up goods, acting in such official capacity that a confession obtained by him is one made to a person in authority.[2] The relation of parent and child does not of itself bring the parties within the rule, but the character of a confession made in such relation depends upon the authority exercised or the inducement held out.[2a] Thus, where the accused was twenty years of age, but his father still exercised his parental authority, and he used means to make his son confess, it was held that the case was reasonably within the rule, so as to render the confession involuntary.[3] But, where the stepfather of the accused advises him to make complaint against others alleged to be concerned in the crime, and that accused might be admitted as a state's witness, it was held to be advice, and not inducement, and that a confession made at the time was voluntary.[4] A confession made to a physician of influence, who was in active conference with the magistrate in regard to the prosecution, in response to inducement held out by him, was held involuntary.[5] Where the confession was made to a physician called to see the accused, who told her that she had better tell all that she knew, the confession was held inadmissible.[6] The fact that a confession is made to a friend of the defendant does not render it involuntary;[7] nor the suggestion of a

[1] *Early* v. *Com.* 86 Va. 921, 11 S. E. 795; *Dumas* v. *State,* 63 Ga. 600; *Stone* v. *State,* 105 Ala. 60, 17 So. 114.

[2] *United States* v. *Stone,* 8 Fed. 232.

[2a] See note in 18 L.R.A.(N.S.) 854.

[3] *State* v. *Force,* 69 Neb. 162, 95 N. W. 42, 12 Am. Crim. Rep. 160.

[4] *People* v. *Burns,* 2 Park. Crim. Rep. 34.

[5] *Beggarly* v. *State,* 8 Baxt. 520. As to confession to physician, see also note in 18 L.R.A.(N.S.) 855.

[6] *Rex* v. *Kingston,* 4 Car. & P. 387.

[7] *Wilson* v. *State,* 44 Tex. Crim. Rep. 430, 71 S. W. 970 See also note in 18 L.R.A.(N.S.) 855.

friend that, if the accused would confess, the prosecution would probably help him, is not made in a relation, nor under such inducement, that it will render the confession inadmissible.[8]

§ 652b. Made in the presence of persons in authority.—Having in mind the rule that a confession made to a person in authority, under the influence of inducement, is generally excluded, it has often been held that a confession made in the presence of a person in authority, upon inducement offered by others, is involuntary, on the principle that such inducement receives the sanction of the persons who are present.[1]

Since, however, the mere fact that a confession is made in the presence of an officer is not of itself sufficient to render the confession involuntary, it follows that the presence of an officer or person in authority, without some act or sanction on the part of such person, does not render the confession involuntary.[2]

§ 653. Condition of party confessing.—It should be remembered that the age, experience, intelligence, and constitu-

[8] *State* v. *Caldwell*, 50 La. Ann. 666, 41 L.R.A. 718, 69 Am. St. Rep. 465, 23 So. 869.

[1] *Reg.* v. *Jones*, 49 J. P. 728; *Reg.* v. *Garner*, 1 Den. C. C. 329, 3 New Sess. Cas. 329, Temple & M. 7, 2 Car. & K. 920, 18 L. J. Mag. Cas. N. S. 1, 12 Jur. 944, 3 Cox, C. C. 175; *People* v. *Silvers*, 6 Cal. App. 69, 92 Pac. 506. See *State* v. *Kirby*, 1 Strobh. L. 378; *Reg.* v. *Laugher*, 2 Car. & K. 225, 2 Cox, C. C. 134; *Reg.* v. *Taylor*, 8 Car. & P. 733; *Reg.* v. *Millen*, 3 Cox, C. C. 507. See *Rex* v. *Pountney*, 7 Car. & P. 302.

[2] *People* v. *Owen*, 154 Mich. 571, 21 L.R.A.(N.S.) 520, 118 N. W. 590; *Jones* v. *State*, 58 Miss. 349; *Com.* v. *Clark*, 130 Pa. 641, 18 Atl. 988; *State* v. *Patterson*, 73 Mo. 695; *State* v. *Armstrong*, 203 Mo. 554, 102 S. W. 503; *State* v. *Church*, 199 Mo. 605, 98 S. W. 16; *Pierce* v. *United States*, 160 U. S. 355, 40 L. ed. 454, 16 Sup. Ct. Rep. 321; *State* v. *Cowan*, 29 N. C. (7 Ired. L.) 239; *United States* v. *Stone*, 8 Fed. 232. See *Reg.* v. *Parker*, 8 Cox, C. C. 465; *Reg.* v. *Zeigert*, 10 Cox, C. C. 555. See *Young* v. *Com.* 8 Bush. 366.

tion, both physical and mental, of prisoners, are so various, and the power of performance so different in the different persons promising, that any rule will necessarily sometimes fail of meeting the needs of a case. The test is whether the accused was likely to view the promise as authoritative. And this test is to be determined by the standard of the person confessing.[1]

§ 653a. Induced by hope or fear.—The ordinary phraseology of the courts, in defining the rule by which the voluntary or involuntary character of the confession is to be measured, is that it is involuntary where made through threats or fear or promise or hope, and this is so often reiterated that it is almost crystalized into a fixed rule. Only two conditions are present when the four qualifying adjectives are used. Thus, if a threat is made it logically follows that the confession is induced by fear, for fear is the effect where the party making the threat has the present ability to carry it into execution. If a promise is made, it logically follows that the confession is induced by hope; for hope of benefit is the effect where the party holding it out has the present ability to carry it into effect. The question is more fully comprehended by stating that the confession is voluntary where it is not the result of any inducement.

We have just considered confessions through threats and promises,[1] and the following rulings illustrate the same principles as phrased by the words "hope or fear." [2]

[1] See supra, § 636. As to age, situation, and character of accused making confession, see note in 18 L.R.A.(N.S.) 786.

[1] Supra, § 646.

[2] *Walker* v. *State,* 52 Ala. 192; *Dupree* v. *State,* 148 Ala. 620, 42 So. 1004; *Runnels* v. *State,* 28 Ark. 121; *Roberts* v. *State,* 75 Ga. 863; *Morgan* v. *State,* 120 Ga. 499, 48 S. E. 238; *Harding* v. *State,* 54 Ind. 359; *State* v. *Castigno,* 71 Kan. 851, 80 Pac. 630; *Brown* v. *Com.* 20 Ky. L. Rep. 1552, 49 S. W. 545; *State* v. *Michel,* 111 La. 434, 35 So. 629; *People* v. *Foley,* 64 Mich. 148, 31 N. W. 94; *State* v. *Jones,* 54 Mo. 478; *State* v. *Armstrong,* 203 Mo.

In the case law it is evident that the court was not controlled as much by the surrounding circumstances, or the condition of the accused, as by the words and manner in which the hope was held out. Otherwise the decisions are in exact conflict. Thus, where an accused called a hotel proprietor to one side, saying that if he would let the case go he would give up the property, it was held voluntary, as not induced by any hope of benefit.[3] But, where the accused said, "If you will take me out of jail, I'll turn up the money," the confession was held to be involuntary.[4] In the first case, it appears that the accused made the offer himself; and in the second case, it appears that the confession was drawn out by an offer on the part of the officer to whom it was made, to assist the defendant if the money could be found. And the latter case seems to support the rule that a confession obtained by a promise of favor is incompetent.[5] The weight of authority is that any confession obtained by telling the ac-

554, 102 S. W. 503; *May* v. *State,* 38 Neb. 211, 56 N. W. 804; *State* v. *Haworth,* 24 Utah, 398, 68 Pac. 155; *State* v. *Bohanon,* 142 N. C. 695, 55 S. E. 797; *Mitchell* v. *Com.* 33 Gratt. 845; *Cornell* v. *State,* 104 Wis. 527, 80 N. W. 745; *State* v. *Young,* 67 N. J. L. 223, 51 Atl. 939; *Gallagher* v. *State,* — Tex. Crim. Rep. —, 24 S. W. 288; *Smith* v. *Com.* 10 Gratt. 734; *Sullins* v. *State,* 53 Ala. 474; *Com.* v. *Kennedy,* 135 Mass. 543; *People* v. *Kennedy,* 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51; *Basye* v. *State,* 45 Neb. 261, 63 N. W. 811; *Warren* v. *State,* 29 Tex. 369; *Clay* v. *State,* 15 Wyo. 42, 86 Pac. 17, 544; *Parker* v. *State,* 34 Ga. 262; *State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128; *Green* v. *State,* 88 Ga. 516, 30 Am. St. Rep. 167, 15 S. E. 10; *Peter* v. *State,* 3 How. (Miss.) 433; *Hopt* v. *Utah,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Bonner* v. *State,* 55 Ala. 242. See *Griner* v. *State,* 121 Ga. 614, 49 S. E. 700; *Hardin* v. *State,* 66 Ark. 53, 48 S. W. 904. See *State* v. *McLaughlin,* 44 Iowa, 82; *Mill* v. *State,* 3 Ga. App. 414, 60 S. E. 4; *Com.* v. *Sheehan,* 163 Mass. 170, 39 N. E. 791; *Com.* v. *Wesley,* 166 Mass. 248, 44 N. E. 228; *Hills* v. *State,* 61 Neb. 589, 57 L.R.A. 155, 85 N. W. 836; *State* v. *Bates,* 25 Utah, 1, 69 Pac. 70.

[3] *Leslie* v. *State,* 35 Fla. 184, 17 So. 559.

[4] *State* v. *Von Sachs,* 30 La. Ann. 942. See *Lacey* v. *State,* 58 Ala. 385.

[5] *Com.* v. *Chabbock,* 1 Mass. 144.

cused that he may be used as a state's witness renders the resulting confession involuntary.[6] Where the accused is led to believe that his statement will have the effect to free him, such a powerful inducement is thus presented to his mind as to lead him to make it without regard to its truth or falsity, and hence it is involuntary.[7]

§ 654. Advice.—As to whether or not mere advice to an accused is sufficient to render the confession that follows involuntary seems to depend upon the fact that if, from the advice, the accused could gather some hope of benefit, by making the confession, it is held involuntary. Thus, under a statute making confessions involuntary when induced by another by the slightest hope of benefit, it was held that any advice to the accused under arrest, given by the officer, to the effect that if he knew anything he had better tell it, rendered the confession involuntary,[1] and such expressions are generally regarded as rendering the confession involuntary.[2] As to admonitions to tell the truth, even where coupled with the

[6] *State* v. *Johnson,* 30 La. Ann. 881; *Johnson* v. *State,* 61 Ga. 305; *Reg.* v. *M'Hugh,* 7 Cox, C. C. 483. See *Thompson* v. *State,* 19 Tex. App. 593.

[7] *Rutherford* v. *Com.* 2 Met. (Ky.) 387; *Shifflet* v. *Com.* 14 Gratt. 652; *State* v. *Phelps,* 11 Vt. 116, 34 Am. Dec. 672; *Clayton* v. *State,* 31 Tex. Crim. Rep. 489, 21 S. W. 255; *United States* v. *Kurtz,* 4 Cranch, C. C. 682, Fed. Cas. No. 15,547; *Anderson* v. *State,* 104 Ala. 83, 16 So. 108. See *State* v. *Carrick,* 16 Nev. 120.

[1] *Dixon* v. *State,* 113 Ga. 1039, 39 S. E. 846.

As to effect of advice and exhortation on admissibility of confession, see note in 18 L.R.A.(N.S.) 812.

[2] *Rex* v. *Walkley,* 6 Car. & P. 175; *Rex* v. *Partridge,* 7 Car. & P. 551; *Reg.* v. *Croydon,* 2 Cox, C. C. 67; *Reg.* v. *Rose,* 67 L. J. Q. B. N. S. 289, 18 Cox, C. C. 717, 78 L. T. N. S. 119, 14 Times L. R. 213, 11 Am. Crim. Rep. 275; *Reg.* v. *Thompson* [1893] 2 Q. B. 12, 62 L. J. Mag. Cas. N. S. 93, 5 Reports, 392, 69 L. T. N. S. 22, 41 Week. Rep. 525, 17 Cox, C. C. 641, 57 J. P. 312, 8 Eng. Rul. Cas. 90, 9 Am. Crim. Rep. 269; *Bram* v. *United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *Rex* v. *Thomas,* 6 Car. & P. 353.

statement that to tell the truth is best, it has been held in this country that the confession is voluntary;[3] but in England the words, "You had better tell the truth," seem to have acquired a sort of technical meaning, importing a threat or a benefit.[4] As anomalous as it may seem, the explanation is that, while the accused is advised to tell the truth, he supposes that what the authorities mean is that he is to say that he is guilty, and this, coupled with the statement that it would be better to tell the truth, furnishes the temptation to make an untrustworthy statement, hence an involuntary confession.[5] In this country, however, the weight of authority is that an inducement cannot be implied from the mere exhortation that it is better, or is best, to tell the truth,[6] nor, under the advice that

[3] *State* v. *Day*, 55 Vt. 510, 4 Am. Crim. Rep. 104.

[4] *Reg.* v. *Jarvis*, L. R. 1 C. C. 96.

[5] *Reg.* v. *Reeve*, L. R. 1 C. C. 362; *Reg.* v. *Laugher*, 2 Car. & K. 225, 2 Cox, C. C. 134; *Reg.* v. *Hatts*, 49 L. T. N. S 780, 48 J. P. 248; *Rex* v. *Griffin*, Russ. & R. C. C. 151; *Reg.* v. *Cheverton*, 2 Fost. & F. 833; *Reg.* v. *Doherty*, 13 Cox, C. C. 23; *Reg.* v. *Fennell*, 14 Cox, C. C. 607, 50 L. J. Mag. Cas. N. S. 126, L. R. 7 Q. B. Div. 147, 44 L. T. N. S. 687, 29 Week. Rep. 742, 45 J. P. 666; *Reg.* v. *Collier*, 3 Cox, C. C. 57; *State* v. *Jackson*, 3 Penn (Del.) 15, 50 Atl. 270; *People* v. *Stewart*, 75 Mich. 21, 42 N. W. 662; *Com.* v. *Preece*, 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107

[6] *Kelly* v. *State*, 72 Ala. 244; *Washington* v. *State*, 106 Ala. 58, 17 So. 546; *Hardy* v. *United States*, 3 App. D. C. 35; *State* v. *Kornstett*, 62 Kan. 221, 61 Pac. 805; *State* v. *Staley*, 14 Minn. 105, Gil. 75; *State* v. *Anderson*, 96 Mo. 241, 9 S. W. 636; *Huffman* v. *State*, 130 Ala. 89, 30 So. 394; *Kelly* v. *State*, 72 Ala. 244; *State* v. *Meekins*, 41 La. Ann. 543, 6 So. 822; *State* v. *Patterson*, 73 Mo. 695; *State* v. *Hopkirk*, 84 Mo. 278; *Heldt* v. *State*, 20 Neb. 496, 57 Am. Rep. 835, 30 N. W. 626; *State* v. *Leuth*, 5 Ohio C. C. 94, 3 Ohio C. D. 48; *Lucasey* v. *United States*, 2 Hayw. & H. 86, Fed. Cas. No. 8,588a; *Sparf* v. *United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168; *King* v. *State*, 40 Ala. 314; *Maull* v. *State*, 95 Ala. 1, 11 So. 218; *Nicholson* v. *State*, 38 Md. 140; *State* v. *Holden*, 42 Minn. 350, 44 N. W. 123; *Fouts* v. *State*, 8 Ohio St. 98; *State* v. *Habib*, 18 R. I. 558, 30 Atl. 462; *State* v. *Gossett*, 9 Rich. L. 428; *Hintz* v. *State*, 125 Wis. 405, 104 N. W. 110; *Roszczyniala* v. *State*, 125 Wis. 414, 104 N. W 113; *Cannada* v. *State*, 29 Tex. App. 537, 16 S. W. 341.

if the accused is guilty a confession could not put him in any worse condition, and that he had better tell the truth at all times.[7] Mere advice to confess if guilty, and, if not, to stand firm,[8] does not render the confession involuntary. Thus, where an officer said that he would help the accused all he could, and that, if the latter was not guilty, he would try to get a compromise, and then adding, "If you did do it, it might be best for you to say so, but, if you did not, stick to it that you did not,"—such advice did not render the confession involuntary.[9]

§ 655. Expectation of compromise or mitigation.—There is no difficulty in holding that confessions, following direct positive promises not to prosecute, or to allow the accused to turn state's evidence, are involuntary and inadmissible, but difficulties arise when the promise is rather in the nature of an opinion, and the punishment is to be lessened rather than to cease. Where a person commits a felony, and, under persuasion of the officer that if he should confess it would go lighter with him, as he might get a jail sentence instead of a penitentiary sentence, there is a strong inducement to make a confession in hope of the benefit inspired by the

[7] *Pearsall* v. *Com.* 29 Ky. L. Rep. 222, 92 S. W. 589; *State* v. *Harman,* 3 Harr. (Del.) 567; *Anderson* v. *State,* — Tex. Crim. Rep. —, 54 S. W. 581. But see *Watts* v. *State,* 99 Md. 30, 57 Atl. 542, supra, III, f, 2; *Miller* v. *State,* 94 Ga. 1, 21 S. E. 128, supra, VII. a; *State* v. *Albert,* 50 La. Ann. 481, 23 So. 609, supra, III, e; supra, § 647; post, § 674; *Fouts* v. *State,* 8 Ohio St. 98; *Young* v. *Com.* 8 Bush, 366; *Stafford* v. *State,* 55 Ga. 592; *State* v. *Whitfield,* 70 N. C. 356; *State* v. *Crank,* 2 Bail. L. 66, 23 Am. Dec. 117; *Matthews* v. *State,* 9 Lea, 128, 42 Am. Rep. 667; *Ulrich* v. *People,* 39 Mich. 245; *Hawkins* v. *State,* 7 Mo. 190; *State* v. *Hagan,* 54 Mo. 192.

[8] *Meinaka* v. *State,* 55 Ala. 47; *Aaron* v. *State,* 37 Ala. 106; *Aaron* v. *State,* 39 Ala. 75; *Dodson* v. *State,* 86 Ala. 60, 5 So. 485. See *State* v. *Whitfield,* 70 N. C. 356; *State* v. *Kornstett,* 62 Kan. 221, 61 Pac. 805.

[9] *Dotson* v. *State,* 88 Ala. 208, 7 So. 259.

lighter punishment promised. Such a mitigation has been held sufficient to render the confession involuntary.[1] But where the promise is a matter of opinion only, it does not render the confession involuntary. Thus, where several were arrested, and the jailer said to one of them that "if the commonwealth should use any of them as witnesses it would prefer her to either of the others," this was held to be an expression of opinion, and not such a promise of benefit as to make the resulting confession involuntary.[2] So, a voluntary offer made by the accused, to return the goods if there is no prosecution, does not render the confession attending the offer involuntary.[3]

§ 656. Of an accomplice.—It is justly held that the prosecution, by calling an accomplice as a witness against his associates, is precluded from subsequently using his admissions on the witness stand to procure his conviction in a prosecution instituted against himself.[1] In such a case the prosecution has tendered a price for the testimony, and it ought to be held to its agreement, where the accomplice actually testifies, for in those cases where he shirks, or breaks his

[1] Supra, § 646e; *State* v. *Jordan*, 87 Iowa, 86, 54 N. W. 63; *People* v. *Johnson*, 41 Cal. 453; *State* v. *Jay*, 116 Iowa, 264, 89 N. W. 1070, 12 Am. Crim. Rep. 93; *Com.* v. *Curtis*, 97 Mass. 577; *State* v. *Smith*, 72 Miss. 420, 18 So. 482; *Harvey* v. *State*, — Miss. —, 20 So. 837; *State* v. *Drake*, 113 N. C. 624, 18 S. E. 166; *Smith* v. *State*, 125 Ga. 252, 54 S. E. 190; *Maxwell* v. *State*, — Miss. —, 40 So. 615; *Johnson* v. *State*, 89 Miss. 773, 42 So. 606; *Sorenson* v. *United States*, 74 C. C. A. 468, 143 Fed. 820. As to effect of promises on admissibility of confession, see also note in 18 L.R.A.(N.S.) 820.

[2] *Fife* v. *Com.* 29 Pa. 429. See *Com.* v. *Tuckerman*, 10 Gray, 173; *State* v. *Bradford*, 156 Mo. 91, 56 S. W. 898.

[3] *State* v. *Emerson*, 48 Iowa, 172. See Wharton, Ev. § 1090; *Murdock* v. *State*, 68 Ala. 567.

[1] *United States* v. *Lee*, 4 McLean, 103, Fed. Cas. No. 15,588; *Jackson* v. *State*, 56 Miss. 311. See, however, *Com.* v. *Woodside*, 105 Mass. 594; *Com.* v. *Dabney*, 1 Rob. (Va.) 696, 40 Am. Dec. 717.

agreement, it is held that he cannot claim protection or immunity from punishment.[2] But, where a confession had been made with reasonable expectation that the accused would become a crown witness, as a return for his expected services, such confession is not admissible where the accused refuses to keep his contract.[3]

§ 657. Collateral inducements to confess.—In excluding the inducement of collateral benefit, as one of the grounds that does not render a confession involuntary, courts draw an arbitrary line. On principles of logic, if a confession is excluded because of a direct benefit which tempts the accused to speak falsely, it is irresistible that the collateral benefits promised in many instances might outweigh the direct benefit. This distinction is shown in a case in Illinois. There the trial court had instructed the jury that if the confessions were obtained from the accused on the promise of an officer, of some collateral benefit, and such promise was carried into effect, and the accused benefit collaterally, still, if no threat or promise had been made in reference to the crime charged, the confession was admissible. The supreme court held such instruction erroneous, and said it should be qualified, as it seemed to have been as originally adopted by the courts from Mr. Greenleaf, where the correct instruction is contained in the following words: The confession "will be received though it were induced . . . by a promise of some collateral benefit or boon, no hope of favor being held out in respect to the criminal charge against

[2] *State* v. *Moran*, 15 Or. 262, 14 Pac. 419; *Com* v. *Knapp*, 10 Pick. 478, 20 Am. Dec. 534; *Moore's Case*, 2 Lewin, C. C. 37; *R.* v. *Holtham*, Stafford Spring Assizes 1843, 2 Russell, Crimes, by Greaves, 958; *R.* v. *Hokes*, Stafford Spring Assizes 1837, 2 Russell, Crimes, by Greaves, 958 (d.)

[3] *Reg.* v. *Gillis*, 11 Cox, C. C. 69, 14 Week. Rep. 845. See *Lauderdale* v. *State*, 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788, 19 S. W. 679; *Neeley* v. *State*, 27 Tex. App. 324, 11 S. W. 376.

him, . . . provided that there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered." [1] But, notwithstanding this distinction, the rule is established that the inducement held out must go directly to the benefit of the accused, by way of his personal escape from punishment.[2]

[1] *Shields* v. *People,* 132 Ill. App. 109. See Greenl. Ev. § 229.

[2] Supra, § 646e, note 7; *Com.* v. *Knapp,* 9 Pick. 496, 20 Am. Dec. 491 (not excluded where it was supposed that the promise would benefit a child or relative); *State* v. *Grant,* 22 Me. 171 (not excluded because made to "save his brother"); *Shifflet* v. *Com.* 14 Gratt. 652 (not excluded because it might benefit accused's mother); *State* v. *Wentworth,* 37 N. H. 196 (not excluded by promise of reward); *McIntosh* v. *State,* 52 Ala. 355 (not excluded by promise of reward); *McKinney* v. *State,* 134 Ala. 134, 32 So. 726 (not excluded by promise of reward); *Stone* v. *State,* 105 Ala. 60, 17 So. 114 (not excluded by promise of employment); *Page* v. *Com.* 27 Gratt. 954.

But in *Com.* v. *Wilson,* 186 Pa. 1, 40 Atl. 283, 11 Am. Crim. Rep. 261, where a detective told accused that if he could show hardihood and nerve he could be admitted to a band of robbers which made large sums of money by robbing banks and railway trains, and the accused confessed crimes to show his qualifications, the court held that the confession was made for a distinct purpose; namely, to satisfy the supposed band that he was capable of crimes as great, and possessed of a record as black, as they, and that he could be trusted by them, and there was a temptation to represent himself worse than he really was, but that the confession should go to the jury to determine his credibility.

See also *Rex* v. *Todd,* 13 Manitoba L. Rep. 364; *Brewer* v. *State,* 72 Ark. 145, 78 S. W. 773 (promise on the part of officers that they would "stay with him" does not exclude); *State* v. *Hopkirk,* 84 Mo. 278 (statement to the accused that if he could get out on bond he could be employed to drive a bus does not exclude); *State* v. *Hardee,* 83 N. C. 619 (promise to accused, by a woman, that if he would tell about the burning she would marry him, does not exclude); *State* v. *Tatro,* 50 Vt. 483, 3 Am. Crim. Rep. 165 (promise to the accused, who was in solitary confinement, that he might go below with the other prisoners, does not exclude); *Rex* v. *Lloyd,* 6 Car. & P. 393 (promise by an officer, that he will allow accused to see his wife if he will tell where the stolen property is, does not exclude).

But see *Rex* v. *Sexton,* cited in note to *Reg.* v. *Moore,* 2 Bennet & H. Lead. Crim. Cas. 581; *Hunt* v.

§ 658. **Issue is whether the influence applied was such as to induce a false statement.**—The distinct issue in every case is, Was there a causal relation between the inducement relating to the crime charged and the confession as a result? If such relation did not exist, then the confession is admissible. It is generally assumed that the inducement is likely to produce a false confession; and this finds expression from the courts in such phrases as, "Here was an inducement sufficient to exclude," or, "There being no inducement, the confession is admissible." Hence the settled rule that where the confession proved against the accused is without inducement it is always admissible,[1] and in England, Keating, J., expresses

State, 135 Ala. 1, 33 So. 329 (promise of protection against wrath of codefendants does not exclude).

[1] This rule is so universal that a citation of an earlier and a later ruling in each state illustrates its adherence to and acceptance by the courts. *United States* v. *Charles,* 2 Cranch, C. C. 76, Fed. Cas. No. 14,786; *Bram* v. *United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *Harrold* v. *Oklahoma,* 94 C. C. A. 415, 169 Fed. 47, 17 A. & E. Ann. Cas. 868; *Aiken* v. *State,* 35 Ala. 399; *Gregg* v. *State,* 106 La. 44, 17 So. 321; *Love* v. *State,* 22 Ark. 336; *Adcock* v. *State,* 73 Ark. 625, 83 S. W. 318; *People* v. *Jim Ti.* 32 Cal. 60; *People* v. *Siemsen,* 153 Cal. 387, 95 Pac. 863; *Beery* v. *United States,* 2 Colo. 186; *State* v. *Potter,* 18 Conn. 166; *Simon* v. *State,* 5 Fla. 285; *Green* v. *State,* 88 Ga. 516, 30 Am. St. Rep. 167, 15 S. E. 10; *Griner* v. *State,* 121 Ga. 614, 49 S. E. 700; *Miller* v. *People,* 39 Ill. 457; *Ginn* v. *State,* 161 Ind. 292, 68 N. E. 294; *State* v. *Neubauer,* 145 Iowa, 337, 124 N. W. 312; *State* v. *Kornstett,* 62 Kan. 221, 61 Pac. 805; *Carpenter* v. *Com.* 29 Ky. L. Rep. 107, 92 S. W. 552; *State* v. *Hamilton,* 42 La. Ann. 1204, 8 So. 304; *State* v. *Gianfala,* 113 La. 463, 37 So. 30; *State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128; *Lowe* v. *State,* 111 Md. 1, 24 L.R.A. (N.S.) 439, 73 Atl. 637, 18 A. & E. Ann. Cas. 744; *Com.* v. *Tuckerman,* 10 Gray, 173; *Com.* v. *Preece,* 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107; *Flagg* v. *People,* 40 Mich. 706, 3 Am. Crim. Rep. 70; *Serpentine* v. *State,* 1 How. (Miss.) 256; *Ammons* v. *State,* 80 Miss. 592, 18 L.R.A.(N.S.) 768, 92 Am. St. Rep. 607, 32 So. 9, 12 Am. Crim. Rep. 82; *State* v. *Brockman,* 46 Mo. 566; *State* v. *Spaugh,* 200 Mo. 571, 98 S. W. 55; *Territory* v. *McClin,* 1 Mont. 394; *State* v. *Berberick,* 38 Mont. 423, 100 Pac. 209, 16 A. & E. Ann. Cas. 1077; *Taylor* v. *State,* 37 Neb. 788, 56 N. W. 623; *State* v. *George,* 50 N. C. (5 Jones, L.) 233;

the rule in the following words: "In my time it used to be held that a mere caution given by a person in authority would exclude an admission, but since there has been a return to doctrines more in accordance with the common-sense view. The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth, from the fear of the threat, or hope of profit from the promise." [2] And where a prisoner was taken before a magistrate on a charge of forgery, and the prosecutor said, in the hearing of the prisoner, that he considered him as the tool of G., and the magistrate then told the prisoner to be sure to tell the truth, and upon this the prisoner made a statement, this was held receivable.[3] The same conclusion was reached

State v. *Daniels,* 134 N. C. 641, 46 S. E. 743; *Heddendorf* v. *State,* 85 Neb. 747, 124 N. W. 150; *Roesel* v. *State,* 62 N. J. L. 216, 41 Atl. 408; *People* v. *Wentz,* 37 N. Y. 303; *People* v. *Rogers,* 192 N. Y. 331, 85 N. E. 135, 15 A. & E. Ann. Cas. 177; *Spears* v. *State,* 2 Ohio St. 583; *Wade* v. *State,* 2 Ohio C. C. N. S. 189, 25 Ohio C. C. 279; *Fife* v. *Com.* 29 Pa. 429; *Com.* v. *Willis,* 223 Pa. 576, 72 Atl. 857; *State* v. *Kirby,* 1 Strobh. L. 155; *State* v. *Perry,* 74 S. C. 551, 54 S. E. 764; *Deathridge* v. *State,* 1 Sneed, 75; *Allen* v. *State,* 12 Tex. App. 190; *Sowers* v. *State,* 55 Tex. Crim. Rep. 113, 113 S. W. 148; *State* v. *Phelps,* 11 Vt. 116, 34 Am. Dec. 672; *Miller* v. *State,* 25 Wis. 384; *Anderson* v. *State,* 133 Wis. 601, 114 N. W. 112; *State* v. *Poole,* 42 Wash. 192, 84 Pac. 727; *Horne* v. *State,* 12 Wyo. 80, 73 Pac. 705. See *Rex* v. *Derrington,* 2 Car. & P. 418; *State* v. *Carson,* 36 S. C. 524, 15 S. E. 588.

If the confession is involuntary, it is equally inadmissible, if offered merely to impeach the accused, where it is offered as a confession. *People* v. *Yeaton,* 75 Cal. 415, 17 Pac. 544.

[2] *Reg.* v. *Reason,* 12 Cox, C. C. 228; *Reg.* v. *Dingley,* 1 Car. & K. 637; *Reg.* v. *Jones* (1871) 12 Cox, C. C. 241, 27 L. T. N. S. 241; *Com.* v. *Ackert,* 133 Mass. 402; *People* v. *McGloin,* 1 N. Y. Crim. Rep. 105, 154; *State* v. *Simon,* 50 Mo. 370; *State* v. *Vaigneur,* 5 Rich. L. 391; *Merritt* v. *State,* 59 Ala. 47; *Sylvester* v. *State,* 71 Ala. 17; *Wilson* v. *State,* 3 Heisk. 232; *Rice* v. *State,* 47 Ala. 38; *Levy* v. *State,* 49 Ala. 390; *State* v. *Alphonse,* 34 La. Ann. 9; *State* v. *Davis,* 34 La. Ann. 351; *State* v. *Revells,* 34 La. Ann. 381, 44 Am. Rep. 436; *State* v. *Platte,* 34 La. Ann. 1061.

[3] *Rex* v. *Court,* 7 Car. & P. 486; *Rex* v. *Thomas,* 7 Car. & P. 345; *Com.* v. *Morey,* 1 Gray, 461; *State* v. *Freeman,* 12 Ind. 100.

where the confession was the result of friendly advice, though the person advising was a stockholder in a corporation defrauded by the defendant.[4]

§ 659. Confessions made under assurances of secrecy are admissible.—Assurances that the confession would not be disclosed, if not made by a person in authority in such a way as to lead to a false statement, do not exclude a confession they induced, such assurances being likely rather to elicit than to suppress truth;[1] and on the same reasoning, where the defendant confessed his guilt to a fellow prisoner on being assured by the latter that one criminal cannot testify against another, it was held that the confession was admissible.[2]

§ 660. Spiritual inducements.—The inducement must refer to a temporal benefit, for hopes which are referable only to a future state are not within the principle which excludes confessions obtained by improper influence.[1] Hence, the fact that the confession was made in response to spiritual exhortations, even by a clergyman or priest, does not exclude them.[2]

[4] *Com.* v. *Tuckerman,* 10 Gray, 173. See also *Com.* v. *Whittemore,* 11 Gray, 201; *Hopt* v. *Utah,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401.

[1] *Rex* v. *Thomas,* 7 Car. & P. 345; *Com.* v. *Knapp,* 9 Pick. 496, 20 Am. Dec. 491; *State* v. *Darnell,* Houst. Crim. Rep. (Del.) 321; *Dumas* v. *State,* 63 Ga. 600. Though see *Murphy* v. *State,* 63 Ala. 1.

[2] *State* v. *Mitchell,* 61 N. C. (Phill. L.) 447.

[1] *Rex* v. *Gilham,* 1 Moody, C. C. 186, Car. Crim. Law, 51; *Com.* v. *Drake,* 15 Mass. 161; *State* v. *Bostick,* 4 Harr. (Del.) 564; *Matthews* v. *State,* 9 Lea, 128, 42 Am. Rep. 637; *Rex* v. *Gilham,* 1 Moody, C. C. 219; *Com.* v. *Goodwin,* 186 Pa. 218, 65 Am. St. Rep. 852, 40 Atl. 412, 11 Am. Crim. Rep. 271; Joy, Confessions, 51.

[2] *Reg.* v. *Dingley,* 1 Car. & K. 637; *Rex* v. *Gilham,* 1 Moody, C. C. 186, Car. Crim. Law, 51; as explained in Joy, Confessions, 186. See, however, *Reg.* v. *Griffin,* 6 Cox, C. C. 219; supra, § 507; *Reg.* v. *Sleeman,* 6 Cox, C. C. 245, Dears.

§ 661. Under duress.—Some confusion has arisen through the use of the word "duress" as the equivalent of the words imprisonment or personal restraint. Duress, in law, means the compulsion or restraint by which a person is illegally forced to do or forbear some act, either through actual imprisonment or physical violence or threatened violence, called duress *per minas*.

The violence or threats must be such as to inspire a person of ordinary firmness with the fear of serious injury to his person, reputation, or fortune, and, when exercised upon the wife, husband, ascendants, or descendants of such person, may constitute duress of him.[1]

It will not be contended that a confession under such duress is otherwise than involuntary and inadmissible. But, notwithstanding, text writers and courts often say in terms, that confessions under duress are voluntary. Hence, the conclusion is that where the word is loosely used, in speaking of confessions, it has no other or stronger meaning than imprisonment or personal restraint, for the purpose of detention and safe-keeping. And when it is said, in this connection, that a confession is made under duress, it is meant custody, imprisonment, or necessary personal restraint only.

When a party is compelled by duress to make a self disserving statement, this statement cannot be put in evidence against him.[2] Legal imprisonment, however, does not operate to ex-

C. C. 249, 2 C. L. R. 129, 23 L. J. Mag. Cas. N. S. 19, 17 Jur. 1082, 2 Week. Rep. 97; Ga. Crim. Code, 1895, § 1007.

[1] Webster's New Int. Dict. Duress (3); *First Nat. Bank* v. *Sargent*, 65 Neb. 594, 59 L.R.A. 296, 91 N. W. 595; *Darling* v. *Hines*, 5 Ind. App. 319, 32 N. E. 109; *Brown* v. *Pierce*, 7 Wall. 214, 19 L. ed. 136. See also *McCoy* v. *State*, 78 Ga. 490, 3 S. E. 768, and note in 18 L.R.A.(N.S.) 795, as to effect of duress on admissibility of confession.

[2] *Stockfleth* v. *De Tastet*, 4 Campb. 11, 2 Rose, 282, 15 Revised Rep. 720; *Robson* v. *Alexander*, 1 Moore, C. P. 448; *Tilley* v. *Damon*, 11 Cush. 247; *Foss* v. *Hildreth*, 10 Allen, 76; *Speer* v. *State*, 4 Tex. App. 474. See supra, § 646; *State*

clude a confession made during its continuance when no threats or promises are used.[3] Thus, when a prisoner, after his arrest, upon being interrogated why he had killed his wife, replied, "Because I loved her;" and said further, "I killed her because she loved another better than me;" and also said to a fellow prisoner in jail, that he had killed her, but if it was to do again he would not do it; it was held that there was nothing in the circumstances under which these confessions were made to render them inadmissible.[4]

A confession is not obtained by duress where the accused makes it in response to the sheriff's question as to whether or not he remembered a certain name; nor in a subsequent conversation in which accused told the sheriff that he would plead guilty, to which the sheriff replied that in that event he would speak to the judge and get the defendant off as easily as possible;[5] nor where the magistrate required the accused to enter a plea, since accused could plead either guilty or not guilty, as he might elect;[6] nor where the confession was made in the presence of the prosecutrix's father, who was excited, and who made threats against accused;[7] nor where accused made a confession when he was in the room next to that in which the inquest was being held, and accused was in the pres-

v. *Patterson*, 73 Mo. 695; *Balbo* v. *People*, 80 N. Y. 484.

[3] *Com.* v. *Cuffee*, 108 Mass. 285; *People* v. *Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Hartung* v. *People*, 4 Park. Crim. Rep. 324; *Com.* v. *Mosler*, 4 Pa. 264; *Stephen* v. *State*, 11 Ga. 225; *Meinaka* v. *State*, 55 Ala. 47; *Redd* v. *State*, 68 Ala. 492; *Spicer* v. *State*, 69 Ala. 159; *Jackson* v. *State*, 69 Ala. 251; *State* v. *Guy*, 69 Mo. 430; *Austin* v. *State*, 14 Ark. 556; supra, §§ 315, 556, 557, 647, 649; *State* v. *Graham*, 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182.

Contra, *Day* v. *State*, 63 Ga. 667; supra, § 315; post, § 796.

[4] *Bush* v. *Com.* 13 Ky. L. Rep. 425, 17 S. W. 330; *State* v. *Freeman*, 1 Speers, L. 57.

[5] *People* v. *Warner*, 104 Mich. 337, 62 N. W. 405.

[6] *State* v. *Briggs*, 68 Iowa, 416, 27 N. W. 358.

[7] *People* v. *Rich*, 133 Mich. 14, 94 N. W. 375.

ence of a dozen people, including his mother.[8] But, where the prosecutrix shut up the accused in a smokehouse, and said to her. "Now I reckon you will tell me something about burning the house. I believe you know all about it," the confession was held involuntary, as having been induced by duress, it having created a hope in the mind of accused that she would be released if she confessed, and, if she did not, that her imprisonment would be continued.[9]

It is to be observed that, when duress is applied, the burden of proof is on the prosecution, to show that the accused was not influenced by it to make his confession.[10]

§ 662. When in custody.—A confession is admissible when voluntarily made to a public officer, even though the prisoner be in custody of such officer, unless the confession be in some sense elicited by threats or promises.[1]

[8] *State* v. *Efler*, 85 N. C. 585.

But, in a case in South Carolina, the court seems to have extended the rule beyond reasonable bounds. In that case a number of citizens had made and passed resolutions charging accused with a crime. They then prepared a letter, which the presenter asked him to sign, saying that he thought it would be best to sign it, and if accused did sign it the presenter thought the whole matter would be dropped, the accused saying he signed it to protect his family. *State* v. *Carroll*, 30 S. C. 85, 14 Am. St. Rep. 883, 8 S. E. 433. Here there was evident compulsion, and the inducement that the matter would be dropped and punishment avoided.

[9] *Hoober* v. *State*, 81 Ala. 51, 1 So. 574.

[10] *Young* v. *State*, 68 Ala. 569.

[1] *Rex* v. *Wild*, 1 Moody, C. C. 452; *Rex* v. *Thornton*, 1 Moody, C. C. 27; *Rex* v. *Gibney*, Jebb, C. C. 15; *Rex* v. *Upchurch*, 1 Moody, C. C. 465; *Reg.* v. *Johnston*, 15 Ir. C. L. Rep. 60; *Reg.* v. *Kerr*, 8 Car. & P. 179; *Rex* v. *Rees*, 7 Car. & P. 569; *Rex* v. *Bartlett*, 7 Car. & P. 832; *Rex* v. *Ellis*, Ryan & M. 432. See *Reg.* v. *Mick*, 3 Fost. & F. 822; *Reg.* v. *Bodkin*, 9 Cox, C. C. 403; *R.* v. *Devlin*, 2 Craw. & D. C. C. (Ir.) 152; *Murphy* v. *People*, 63 N. Y. 590; *Balbo* v. *People*, 80 N. Y. 484; *Cox* v. *People*, 80 N. Y. 500; *Com.* v. *Harman*, 4 Pa. 269; *State* v. *Guy*, 69 Mo. 430; *Jones* v. *State*, 58 Miss. 349. See *People* v. *Wentz*, 37 N. Y. 303; *Young* v. *Com.* 8 Bush, 366; *Reg.* v. *Cheverton*, 2 Fost. & F. 833; *Hilburn* v. *State*, 121 Ga. 344, 49 S. E. 318; *State* v. *Lewis*, 112 La. 872, 36 So.

§ 663. In answer to questions assuming guilt.—The accused's confession will not be rejected as evidence merely because it was made in answer to a question which assumed his guilt.[1] Thus, where the officer who committed the prisoner on a charge of murder asked "whether, if it was to do again, he would do it," and the reply was, "Yes sir-ree, Bob;" it was held that both the question and answer were admissible in evidence, as well as the fact that, in making the reply, the prisoner's "manner was short."[2] From the reply made, it is seen that the accused was defiant, and could have been in no manner influenced to his detriment by the question. On the

788; *Com.* v. *Chance,* 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *People* v. *Parsons,* 105 Mich. 177, 63 N. W. 69; *State* v. *Flemming,* 130 N. C. 688, 41 S. E. 549. See *Com.* v. *Goodwin,* 186 Pa. 218, 65 Am. St. Rep. 852, 40 Atl. 412, 11 Am. Crim. Rep. 271; *Clay* v. *State,* 15 Wyo. 42, 86 Pac. 17, 544; *Ivey* v. *State,* 4 Ga. App. 828, 62 S. E. 565; *State* v. *Pamelia,* 122 La. 207, 47 So. 508; *People* v. *Owen,* 154 Mich. 571, 21 L.R.A.(N.S.) 520, 118 N. W. 590; *State* v. *Wooley,* 215 Mo. 620, 115 S. W. 417; *State* v. *Brooks,* 220 Mo. 74, 119 S. W. 353; *Tyner* v. *United States,* 12 Okla. Crim. Rep. 689, 103 Pac. 1057; *Crosby* v. *State,* 93 Ark. 156, 137 Am. St. Rep. 80, 124 S. W. 781; *Gilmore* v. *State,* 3 Okla. Crim. Rep. 434, 27 L.R.A.(N.S.) 151, 105 Pac. 801; *Sims* v. *State,* 59 Fla. 38, 52 So. 193; *Toomer* v. *State,* 112 Md. 285, 76 Atl. 118; supra, § 651a.

As to confessions made when accused is under personal restraint, see note in 18 L.R.A.(N.S.) 795.

[1] *Rex* v. *Thornton,* 1 Moody, C. C. 28; *Rex* v. *Gibney,* Jebb, C. C. 15; *Cox* v. *People,* 80 N. Y. 500; *State* v. *Sanders,* 84 N. C. 728; Phillipps, Ev. 427; *Miller* v. *State,* 40 Ala. 54; *White* v. *State,* 133 Ala. 122, 32 So. 139; *State* v. *Staley,* 14 Minn. 105, Gil. 75; *State* v. *Barrington,* 198 Mo. 23, 95 S. W. 235; *Roesel* v. *State,* 62 N. J. L. 216, 41 Atl. 408; *State* v. *Hand,* 71 N. J. L. 137, 58 Atl. 641; *Com.* v. *Hamilton,* Lewis, Crim. Law, 422, cited in 1 Brightley's Dig. (Pa.) 972; *Birkenfeld* v. *State,* 104 Md. 253, 65 Atl. 1; *Austin* v. *State,* 14 Ark. 556; *State* v. *Tazwell,* 30 La. Ann. 884; *State* v. *McGee,* 36 La. Ann. 206; *Carroll* v. *State,* 23 Ala. 28, 58 Am. Dec. 282; *McClain* v. *Com.* 110 Pa. 263, 1 Atl. 45; *State* v. *Blodgett,* 50 Or. 329, 92 Pac. 820; *State* v. *Turner,* 122 La. 371, 47 So. 685; *People* v. *Wentz,* 37 N. Y. 304; *Grant* v. *State,* 55 Ala. 201. As to confessions elicited by questions see note in 18 L.R.A.(N.S.) 799.

[2] *Carroll* v. *State,* 23 Ala. 28, 58 Am. Dec. 282.

other hand, where an officer not only assumes guilt, in his question, but accompanies the questions by menaces, amounting to a demand that the prisoner must speak, this may render the confession involuntary.[3] And this is true where the question is of such a character that it is calculated to entrap the accused in such a manner that he does not realize the effect of his answer.[4]

§ 664. Under oath.—In the earlier cases, confessions under oath were generally excluded.[1] The reason for this was that the "examination of the prisoner should be without oath, and, of the others, upon oath," [2] so that where the accused was examined on oath the confession was rejected, because of the illegal manner in which it was taken, and not merely because of the oath.[3] But, when the disqualifications of the accused were removed, and he was allowed to become a witness in his own behalf, at his own election the rule ceased when the

[3] *State* v. *Auguste,* 50 La. Ann. 488, 23 So. 612. See *Kelly* v. *State,* 72 Ala. 244.

[4] *McClain* v. *Com.* 110 Pa. 263, 1 Atl. 45. See *Peck* v. *State,* 147 Ala. 100, 41 So. 759.

[1] *Rex* v. *Wilson,* Holt, N. P. 597, Richards, C. B.; *Rex* v. *Haworth,* 4 Car. & P. 256, Parke, J. semble; *Rex* v. *Webb,* 4 Car. & P. 564, Garrow, B.; *Rex* v. *Tubby,* 5 Car. & P. 530, Vaughan, B.; *Rex* v. *Lewis,* 6 Car. & P. 162, Gurney B. semble; *Rex* v. *Rivers,* 7 Car. & P. 177, Park, J.; *Reg.* v. *Wheeley,* 8 Car. & P. 250, Alderson, B.; *Reg.* v. *Wheater,* 2 Moody, C. C. 45, 2 Lewin, C. C. 157, semble; Joy, Confessions, 62. As to confessions under oath, see also note in 18 L.R.A.(N.S.) 872.

[2] Buller, N. P. 242.

[3] *Reg.* v. *Scott,* Dears. & B. C. C. 47, 25 L. J. Mag. Cas. N. S. 128, 2 Jur. N. S. 1096, 4 Week. Rep. 777, 7 Cox, C. C. 164; *United States* v. *Graff,* 14 Blatchf. 381, Fed. Cas. No. 15,244; *Reg.* v. *Wheater,* 2 Moody, C. C. 45, 2 Lewin, C. C. 157; Starkie, Ev. 11, 38.

See *Steele* v. *State,* 76 Miss. 387, 24 So. 910; *State* v. *Glass,* 50 Wis. 218, 36 Am. Rep. 845, 6 N. W. 500; *People* v. *Gibbons,* 43 Cal. 557; *United States* v. *Duffy,* 1 Cranch, C. C. 164, Fed. Cas. No. 14,998; *United States* v. *Bascadore,* 2 Cranch, C. C. 30, Fed. Cas. No. 14,536; *Schoeffler* v. *State,* 3 Wis. 823.

reason ceased. Hence, the mere administration of an oath, to the accused, will not render the confession involuntary;[4] nor the fact that the confession was made under oath, as a witness, or otherwise, in prior judicial proceedings, if no compulsion nor undue influence was used.[5] Thus, voluntary admissions of an accused, given in evidence at a fire inquest, and reduced to writing, and signed by him, are admissible on trial for arson;[6] and so of a bankrupt's schedule of assets, signed by him, in bankruptcy proceedings.[7] Declarations, also, of the accused, though made as a witness before a committee of the house of commons, under compulsory process, were hold-

[4] *United States* v. *Graff*, 14 Blatchf. 381, Fed. Cas. No. 15,244; *United States* v. *Brown*, 40 Fed. 457; *Com.* v. *Wesley*, 166 Mass. 248, 44 N. E. 228; *Com.* v. *Clark*, 130 Pa. 641, 18 Atl. 988; *People* v. *Owen*, 154 Mich. 571, 21 L.R.A. (N.S.) 520, 118 N. W. 590; *Rex* v. *Tubby*, 5 Car & P. 530; *Jackson* v. *State*, 56 Miss. 311; *State* v. *Lyts*, 25 Wash. 347, 65 Pac. 530; *Salas* v. *State*, 31 Tex. Crim. Rep. 485, 21 S. W. 44.

[5] *Rex* v. *Ellis*, Ryan & M. 432; *Rex* v. *Thornton*, 1 Moody, C. C. 27; *Reg.* v. *Garbett*, 1 Den. C. C. 236, 2 Car. & K. 474, 2 Cox, C. C. 448; *Reg.* v. *Wheater*, 2 Moody, C. C. 45, 2 Lewin, C. C. 157; *Reg.* v. *Goldshede*, 1 Car. & K. 657; *Rex* v. *Tubby*, 5 Car. & P. 530; *Com.* v. *King*, 8 Gray, 501; *Com.* v. *Reynolds*, 122 Mass. 454; *Hendrickson* v. *People*, 10 N. Y. 13, 61 Am. Dec. 721; *Teachout* v. *People*, 41 N. Y. 7; *People* v. *McGloin*, 91 N. Y. 241, 1 N. Y. Crim. Rep. 155; *Anderson* v. *State*, 26 Ind. 89; *Alston* v. *State*, 41 Tex. 39.

Contra: *Josephine* v. *State*, 39 Miss. 615; *People* v. *Mitchell*, 94 Cal. 550, 29 Pac. 1106; *Newton* v. *State*, 21 Fla. 53; *Dumas* v. *State*, 63 Ga. 600; *Com.* v. *Wesley*, 166 Mass. 248, 44 N. E. 228; *People* v. *Butler*, 111 Mich. 483, 69 N. W. 734; *People* v. *Hendrickson*, 8 How. Pr. 404; *Com.* v. *Clark*, 130 Pa. 641, 18 Atl. 988; *Kirby* v. *State*, 23 Tex. App. 13, 5 S. W. 165; *Dickerson* v. *State*, 48 Wis. 288, 4 N. W. 321.

[6] *Com.* v. *Bradford*, 126 Mass. 42; post, § 665.

See *Reg.* v. *Coote*, 9 Moore, P. C. C. N. S. 463, 42 L. J. P. C. N. S. 45, L. R. 4 P. C. 599, 29 L. T. N. S. 111, 21 Week. Rep. 553, 12 Cox, C. C. 557.

[7] *Abbott* v. *People*, 75 N. Y. 602; *Reg.* v. *Wheater*, 2 Moody, C. C. 45, 2 Lewin, C. C. 157; *Reg.* v. *Sloggett*, Dears. & B. C. C. 656, 7 Cox, C. C. 139, 25 L. J. Mag. Cas. N. S. 93, 2 Jur. N. S. 764, 4 Week. Rep. 487.

See *United States* v. *Prescott*, 2 Dill. 405, Fed. Cas. No. 16,085.

en by Abbott, Ch. J.,[8] to be admissible afterwards against him upon an indictment for corruptly granting licenses to public houses. So, a statement made voluntarily, under oath, by a witness before a coroner's inquest, in answer to interrogatories there put to him, although he was at the time informed that he was suspected of the crime, has been held subsequently admissible when the accused was on trial for the homicide.[9] But where two persons were arrested, placed in jail on a murder charge, and, while in custody, taken before the coroner's jury, and, without being informed that they were not compelled to testify, were sworn and examined as witnesses, not on their own motion but on motion of the coroner, with regard to the homicide and their connection with it, confessions or inculpatory statements elicited at such examination were held inadmissible against them.[10] And where persons were subpœnaed as witnesses to appear before a coroner's jury engaged in investigating the cause of the death of the deceased, and were duly sworn and testified, although they were suspected of the murder, even though they made no objection to testifying, and were not represented by counsel, nor warned that the state-

[8] *Rex* v. *Merceron,* 2 Starkie, 366; *Reg.* v. *Scott,* 25 L. J. Mag. Cas. N. S. 128, 7 Cox, C. C. 164, Dears. & B. C. C. 47, 2 Jur. N. S. 1096, 4 Week. Rep. 777.

See *Reg.* v. *Hillam,* 12 Cox, C. C. 174; *Reg.* v. *Widdop,* L. R. 2 C. C. 3, 42 L. J. Mag. Cas. N. S. 9, 27 L. T. N. S. 693, 21 Week. Rep. 176, 12 Cox, C. C. 251; Roscoe, Crim. Ev. 50.

[9] *Teachout* v. *People,* 41 N. Y. 7.

See *Rex* v. *Haworth,* 4 Car. & P. 254; *Rex* v. *Tubby,* 5 Car. & P. 530; *Reg.* v. *Braynell,* 4 Cox, C. C. 402; *State* v. *Gilman,* 51 Me. 206; *Hendrickson* v. *People,* 1 Park. Crim. Rep. 409; *People* v. *Banker,* 2 Park. Crim. Rep. 26; *People* v. *McMahon,* 2 Park. Crim. Rep. 663; *Snyder* v. *State,* 59 Ind. 105; *State* v. *Broughton,* 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507; *State* v. *Vaigneur,* 5 Rich. L. 391; *Schoeffler* v. *State,* 3 Wis. 823; *Dickerson* v. *State,* 48 Wis. 288, 4 N. W. 321.

See *Rex* v. *Lewis,* 6 Car. & P. 161; *Rex* v. *Davis,* 6 Car. & P. 177; *Reg.* v. *Owen,* 9 Car. & P. 238; *People* v. *McMahon,* 15 N. Y. 384; *People* v. *Soto,* 49 Cal. 69.

[10] *Adams* v. *State,* 129 Ga. 248, 17 L.R.A.(N.S.) 468, 58 S. E. 822, 12 A. & E. Ann. Cas. 158.

ments might be used against them, nor that they were privileged to refuse to testify, it was held that on a subsequent trial for the homicide the statements and confessions elicited were not admissible.[11] But where a defendant, being mistaken for a witness, was partially examined upon oath, this was held not to vitiate a confession subsequently made by him after due caution from the magistrate.[12] It is held, however, that when a party under charge of committing a particular crime, is called by the prosecution, and compelled to answer under oath as to such crime, on the trial of another party, his testimony is regarded as given under compulsion, and cannot afterwards be introduced against him when he is on trial; and the same privilege is applied to all cases in which he is forced to answer under oath when charged with the crime as to which his confession is sought to be used against him.[13] And, when the defendant is in custody under charge of crime, and is then sworn and questioned by the examining magistrate, his answers thus compelled cannot afterwards be put in evidence against him.[14] But the fact that the statement was made by the defendant on oath on a former trial, when he was examined in his own behalf, does not exclude it, he having made it voluntarily, though under oath.[15] And where the accused, of his own choice, and after warning, takes an oath before the grand jury, such oath does not render a confession thereupon made, involuntary.[16]

[11] *Tuttle* v. *People,* 33 Colo. 243, 70 L.R.A. 33, 79 Pac. 1035, 3 A. & E. Ann. Cas. 513.

See *State* v. *Matthews,* 66 N. C. 106; supra, § 622c.

[12] *Rex* v. *Webb,* 4 Car. & P. 564.

[13] *Jackson* v. *State,* 56 Miss. 311; *People* v. *McMahon,* 15 N. Y. 384; 1 Archbold, Crim. Pr. & Pl. Pomeroy's ed. 386; post, § 668.

[14] Post, §§ 668, 669; *Com.* v. *Harman,* 4 Pa. 269.

[15] See *State* v. *Witham,* 72 Me. 531; *People* v. *Arnold,* 43 Mich. 303, 38 Am. Rep. 182, 5 N. W. 385; *State* v. *Eddings,* 71 Mo. 545, 36 Am. Rep. 496; *State* v. *Jefferson,* 77 Mo. 136; *Dumas* v. *State,* 63 Ga. 600; *Mack* v. *State,* 48 Wis. 271, 4 N. W. 449; *State* v. *Glass,* 50 Wis. 218, 36 Am. Rep. 845, 6 N. W. 500; *People* v. *Kelley,* 47 Cal. 125; supra, § 463.

[16] Supra, § 622c; *Jenkins* v. *State,*

§ 665. Confession involuntary when answers are given under compulsion.—The privilege extends to all cases where the defendant can prove that the answers offered in evidence were given by him when examined as a witness in another suit, in which he claimed the protection of the court, and had still been illegally compelled to answer.[1] Testimony so obtained is excluded, not, as it seems, because it may possibly be untrue, but because the right of the witness to be silent has been infringed; and it is deemed expedient, on grounds of public policy, to uphold the broad legal maxim, that no man shall be forced to criminate himself.[2] But if the witness is wrongfully compelled to answer, and he does answer, that does not render his evidence illegal as respects other parties. It is the witness's own affair, and another party cannot complain of it.[3]

§ 666. English practice on preliminary examination.—In England the procedure is regulated by the indictable offenses act 1848, 11 & 12 Vict. chap. 42, the criminal law amendment act 1867, 30 & 31 Vict. chap. 35, and the criminal evidence act 1898, 61 & 62 Vict. chap. 36.

At common law a party accused of a crime cannot be required to answer any questions which may expose him to pros-

35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182; *United State* v. *Kirkwood,* 5 Utah, 123, 13 Pac. 234; *Wisdom* v. *State,* 42 Tex. Crim. Rep. 579, 61 S. W. 926; *Giles* v. *State,* 43 Tex. Crim. Rep. 561, 67 S. W. 411; *Harshaw* v. *State,* 94 Ark. 343, 127 S. W. 745.

[1] Supra, §§ 463 et seq.; *Reg.* v. *Garbett,* 1 Den. C. C. 236, 2 Car. & K. 474, 2 Cox, C. C. 448; *Reg.* v. *Coote,* L. R. 4 P. C. 599, 9 Moore, P. C. C. N. S. 463, 42 L. J. P. C. N. S. 45, 29 L. T. N. S. 111, 21 Week. Rep. 553, 12 Cox, C. C. 557.

[2] Taylor, Ev. § 822.

See *State* v. *Spier,* 86 N. C. 600.

[3] *Reg.* v. *Kinglake,* 11 Cox, C. C. 499, 22 L. T. N. S. 335, 18 Week. Rep. 805; *Reg.* v. *Coote,* 12 Cox, C. C. 557, 42 L. J. P. C. N. S. 45, L. R. 4 P. C. 599, 9 Moore, P. C. C. N. S. 463, 29 L. T. N. S. 111, 21 Week. Rep. 553.

See *Com.* v. *Bradford,* 126 Mass. 42, cited supra, § 664.

ecution. In England, however, in the days of Philip and Mary, a statute was passed authorizing such an examination, under certain conditions; and this statute has been reproduced, with various modifications, in several of the states. By these statutes, which are now noticed because they are of the same character as several American statutes on the same topic, "it would seem that in order to render a prisoner's statement strictly valid as a statutory confession, the following circumstances must all have occurred: The charge must have been read to the accused;[1] all the witnesses must have been examined in his presence, and the depositions read to him after the examinations were completed; he must then, and not till then, be twice cautioned by the justice: first, generally;[2] and, secondly, as to the inefficacy of any promises or threats which may have been formerly held out to him; his whole statement must next be taken down in his own words;[3] it must then be read to him,[4] and he must be pressed for his signature,[5] though the act is silent as to the effect of his refusing to sign it, or even to admit its correctness; the justice must also sign the statement;[6] and this being done, it must be kept with the depositions, and be transmitted together with them and certain other documents to the court where the trial is to be had, on or before the opening of such court."

Since the passing of the criminal evidence act 1898, it has been usual, but is not essential, to inform the accused that he is free, if he wishes, to be sworn as a witness in his own be-

[1] Taylor, Ev. § 812.
See supra, § 622c, note 12.

[2] See *State* v. *Rorie*, 74 N. C. 148; *State* v. *Spier*, 86 N. C. 600.

[3] See *Reg.* v. *Roche*, Car. & M. 341; *R.* v. *Sexton*, and *R.* v. *Mallett*, cited in 2 Russell, Crimes, 867.

[4] See § 18; 2 Russell, Crimes, 881, 882.

[5] See 2 Russell, Crimes, 881, 882; *Rex* v. *Lambe*, 2 Leach, C. L. 552; *Rex* v. *Thomas*, 2 Leach, C. L. 637; *Foster's Case*, 1 Lewin, C. C. 46; *Hirst's Case*, 1 Lewin, C. C. 46; *Rex* v. *Telicote*, 2 Starkie, 483; *Rex* v. *Pressly*, 6 Car. & P. 183.

[6] See *Rex* v. *Tarrant*, 6 Car. & P. 182; Taylor, Ev. § 815.

half. If he elects to be so sworn, the evidence which he gives is taken down in the form of a deposition and read over to and signed by him.

§ 668. Confession of accused, where compelled to answer under oath.—But the testimony of an accused party, taken as such, is not admissible, when such accused party is put on his oath and sworn and examined, not on his own motion, but on the motion of the prosecution.[1] This rule is founded upon the unreliable as well as the inquisitorial character of such statements; and therefore where a man, having been arrested by a constable, without a warrant, upon suspicion of having committed murder, was compelled to answer under oath as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder.[2] The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate.[3]

§ 669. Confession of accused, where voluntary, under oath.—Where an accused voluntarily offers himself as a witness in a proceeding, the confessions or statements then made can be proved against him in another trial.[1] Thus,

[1] *Rex* v. *Lewis*, 6 Car. & P. 161; *Rex* v. *Davis*, 6 Car. & P. 177; *United States* v. *Williams*, 1 Cliff. 5, Fed. Cas. No. 16,707; *Schoeffler* v. *State*, 3 Wis. 823; *People* v. *Gibbons*, 43 Cal. 557; *State* v. *Garvey*, 25 La. Ann. 191; Taylor, Ev. § 818.

As to admissibility of confessions under oath, see also note in 18 L.R.A.(N.S.) 872.

[2] *People* v. *McMahon*, 15 N. Y. 384; *State* v. *Young*, 60 N. C. (1 Winst. L.) 126.

See supra, § 664; *Teachout* v. *People*, 41 N. Y. 7; *Dickerson* v. *State*, 48 Wis. 288, 4 N. W. 321.

[3] *Com.* v. *Harman*, 4 Pa. 269; supra, § 665.

[1] Supra, § 664; *People* v. *Mitchell*, 94 Cal. 550, 29 Pac. 1106; *Burnett* v. *State*, 87 Ga. 622, 13 S. E. 552; *State* v. *Lewis*, 39 La. Ann. 1110, 3 So. 343; *Com.* v. *Bradford*, 126 Mass. 42; *Hendrickson* v. *People*, 10 N. Y. 13, 61 Am. Dec. 721; *State* v. *Vaigneur*, 5 Rich. L. 391; *Alston* v. *State*, 41 Tex. 39; *State*

where a magistrate told an accused, on examination before him for the larceny of a watch, that, unless he accounted for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing, and warned him not to commit himself by his confessions, it was held that the statements of the accused then made, on his examination, were admissible as a confession on a subsequent trial.[2]

§ 670. Confessions obtained by trick, artifice, or deception.—A confession is not rendered inadmissible by the fact that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though the mistake was created by artifice, with a view to obtain the confession, supposing there was nothing in the artifice calculated to produce an untrue confession.[1] Nor do false statements made to the defendant exclude the answer, if such false

v. *Hopkins*, 13 Wash. 5, 42 Pac. 627; *Schoeffler* v. *State*, 3 Wis. 823; *State* v. *Coffee*, 56 Conn. 399, 16 Atl. 151; *State* v. *Carroll*, 85 Iowa, 1, 51 N. W. 1159; *Jenkins* v. *State*, 35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182; *United States* v. *Kirkwood*, 5 Utah, 123, 13 Pac. 234; *Powell* v. *State*, — Miss. —, 23 So. 266.

[2] *State* v. *Cowan*, 29 N. C. (7 Ired. L.) 239.

See *Reg.* v. *Stripp*, Dear. C. C. 648, 25 L. J. Mag. Cas. N. S. 109, 2 Jur. N. S. 452, 4 Week. Rep. 489, 7 Cox, C. C. 97, 36 Eng. L. & Eq. Rep. 587; *Beggarly* v. *State*, 8 Baxt. 520; *State* v. *Branham*, 13 S. C. 389; *State* v. *Rigsby*, 6 Lea, 554; *Shrivers* v. *State*, 7 Tex. App. 450.

But see *Honeycutt* v. *State*, 8 Baxt. 371; *Henry* v. *State*, 38 Tex. Crim. Rep. 306, 42 S. W. 559; *Robinson* v. *State*, — Tex. Crim. Rep. —, 63 S. W. 869; *People* v. *Kelley*, 47 Cal. 125; *State* v. *Silverio*, 79 N. J. L. 482, 76 Atl. 1069; *State* v. *Longstreth*, — N. D. —, 121 N. W. 1114.

[1] *R.* v. *Burley*, cited in 1 Phillipps, Ev. 104; *Rex* v. *Derrington*, 2 Car. & P. 418; *Re 3,109 Cases of Champagne*, 1 Ben. 241, Fed. Cas. No. 14,012; *Com.* v. *Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Com.* v. *Tuckerman*, 10 Gray, 173; *Com.* v. *Hanlon*, 3 Brewst. (Pa.) 461; *Price* v. *State*, 18 Ohio St. 418; *State* v. *Fortner*, 43 Iowa, 494; *State* v. *Phelps*, 74 Mo. 128; supra, § 644.

For note as to admissibility of confessions obtained by artifice or fraud, see 18 L.R.A.(N.S.) 840.

statements did not amount to promises or threats.[2] Confessions elicited by a detective while disguised as a confederate are in like manner admissible.[3]

Such has been the unbroken line of authority during all periods of the law.[4] And yet the impression that follows the use of the words "trick, artifice, or deception," is so unpleasant that courts show a tendency to dissent from the rule. Where supported, it is generally argued that society and crime are at war with each other, and that capture by surprise or ambush or masked battery is permissible.[5] In answer to this, it can be said truly that the rack and the wheel sometimes produced true confessions, but experience showed that such confessions were generally unreliable.[6] There are cases holding that where the deception amounts to an actual fraud, the confession is to be deemed involuntary. Thus, where a confession was induced by the prosecutor falsely stating to the

[2] See *Murphy* v. *People*, 63 N. Y. 590.

[3] Supra, § 440.

[4] Joy, Confessions, p. 42, cases cited; *State* v. *Hopkirk*, 84 Mo. 278; *Fife* v. *Com.* 29 Pa. 429; *Gates* v. *People*, 14 Ill. 433; *State* v. *Staley*, 14 Minn. 105, Gil. 75; *State* v. *Phelps*, 74 Mo. 128; *Hardy* v. *United States*, 3 App. D. C. 35; *Com.* v. *Hanlon*, 3 Brewst. (Pa.) 461; *Com.* v. *Flood*, 152 Mass. 529, 25 N. E. 971; *Marable* v. *State*, 89 Ga. 425, 15 S. E. 453; *Rex* v. *Ryan*, 9 Ont. L. Rep. 137, 4 A. & E. Ann. Cas. 875; *State* v. *Jones*, 54 Mo. 478; *State* v. *Wilson*, 172 Mo. 420, 72 S. W. 696; *State* v. *Rush*, 95 Mo. 199, 8 S. W. 221; *Burley's Case*, cited in note to *Reg.* v. *Moore*, 2 Bennett & H. Lead. Crim. Cas. 202; *Price* v. *State*, 18 Ohio St. 418; *State* v. *McClain*, 137 Mo. 307, 38 S. W. 906; *Jefferds* v. *People*, 5 Park. Crim. Rep. 522; *Cornwall* v. *State*, 91 Ga. 277, 18 S. E. 154; *People* v. *White*, 176 N. Y. 331, 68 N. E. 630; *King* v. *State*, 40 Ala. 314; *Stone* v. *State*, 105 Ala. 60, 17 So. 114; *Burton* v. *State* 107 Ala. 108, 18 So. 284; *State* v. *Van Tassel*, 103 Iowa, 6, 72 N. W. 497; *Presley* v. *State*, 59 Ala. 98; *State* v. *Harrison*, 115 N. C. 706, 20 S. E. 175; *Com.* v. *Cressinger*, 193 Pa. 326, 44 Atl. 433; *Spencer* v. *State*, 48 Tex. Crim. Rep. 580, 90 S. W. 638; *State* v. *Allen*, 37 La. Ann. 685.

[5] *Com.* v. *Cressinger*, 193 Pa. 326, 44 Atl. 433; *State* v. *Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *Com.* v. *Goodwin*, 186 Pa. 218, 60 Am. St. Rep. 852, 40 Atl. 412, 11 Am. Crim. Rep. 271.

[6] *Heldt* v. *State*, 20 Neb. 496, 57 Am. Rep. 835, 30 N. W. 626.

accused that he knew all about his alleged guilt, it was held involuntary, on the ground that under the circumstances such a statement was likely to produce fear or intimidation.[7] In a case of alleged larceny, the prosecuting witness sent word to the accused, stating that the prosecutor's wife and boy had seen accused taking the goods, and that it would be better for him to come in and tell what he got, and pay for it, and, unless he did it, he would certainly prosecute him, which was an untrue statement. Misled by the statement, accused, anxious to stop the prosecution, settled for a price below a felony theft. Under the circumstances, the confession was not voluntary, and should have been excluded.[8] In this case the confession could have been properly rejected upon the ground that a compromise is not a confession, and that the court should have so instructed the jury. Again, where the accused was charged with arson, and the prosecuting witness said to him, "If you will tell me I wont bother you; I wont tell anyone," the confession was held to have been made under a promise that he would not be exposed or troubled if he confessed, and was therefore inadmissible.[9]

While these cases are opposed to the weight of authority, yet, nevertheless, they are authority for a rigid inspection of the testimony by which the confession is proved. As the value of a confession depends upon the testimony that supports it, there is every reason to state that, where the trick or deception contravenes principles of truth, the confession itself should not go to the jury without a cautionary instruction to be attached to it in relation to the credibility of the testimony by which it is supported.[10] On the same principle that confessions obtained by trick, artifice, or deception are admissible

[7] *State* v. *Brockman*, 46 Mo. 566.

[8] *Cook* v. *State*, 32 Tex. Crim. Rep. 27, 40 Am. St. Rep. 758, 22 S. W. 23.

See *State* v. *Campbell*, 129 Iowa, 154, 105 N. W. 395; *Austine* v. *People*, 51 Ill. 236.

[9] *White* v. *State*, 70 Ark. 24, 65 S. W. 937, 12 Am. Crim. Rep. 86.

[10] Courts, from necessity, must

where there is nothing in the means used calculated to produce an untrue confession, a letter given by the accused to a person to be posted is admissible in evidence, though surreptitiously detained and opened.[11] But, where an accused, under a vigorous examination by officers, during which he is informed that a stone, which he threw, hit and killed the deceased, and he is told by the officers that he had better tell the whole truth, in response to which he wrote a letter to his father, asking

often accept testimony procured by "setting a thief to catch a thief." But this should only be done in those cases where justice would otherwise fail. In speaking of this method of obtaining confessions, Justice Sherwood very vigorously observes: "In a former dissenting opinion I spoke of the testimony of Dingfelder, the assumed name of the detective, Jno. F. McCullough, who testified as to extra-judicial confessions made by the defendant, while the detective was in jail with him. In that opinion, I held that the testimony of the detective should not have gone to the jury without a cautionary instruction as to the credibility to be attached to it, similar to an instruction in relation to the testimony of an accomplice, but upon more mature reflection, I am satisfied that I should have taken a more advanced position. The detective, by a previous arrangement and concert of action between the circuit attorney Clover, the assistant circuit attorney McDonald, and Furlong, forged the name of Morris to a check, was arrested per agreement on a warrant duly issued; indicted for the forgery on testimony which was really false, but believed by the witnesses to be true, and cast into jail, where he obtained the alleged confession from the defendant. I hold now, that such a confession, so obtained by such means, should be altogether rejected. Such a course on the part of the sworn officers of the law cannot be denounced in terms too strong. It was a prostitution of the process of the court; it was a corrupting of the very fountain head of justice; and the pure administration of the law, and public policy, imperatively demand that evidence so procured should be spurned with infinite loathing whenever offered. It is true that the opinion of the majority condemns, "as gently as any sucking dove," the method of obtaining the alleged confession, but at the same time accepts the fruits of the nefarious work. This is condemnation in theory, but approval in practice. Sherwood dissenting opinion *State* v. *Brooks,* 92 Mo. 542, 607, 5 S. W. 257, 330.

[11] *Rex* v. *Derrington,* 2 Car. & P. 418; *Com.* v. *Goodwin,* 186 Pa. 218, 65 Am. St. Rep. 852, 40 Atl. 412, 11 Am. Crim. Rep. 271; *Sanders* v. *State,* 113 Ga. 267, 38 S. E. 841.

for assistance, in which he admitted the alleged facts as to the killing, such letter is not admissible in evidence against him.[12] And, where a defendant in jail dictated letters to his wife, admitting the crime, which letters were intercepted and used on the trial, the court held the letters inadmissible, on the ground that they were communications between husband and wife.[13] And, upon the same principle of a privileged communication, where a confession has been obtained by a party falsely representing himself to be an attorney, the court would exclude it on that ground.[14]

§ 671. Where inducement is not held out directly to accused.—Whenever a promise or threat is held out in such a way as to reach the defendant, although not made to the defendant directly, it will exclude the confession. "Thus, where a superior clerk in the postoffice said to the wife of a postman, who was in custody for opening and detaining a letter, 'Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;' the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of this statement.[1] So where, in a case of murder, government had published a handbill offering pardon to anyone of the offenders, except the person who struck the blow, who should give such information as would lead to the conviction of his accomplices; and it appeared that the prisoner was aware of this offer, and was induced by it to make a confession,—the court held that what he said could not be given in evidence." [2]

[12] *People* v. *McCullough*, 81 Mich. 25, 45 N. W. 515.

[13] *Com.* v. *Fisher*, 221 Pa. 538, 70 Atl. 865.

See supra, § 644.

[14] See *People* v. *Barker*, 60 Mich. 277, 306, 1 Am. St. Rep. 501, 27 N. W. 539; *State* v. *Russell*, 83 Wis. 330, 335, 53 N. W. 441.

See *Wilson* v. *State*, 16 Ind. 392.

[1] *Reg.* v. *Harding*, Armstrong, M. & O. 340.

[2] *Reg.* v. *Boswell*, Car. & M. 584; Taylor, Ev. § 808.

§ 672. Confession in presence of party in authority.—The presence of persons in authority does not *per se* exclude a confession,[1] nor does the fact that the custody was without a warrant.[2] Hence the confessions of a prisoner in jail, made by him in the presence of an officer, who had no control over the jail, to a friend who advised him to tell the truth, such friend being in no way connected with the prosecution, and the officer not in any way countenancing the advice, have been held admissible.[3] The same position was taken in a case where the evidence was that the prisoner, when arrested, made certain confessions to the officer, who used no threats and made no promises, and the prisoner was very much frightened at the time, and spoke partly in English and partly in German, the officer not understanding the latter.[4]

§ 673. Apparent authoritative influence is ground for exclusion.—A confession is only to be excluded on the ground of undue influence where it is elicited by temporal inducement, *e. g.*, by threat, promise, or hope of favor held out to the party, in respect of his escape from the charge against him, by a person in authority, under circumstances likely to lead to a false statement; or where there is reason to presume that such person appeared to the party to sanction such a threat or promise.[1] If the influence applied was such as to

See *Com.* v. *Morey*, 1 Gray, 461; *Ward* v. *People*, 3 Hill, 395.

[1] *Cox* v. *People*, 80 N. Y. 500; *State* v. *Cook*, 15 Rich. L. 29; *Wiley* v. *State*, 3 Coldw. 362; supra, § 652.

[2] *Balbo* v. *People*, 80 N. Y. 484.

[3] Supra, § 649; *Reg.* v. *Parker*, Leigh & C. C. C. 42, 30 L. J. Mag. Cas. N. S. 144, 7 Jur. N. S. 586, 4 L. T. N. S. 451, 9 Week. Rep. 699, 8 Cox, C. C. 465; *Com.* v. *Smith*, 119 Mass. 305; *State* v. *Gossett*, 9 Rich. L. 428; *People* v. *Thoms*, 3 Park. Crim. Rep. 256; *Aaron* v. *State*, 37 Ala. 106; supra, §§ 649, 652b.

[4] *People* v. *Thoms*, 3 Park. Crim. Rep. 256.

See *State* v. *Rorie*, 74 N. C. 148.

[1] Supra, §§ 650–655; *Rex* v. *Upchurch*, 1 Moody, C. C. 465; *Rex* v. *Jones*, Russ. & R. C. C. 152; *Rex* v. *Jenkins*, Russ. & R. C. C.

make the defendant believe that his condition would be bettered by making a confession, true or false, or that he would be made to suffer if he did not confess, the confession is to be excluded; but if not, the confession is admissible.

§ 674. Construction of expressions tending to elicit a false confession.—Where the arresting officer says: "It is better for a man who is guilty to plead guilty, for he gets a lighter sentence;" [1] and where he says: "You had better tell all about it;" [2] these expressions have been held to vitiate confessions so induced.[3] Undoubtedly the line of discrimination between the words last quoted and others which have been subjected to a contrary interpretation is difficult to draw accurately. But the principle is of easy definition. Was the inducement likely to lead to a false confession? If so, the confession must be rejected.[4]

V. VOLUNTARY CHARACTER AND COMPETENCY GENERALLY.

§ 674a. Voluntary character question for the court.—Whether the confession was voluntary is an independent is-

492; *Reg.* v. *Hearn,* Car. & M. 109; *Rex* v. *Thompson,* 1 Leach, C. L. 291; *Rex* v. *Parratt,* 4 Car. & P. 570; *Rex* v. *Enoch,* 5 Car. & P. 539; *Rex* v. *Mills,* 6 Car. & P. 146; *Rex* v. *Thomas,* 6 Car. & P. 353; *Rex* v. *Lloyd,* 6 Car. & P. 393; *Rex* v. *Court,* 7 Car. & P. 486; *Rex* v. *Shepherd,* 7 Car. & P. 579; *Reg.* v. *Drew,* 8 Car. & P. 140; *Reg.* v. *Sleeman,* 1 Dears. C. C. 269; *R.* v. *Nolan,* 1 Craw. & D. C. C. (Ir.) 74; *R.* v. *Cain,* 1 Craw. & D. C. C. (Ir.) 37; *Wright's Case,* 1 Lewin, C. C. 48; *R.* v. *Sexton,* 1 Deacon, Crim. Law, 424, 427; *Rex* v. *Thornton,* 1 Moody, C. C. 27; *Rex* v. *Simpson,* 1 Moody, C. C. 410; *R.* v. *Moody,* 2 Craw. & D. C. C. (Ir.) 547; *Reg.* v. *Luckhurst,* Dears. C. C. 245, 6 Cox, C. C. 243, 2 C. L. R. 129, 23 L. J. Mag. Cas. N. S. 18, 17 Jur. 1082, 2 Week. Rep. 243, 22 Eng. L. & Eq. Rep. 604; *Com.* v. *Culver,* 126 Mass. 464, 3 Am. Crim. Rep. 81; *People* v. *Wentz,* 37 N. Y. 303; *King* v. *State,* 40 Ala. 314; *Miller* v. *People,* 39 Ill. 457; *Redd* v. *State,* 69 Ala. 257; supra, §§ 623, et seq.; Joy, Confessions, 25; supra, §§ 646, et seq.

[1] *Com.* v. *Curtis,* 97 Mass. 574.

[2] See cases cited supra, § 651; also *State* v. *York,* 37 N. H. 175; *Vaughan* v. *Com.* 17 Gratt. 576.

[3] See supra, §§ 650–655.

[4] Supra, §§ 646d, 650, 658.

sue, to be determined by the court. The defendant is entitled to produce evidence to prove that it was induced by threats or promises to rebut proof that it was voluntary.[1] The prosecution may produce evidence that it was voluntary to rebut proof that it was induced by threats or promises.[2]

§ 675. During sleep and prayer.—A large factor in determining the voluntary character of a confession is the mental condition of the accused.[1] Manifestly, then, during sleep, when the reflective faculties are suspended, and the bodily condition rests almost wholly upon the action of the involuntary muscles, and there is generally a complete loss of consciousness, confessions under such conditions are involuntary and therefore inadmissible.[2] It is said, however, in one case, that the operation of the mind was an enigma, and its expressions in the unconsciousness of sleep were frequently vagaries and fictions, but sometimes born of reality, and hence an ejaculation of the accused that "they have deviled me so much about this that I don't care how it goes; I only consented to his death and gave him the poison,"—was held admissible, and its character, as to being voluntary, was a question for the jury.[3] Under any reasonable interpretation of voluntary character, the words, "they have deviled me so much about this that I don't care how it goes," would show not only that it was involuntary, but induced by a continuous inquisition. From this case it seems that there are courts controlled by the idea that there is some mystery about sleep that lends peculiar weight to expressions uttered in a state of unconsciousness,

[1] Post, § 689; s. p. *State* v. *Platte*, 34 La. Ann. 1061.

[2] *Com.* v. *Ackert*, 133 Mass. 402; post, § 689; supra, §§ 622h–622j.

[1] Supra, § 635.

See also note in 18 L.R.A.(N.S.) 788.

[2] *People* v. *Robinson*, 19 Cal. 40; *Daniels* v. *State*, 78 Ga. 98, 6 Am. St. Rep. 238.

See *Lanergan* v. *People*, 39 N. Y. 39; post, § 680.

[3] *State* v. *Morgan*, 35 W. Va. 260, 13 S. E. 385.

and that gives them a free and voluntary character. In a Georgia case [4] the court had to deal with a confession claimed to be made during prayer, when the accused was confined in his cell, but his expression was overheard by the jailer. There it seems to have been admitted on the theory that even where a person could not be compelled to testify, or where the communication was privileged, yet a third person overhearing could testify to what was heard.

§ 676. During intoxication.—While a disturbance or a partial loss of full control of the mental faculties is not in itself a ground for declaring the confession to be involuntary, the circumstances are to be taken into consideration by the jury when they come to consider the evidence.[1] Hence, confessions made during intoxication are not involuntary on account of the intoxication,[2] and particularly so where the circumstances of the confession show deliberation and intelligence on the part of the accused,[3] and this is true even though the intoxication was induced by a police officer, who sought in this way to lead the accused to confess.[4] But where the sheriff, on arresting accused, furnished him with liquor and then

[4] *Woolfolk* v. *State,* 85 Ga. 69, 99, 11 S. E. 814.

See *Betts* v. *State,* 66 Ga. 508.

[1] *White* v. *State,* 32 Tex. Crim. Rep. 625, 25 S. W. 784; *Com.* v. *Howe,* 9 Gray, 110; *State* v. *Laughlin,* 171 Ind. 66, 84 N. E. 756; *State* v. *Hogan,* 117 La. 863, 42 So. 352; *State* v. *Feltes,* 51 Iowa, 495, 1 N. W. 755; *People* v. *Kent,* 41 Misc. 191, 83 N. Y. Supp. 948; *Com.* v. *Chance,* 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551.

[2] *State* v. *Berry,* 50 La. Ann. 1309, 24 So. 329; *Lester* v. *State,* 32 Ark. 727; *State* v. *Grear,* 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472; *Williams* v. *State,* 12 Lea, 211; *Mixon* v. *State,* 36 Tex. Crim. Rep. 66, 35 S. W. 394.

[3] *Leach* v. *State,* 99 Tenn. 584, 42 S. W. 195.

[4] *Rex* v. *Spilsbury,* 7 Car. & P. 187; *Gore* v. *Gibson,* 13 Mees. & W. 625, 14 L. J. Exch. N. S. 151, 9 Jur. 140; *Jefferds* v. *People,* 5 Park. Crim. Rep. 522; *Eskridge* v. *State,* 25 Ala. 30; *People* v. *Ramirez,* 56 Cal. 533, 38 Am. Rep. 73; *State* v. *Hopkirk,* 84 Mo. 278.

See also note in 18 L.R.A.(N.S.) 843.

questioned him to obtain a confession, such conduct is unjustifiable, and the confession must be excluded,[5] and this rule has found positive expression in, at least, one statute.[6]

§ 676a. By children.—A confession of guilt by a child does not stand on any different footing than that of an adult. The determining question in such case is the age, intelligence, and general understanding. A safe rule, and a rule based both on logic and justice, is that the court ought not to receive the confession of a child who could not qualify as a witness.[1] It should first be shown that the child is reasonably intelligent, and old enough to understand the effect of what he says and to comprehend the situation.[2] However, a child under fourteen years of age may be convicted of a crime upon his extrajudicial confession, if the fact of the crime be otherwise proved, where it is first shown that the child was able to distinguish between right and wrong, with respect to the offense for which he is on trial.[3] But a confession obtained from a child through threats and fear, where he was privately examined and without friends or counsel to advise him, is inadmissible.[4]

[5] *McNutt* v. *State,* 68 Neb. 207, 94 N. W. 143, 14 Am. Crim. Rep. 127; *McCabe* v. *Com.* 3 Sadler (Pa.) 426, 8 Atl. 45.

[6] Georgia Code 1895, § 5194.

[1] *Grayson* v. *State,* 40 Tex. Crim. Rep. 573, 51 S. W. 246.

See *Ford* v. *State,* 75 Miss. 101, 21 So. 524.

[2] *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404; *Birkenfield* v. *State,* 104 Md. 253, 65 Atl. 1; *Rex* v. *Thornton,* 1 Moody, C. C. 27; *State* v. *Aaron,* 4 N. J. L. 231, 7 Am. Dec. 592.

[3] *Martin* v. *State,* 90 Ala. 602, 24 Am. St. Rep. 844, 8 So. 858; *Com.* v. *Smith,* 119 Mass. 305; *Bartley* v. *People,* 156 Ill. 234, 40 N. E. 831; *Com.* v. *Preece,* 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107; *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404; *State* v. *Bostick,* 4 Harr. (Del.) 563; *Pennsylvania* v. *Dillon,* 4 Dall. 116, 1 L. ed. 765.

[4] *Hoober* v. *State,* 81 Ala. 51, 1 So. 574; *State* v. *Mason,* 4 Idaho, 543, 43 Pac. 63; *State* v. *Doherty,* 2 Overt. 80.

See *Hampton* v. *State,* 167 Ala. 73, 52 So. 659.

§ 676b. Of different offense.—A confession made by an accused of an offense different from that with which he is charged, and in no way connected with it, is not admissible on his trial for the offense charged.[1] But where the different offense confessed is a part of the same scheme, or is so connected as not to be severed from the offense on trial, it is admissible.[2]

§ 676c. Caution as affecting character of the confession.—Unless otherwise provided by statute,[1] a confession otherwise voluntary is not rendered inadmissible because the accused was not cautioned before making it. As stated by Mr. Joy, "A confession is admissible although it does not appear that the prisoner was warned that what he said would

[1] *State* v. *Jackson,* 95 Mo. 623, 8 S. W. 749; *Com.* v. *Wilson,* 186 Pa. 1, 40 Atl. 283, 11 Am. Crim. Rep. 261; *Tidwell* v. *State,* 40 Tex. Crim. Rep. 38, 47 S. W. 466, 48 S. W. 184; *Drury* v. *Territory,* 9 Okla. 398, 60 Pac. 101, 13 Am. Crim. Rep. 300.

See *Neiderluck* v. *State,* 21 Tex. App. 320, 17 S. W. 467; *Wilson* v. *State,* 84 Ala. 426, 4 So. 383.

See *United States* v. *Kurtz,* 4 Cranch, C. C. 682, Fed. Cas. No. 15,547; *Lismore* v. *State,* 94 Ark. 207, 126 S. W. 853; *People* v. *Williams,* 159 Mich. 518, 124 N. W. 555; *State* v. *Wenzel,* 72 N. H. 396, 56 Atl. 918; *State* v. *Lawrence,* 74 Ohio St. 38, 77 N. E. 266, 6 A. & E. Ann. Cas. 888; *Robinson* v. *State,* 55 Tex. Crim. Rep. 42, 114 S. W. 811.

[2] *State* v. *Cowen,* 56 Kan. 470, 43 Pac. 687; *State* v. *Jones,* 171 Mo. 401, 94 Am. St. Rep. 786, 71 S. W. 680; *Campos* v. *State,* 50 Tex. Crim. Rep. 289, 97 S. W. 100; *Pilgrim* v. *State,* 59 Tex. Crim. Rep. 231, 128 S. W. 128.

See *State* v. *Poole,* 42 Wash. 192, 84 Pac. 727; *State* v. *Dalton,* 43 Wash. 278, 86 Pac. 590.

[1] Under the provisions of the Texas Criminal Code, where the accused is under arrest, his confession to the officer or to others cannot be used against him unless he has been first cautioned that they may be used against him. *Greer* v. *State,* 31 Tex. 129; *Wilson* v. *State,* 32 Tex. 112; *Adams* v. *State,* 34 Tex. 526; *Carter* v. *State,* 37 Tex. 362; *Maddox* v. *State,* 41 Tex. 205; *Haynie* v. *State,* 2 Tex. App. 168; *Davis* v. *State,* 2 Tex. App. 588; *Marshall* v. *State,* 5 Tex. App. 273; *Jackson* v. *State,* 7 Tex. App. 363; *Kennon* v. *State,* 11 Tex. App. 356; *Young* v. *State,* 54 Tex. Crim. Rep. 417, 113 S. W. 276.

be used against him, or although it appears that he was not so warned," [2] and this expresses the rule upon the subject.[3]

Caution pertains particularly to judicial examinations, such as those held before a committing magistrate, and on the trial of the accused. In such examinations, or at such trial, it is the duty of the court to advise the accused of his legal rights, where the statute provides that he may or may not testify, at his own election, and this caution is regulated by the statute itself.[4] Aside, then, from the statute, a confession otherwise voluntary is admissible, notwithstanding the fact that the accused was not cautioned.[5] However, it has been observed that after the fact appears that the influence of hope or fear existed, inducing a confession, an explicit warning must be given the accused of the consequences of a confession, and it must also be clear that he understood such warning, before his confessions are admissible in evidence.[6] This is the humane procedure, and, while the absence of caution does not affect the voluntary character of an otherwise admissible confession, the practice ought to prevail that the accused is advised of his legal

[2] Joy, Confessions, § 5, p. 45.

[3] *Simon* v. *State,* 36 Miss. 636; *Golson* v. *State,* 124 Ala. 8, 26 So. 975; *State* v. *Rugero,* 117 La. 1040, 42 So. 495; *Com.* v. *Robinson,* 165 Mass. 426, 43 N. E. 121; *State* v. *Barrington,* 198 Mo. 23, 95 S. W. 235; *Sampson* v. *State,* 54 Ala. 241; *Reg.* v. *Priest,* 2 Cox, C. C. 378; *State* v. *Ellington,* 4 Idaho, 529, 43 Pac. 60; *State* v. *Hogan,* 117 La. 863, 42 So. 352; *Coil* v. *State,* 62 Neb. 15, 86 N. W. 925; *State* v. *Howard,* 92 N. C. 772; *State* v. *Hand,* 71 N. J. L. 137, 58 Atl. 641; *Dill* v. *State,* 35 Tex. Crim. Rep. 240, 60 Am. St. Rep. 37, 33 S. W. 126; *State* v. *Baker,* 58 S. C. 111, 36 S. E. 501, 12 Am. Crim. Rep. 107; *People* v. *Kennedy,* 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51; *People* v. *Randazzio,* 194 N. Y. 147, 87 N. E. 112.

[4] *Daniels* v. *State,* 57 Fla. 1, 48 So. 747.

[5] *Reg.* v. *Arnold,* 8 Car. & P. 621, 622; *Reg.* v. *Priest,* 2 Cox, C. C. 378; *Simon* v. *State,* 36 Miss. 636, 639; *State* v. *Hand,* 71 N. J. L. 137, 58 Atl. 641; *Com.* v. *Masler,* 4 Pa. 264; *State* v. *Baker,* 58 S. C. 111, 36 S. E. 501, 12 Am. Crim. Rep. 107; *State* v. *Workman,* 15 S. C. 540, 545.

[6] *Van Buren* v. *State,* 24 Miss. 512.

rights wherever the conditions are such that it is reasonably certain that he does not himself fully understand them.[7]

VI. How Far Original Improper Influence Vitiates Subsequent Confessions.

§ 677. Confession subsequent to an involuntary confession; burden of proof.—Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible.[1] The question of whether or not such subsequent confession can be received in evidence is for the judge, and each case

[7] *State* v. *Andrews,* 35 Or. 388, 58 Pac. 765; *McNish* v. *State,* 45 Fla. 83, 110 Am. St. Rep. 65, 34 So. 219, 12 Am. Crim. Rep. 125.

[1] Joy, Confessions, p. 69; Russell, Crimes, 7th Eng. ed. p. 2180; 2 Russell, Crimes, 382; *Reg.* v. *Hewett,* Car. & M. 534; *Rex* v. *Cooper,* 5 Car. & P. 535; *Rex* v. *Howes,* 6 Car. & P. 404; *Reg.* v. *Rue,* 13 Cox, C. C. 209, 34 L. T. N. S. 400; *Com.* v. *Cullen,* 111 Mass. 435; *Com.* v. *Harman,* 4 Pa. 269; *State* v. *Roberts,* 12 N. C. (1 Dev. L.) 259; *Peter* v. *State,* 4 Smedes & M. 31; *Deathridge* v. *State,* 1 Sneed, 75; *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404; *Ward* v. *State,* 50 Ala. 120; *Redd* v. *State,* 69 Ala. 255; *State* v. *Jones,* 54 Mo. 478; *Barnes* v. *State,* 36 Tex. 356; *Walker* v. *State,* 7 Tex. App. 245, 32 Am. Rep. 595; *Love* v. *State,* 22 Ark. 336.

But see *Moore* v. *Com.* 2 Leigh, 701; *Mackmasters* v. *State,* 82 Miss. 459, 34 So. 156, 12 Am. Crim. Rep. 119; *Johnson* v. *State,* 48 Tex. Crim. Rep. 423, 88 S. W. 223; *Clayton* v. *State,* 31 Tex Crim. Rep. 489, 21 S. W. 255; *Simon* v. *State,* 37 Miss. 288; *Wyatt* v. *State,* 25 Ala. 9; *Porter* v. *State,* 55 Ala. 95; *Hoober* v *State,* 81 Ala. 51, 1 So. 574; *Banks* v. *State,* 84 Ala. 430, 4 So. 382; *Corley* v. *State,* 50 Ark. 305, 7 S. W. 255; *Williams* v. *State,* 69 Ark 599, 65 S. W. 103, 12 Am. Crim. Rep. 110; *People* v. *Castro,* 125 Cal. 521, 58 Pac. 133; *Burns* v. *State,* 61 Ga. 192; *State* v. *Chambers,* 39 Iowa, 179; *Taylor* v. *Com.* 19 Ky. L. Rep. 836, 42 S. W. 1125; *State* v. *Mims,* 43 La. Ann. 532, 9 So. 113; *Peter* v. *State,* 4 Smedes & M. 31; *Van Buren* v. *State,* 24 Miss. 512; *Ford* v. *State,* 75 Miss. 101, 21 So. 524; *Banks* v. *State,* 93 Miss. 700, 47 So. 437; *Durham* v. *State,* — Miss. —, 47 So. 545; *State* v. *Brown,* 73 Mo. 631; *State* v. *Drake,* 82 N. C. 592; *State* v. *Drake,* 113 N. C. 624, 18 S. E. 166;

must be determined upon its own facts.[2] But the judge will indulge the presumption that, where a confession has been obtained under improper inducement, the subsequent confession of the same crime is the result of the same influence.[3] However, this is not a conclusive presumption, and may be rebutted by positive proof showing that the subsequent confession was free from the original improper inducement.[4] But such proof must clearly show that the impression caused by the improper inducement had been removed before the subsequent confession was made, to admit such subsequent confession in evidence.[5] But when it appears that the original improper inducement has ceased to operate, the subsequent confessions are admissible.[6]

Milligan's Case, 6 N. Y. City Hall Rec. 69; *Nichols* v. *State,* 1 Ohio Dec. Reprint, 55; *State* v. *Wintzingerode,* 9 Or. 153; *Com.* v. *Harman,* 4 Pa. 269; *People* v. *Rankin,* 2 Wheeler, C. C. 467.

See also note in 18 L.R.A.(N.S.) 857.

[2] Russell, Crimes, 7th Eng. ed. p. 2180.

[3] *Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123; *Com.* v. *Sheets,* 197 Pa. 69, 46 Atl. 753.

See *Reg.* v. *Viau,* Rap. Jud. Quebec 7 B. R. 362; *State* v. *Drake,* 82 N. C. 592; *Beggarly* v. *State,* 8 Baxt. 520; *Redd* v. *State,* 69 Ala. 255; *Porter* v. *State,* 55 Ala. 95; *State* v. *Jones,* 54 Mo. 478; *State* v. *Brown,* 73 Mo. 631; *State* v. *Brittain,* 117 N. C. 783, 23 S. E. 433; *Cady* v. *State,* 44 Miss. 332; *Barnes* v. *State,* 36 Tex. 356; *Whitley* v. *State* 78 Miss. 255, 53 L.R.A. 402, 28 So. 852, 12 Am. Crim. Rep. 122; *Serpentine* v. *State,* 1 How. (Miss.) 256; *Love* v. *State,* 22 Ark. 336; *Simon* v. *State,* 5 Fla. 285; *People* v. *Johnson,* 41 Cal. 452; *Com.* v. *Knapp,* 9 Pick. 496,.20 Am. Dec. 491.

[4] *State* v. *Howard,* 17 N. H. 171; *Thompson* v. *Com.* 20 Gratt. 724; *Deathridge* v. *State,* 1 Sneed, 75; *Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123.

[5] *Bob* v. *State,* 32 Ala. 560; *Corley* v. *State,* 50 Ark. 305, 7 S. W. 255; *McNish* v. *State,* 45 Fla. 83, 110 Am. St. Rep. 65, 34 So. 219, 12 Am. Crim. Rep. 125; *State* v. *Drake,* 113 N. C. 624, 18 S. E. 166; *Levison* v. *State,* 54 Ala. 520; *Owen* v. *State,* 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206; *United States* v. *Chapman,* Fed. Cas. No. 14,783.

[6] Russell, Crimes, 7th Eng. ed. p. 2182; *Rex* v. *Thompson,* 1 Leach, C. L. 291; *Reg.* v. *Cheverton,* 2 Fost. & F. 833; *State* v. *Howard,* 17 N. H. 171; *State* v. *Carr,* 37 Vt. 191; *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404; *Com.* v.

After the fact is known that an improper influence existed, inducing a former confession, an explicit warning should be given the accused of the consequences of a confession, and it must be clear that he was relieved from the effect of the improper influence previously applied, before the subsequent confession is admissible in evidence.[7]

In those states where the confessions are prima facie voluntary, logically the subsequent confession would be presumed to be voluntary.[8] But under such circumstances, the accused would have the right to introduce evidence showing that the confession was involuntary.[9]

While lapse of time may, of itself, raise the presumption that the fact of the improper inducement has ceased,[10] still,

Sheets, 197 Pa. 69, 46 Atl. 753; *Laughlin* v. *Com.* 18 Ky. L. Rep. 640, 37 S. W. 590.

See *State* v. *Fisher,* 51 N. C. (6 Jones, L.) 478; *Com.* v. *Cullen,* 111 Mass. 435; *Com.* v. *Cuffee,* 108 Mass. 285.

See *Com.* v. *Knapp,* 10 Pick. 477, 20 Am. Dec. 534; *Jackson* v. *State,* 39 Ohio St. 37; *Wigginton* v. *Com.* 92 Ky. 287, 17 S. W. 634; *Pennsylvania* v. *Dillon,* 4 Dall. 116, 1 L. ed. 765; *Young* v. *State,* 50 Ark. 501, 8 S. W. 828; *Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123; *Hardy* v. *United States,* 3 App. D. C. 35; *United States* v. *Nardello,* 4 Mackey, 503; *State* v. *Foster,* 136 Iowa, 527, 114 N. W. 36; *Green* v. *Com.* 26 Ky. L. Rep. 1221, 83 S. W. 638; *State* v. *Stuart,* 35 La. Ann. 1015; *State* v. *Wilson,* 36 La. Ann. 864; *State* v. *Jones,* 46 La. Ann. 1395, 16 So. 369; *Com.* v. *Myers,* 160 Mass. 530, 36 N. E. 481; *Simmons* v. *State,* 61 Miss. 243; *State* v. *Patterson,* 73 Mo. 695; *Jackson's Case,* 1 N. Y. City Hall. Rec. 28.

See *State* v. *Henry,* 6 Baxt. 539.

[7] *Meynell's Case,* 2 Lewin, C. C. 122; *Van Buren* v. *State,* 24 Miss. 512; *State* v. *Fisher,* 51 N. C. (6 Jones, L.) 478; *State* v. *Scates,* 50 N. C. (5 Jones, L.) 420; *State* v. *Gregory,* 50 N. C. (5 Jones, L.) 315; *State* v. *Jones,* 54 Mo. 478; *State* v. *Chambers,* 39 Iowa, 179; *United States* v. *Cooper,* Fed. Cas. No. 14,864; *Porter* v. *State,* 55 Ala. 95; *Reg.* v. *Finkle,* 15 U. C. C. P. 453; *Rex* v. *Cooper,* 5 Car. & P. 535; *Reg.* v. *Viau,* Rap. Jud. Quebec 7 B. R. 362.

[8] *State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128.

[9] *Roesel* v. *State,* 62 N. J. L. 216, 41 Atl. 408; *Com.* v. *Van Horn,* 188 Pa. 143, 41 Atl. 469.

[10] *State* v. *Force,* 69 Neb. 162, 95 N. W. 42, 12 Am. Crim. Rep. 160; *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404.

mere length of time is immaterial, and if there has been no change in the circumstances or situation, the subsequent confession is inadmissible.[11]

It has been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession;[12] but the warning so given should be explicit, and it ought to be full enough to apprise the accused, first, that anything that he may say after such warning can be used against him; and, second, that his previous confession, made under improper inducement, cannot be used against him,[13] for it has been well said that, "for want of this information, the accused might think that he could not make his case worse than he had already made it, and, under this impression, might have signed the confession before the magistrate."[14] In the following cases the warning was held insufficient to remove the inducement and admit the subsequent confession.[15]

Another element to be considered, upon the question of whether or not a subsequent confession is rendered involun-

[11] *United States* v. *Chapman*, Fed. Cas. No. 14,783; *State* v. *Chambers*, 39 Iowa, 179; *Sherrington's Case*, 2 Lewin, C. C. 123; *United States* v. *Cooper*, Fed. Cas. No. 14,864; *Dinah* v. *State*, 39 Ala. 359; *Beery* v. *United States*, 2 Colo. 186; *Peter* v. *State*, 4 Smedes & M. 31.

[12] *Rex* v. *Bryan*, Jebb, C. C. 157; *Reg.* v. *Horner*, 1 Cox, C. C. 364; *Reg.* v. *Collier*, 3 Cox, C. C. 57; *Reg.* v. *Bate*, 11 Cox, C. C. 686; *Howard* v. *Com.* 28 Ky. L. Rep. 737, 90 S. W. 578; *Com.* v. *Howe*, 132 Mass. 250; *Ward* v. *People*, 3 Hill, 395; *Venable* v. *Com.* 24 Gratt. 639; *State* v. *Carr*, 37 Vt. 191; *Maples* v. *State*, 3 Heisk. 408; Joy, Confessions, 72-74; *Rex* v. *Howes*, 6 Car. & P. 404; *Com.* v. *Chabbock*, 1 Mass. 144; *Jones* v. *State*, 58 Miss. 349; post, § 703c.

[13] *State* v. *Gregory*, 50 N. C. (5 Jones, L.) 315; *State* v. *Scates*, 50 N. C. (5 Jones, L.) 420.

[14] *Rex* v. *Sexton*, cited in note to *Reg.* v. *Moore*, 2 Benn. & H. Crim. Cas. 190; *Smith* v. *Worcester*, Spring Assizes, 1830.

[15] *Reg.* v. *Millen*, 3 Cox, C. C. 507; *Reg.* v. *Doherty*, 13 Cox, C. C. 23; *United States* v. *Chapman*, Fed. Cas. No. 14,783; *State* v. *Chambers*, 39 Iowa, 179; *Ford* v. *State*, 75 Miss. 101, 21 So. 524.

tary because of an original improper inducement connected with the first confession, is: Did the confession immediately follow, or did the accused finally yield to the original improper inducement? If he did, then manifestly the confession is involuntary.[16] If he did not, and it appears to the satisfaction of the court that the influence of such improper inducement ceased to operate before the confession was made, then it is voluntary and admissible.[17] The burden of proof is on the prosecution to show that the subsequent confession was not made under the improper inducement which rendered the first confession involuntary.[18]

[16] *Barnes* v. *State,* 36 Tex. 356; *Miller* v. *State,* 40 Ala. 54; *Ward* v. *State,* 50 Ala. 120; *Porter* v. *State,* 55 Ala. 95; *People* v. *Robertson,* 1 Wheeler, C. C. 66; *State* v. *George,* 50 N. C. (5 Jones, L.) 233; *State* v. *Drake,* 113 N. C. 624, 18 S. E. 166.

[17] *Beggarly* v. *State,* 8 Baxt. 520; *State* v. *Vaigneur,* 5 Rich. L. 391; *Paris* v. *State,* 35 Tex. Crim. Rep. 82, 31 S. W. 855; *Rizzolo* v. *Com.* 126 Pa. 54, 17 Atl. 520; *Rex* v. *Richards,* 5 Car. & P. 318; *Mose* v. *State,* 36 Ala. 211; *Sampson* v. *State,* 54 Ala. 241; *State* v. *Vey,* 21 S. D. 612, 114 N. W. 719; *Moore* v. *Com.* 2 Leigh, 701; *State* v. *Edwards,* 106 La. 674, 31 So. 308; *Walker* v. *State,* 9 Tex. App. 38; *Holland* v. *State,* 39 Fla. 178, 22 So. 298. See *Carlisle* v. *State,* 37 Tex. Crim. Rep. 108, 38 S. W. 991; *Early* v. *Com.* 86 Va. 921, 11 S. E. 795; *State* v. *Haworth,* 24 Utah, 398, 68 Pac. 155; *McAdory* v. *State,* 62 Ala. 154; *Levison* v. *State,* 54 Ala. 520; *Morehead* v. *State,* 9 Humph. 635; Russell, Crimes, 7th Eng. ed. p. 2182; *State* v. *Willis,* 71 Conn. 293, 41 Atl. 820; *Laughlin* v. *Com.* 18 Ky. L. Rep. 640, 37 S. W. 590; *Bullock* v. *State,* 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *State* v. *Potter,* 18 Conn. 166; *Holsenbake* v. *State,* 45 Ga. 43.

[18] *Deathridge* v. *State,* 1 Sneed, 75; *State* v. *Roberts,* 12 N. C. (1 Dev. L.) 259; *Thompson* v. *Com.* 20 Gratt. 724; *Peter* v. *State,* 4 Smedes & M. 31; *Cady* v. *State,* 44 Miss. 333; *State* v. *Drake,* 82 N. C. 592. See also *Reg.* v. *Sherrington,* 2 Lewin, C. C. 123; Roscoe, Crim. Ev. 8th ed. 68; Compare *McAdory,* v. *State,* 62 Ala. 677; *Murray* v. *State,* 25 Fla. 528, 6 So. 498; *Porter* v. *State,* 55 Ala. 95; *Com.* v. *Howe,* 132 Mass. 250; *Ward* v. *State,* 50 Ala. 120; *Com.* v. *Harman,* 4 Pa. 269; *Walker* v. *State,* 7 Tex. App. 245, 32 Am. Rep. 595; *Daniels* v. *State,* 78 Ga. 98, 6 Am. St. Rep. 238; *United States* v. *Cooper,* 3 Quart. L. J. 42, Fed. Cas. No. 14,864; *Owen* v. *State,* 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206; *State* v. *Wescott,* 130

§ 677a. Inculpatory facts discovered through inadmissible confessions.—Where an inadmissible confession results in the discovery of inculpatory facts, all courts admit evidence of such facts, but differ in the extent to which they will admit the inadmissible confession under such circumstances.[1]

The authorities are logically divided into three classes: First, those courts that admit the entire confession to accompany the facts. This view is supported by one authoritative writer who observes: "If we are to cease distrusting any part, we should cease distrusting all," of the confession,[1a] and this view is sustained in the following cases, where the entire inadmissible confession is admitted.[2] Second, those courts

Iowa, 1, 104 N. W. 341; *Banks* v. *State,* 93 Miss. 700, 47 So. 437; *Durham* v. *State,* —.Miss. —. 47 So. 545; *Mackmasters* v. *State,* 82 Miss. 459, 34 So. 156, 12 Am. Crim. Rep. 119; *State* v. *Force,* 69 Neb. 162, 95 N. W. 42, 12 Am. Crim. Rep. 160; *Whitney* v. *Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257, 12 Am. Crim. Rep. 170.

[1] As to admissibility of evidence obtained by aid of an involuntary or inadmissible confession, see note in 53 L.R.A. 402.

[1a] *Wigmore,* Ev. § 857.

[2] *Sampson* v. *State,* 54 Ala. 241; *Anderson* v. *State,* 104 Ala. 83, 16 So. 108; *People* v. *Ah Ki,* 20 Cal. 178; *State* v. *Moore,* 2 N. C. (1 Hayw.) 482; *Brister* v. *State,* 26 Ala. 128; *State* v. *Brick,* 2 Harr. (Del.) 530; *Warren* v. *State,* 29 Tex. 369 (under Code. All Texas cases in accord); *Whitney* v. *Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257, 12 Am. Crim. Rep. 170. See *State* v. *Johnny,* 29 Nev. 203, 87 Pac. 3; *Jane* v. *Com.* 2 Met. (Ky.) 30; *Fredrick* v. *State,* 3 W. Va. 695; *Parker* v. *State,* 40 Tex. Crim. Rep. 119, 49 S. W. 80; *Beery* v. *United States,* 2 Colo. 211 (Dissenting opinion by Wells).

In reply to the view that an inadmissible confession, corroborated by the discovery of inculpatory facts, ought to be admitted as a whole, it is obvious that apparent corroboration cannot establish the truth of something that never had an existence. It is a universal experience that crimes are most frequently discovered through, or witnessed by, persons whose situation is such as to point to such witness as the guilty party, and whose knowledge of the facts is equal to that of the party who actually committed the crime. Thus, a prospector in a western state saw two men apparently digging a discovery shaft on a claim, at the same time giving some evidence of apprehension in their manner.

that admit only that part of the confession relevant to the corroborating facts. This view has been accepted upon the authority of Mr. Leach, who observes: "But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true." [3] This is the settled rule

When they left the spot, the prospector, out of a natural curiosity, and thinking that they were merely hiding the discovery of a bonanza claim, inspected the work, only to discover that they had hidden rich amalgam, evidently stolen from a nearby placer. The prospector was apprehended by parties searching for the thieves, in the very act of uncovering the hidden amalgam. Such conditions are a part of nearly every crime. Where a confession is extorted from the discoverer of, or the witness to, a crime, it can always be corroborated by convincing proof, but to convict the witness is an absolute miscarriage of justice. In the illustration used is shown the wrong that would follow by admitting the extorted confession, because it was apparently corroborated by the facts discovered through it. In this instance, but for the admission of the extorted confession, the prospector would have been cleared by extraneous facts which proved that his personal factor was such that he would not go near a placer claim; that he had no knowledge of ditches or the location of riffles where the amalgam would be found, and did not know how to gather it and take it from the riffles. But the admission of the involuntary confession corroborated the facts, and the facts corroborated the confession. Result, conviction. Later, further investigation revealed the thief. Here, then, is an example of the corpus, but not a *corpus delicti*. Hence the only safe rule is to reject the inadmissible confession, and to show the crime by evidence *aliunde* the confession. See *Kennon* v. *State*, 11 Tex. App. 356; *Owens* v. *State*, 16 Tex. App. 448; *Walker* v. *State*, 2 Tex. App. 326; *Johnson* v *State*, 142 Ala. 1, 37 So. 937.

[3] 1 Leach, C. L. 291. See 2 East, P. C. 657; *Reg.* v. *Garbett*, 2 Car. & K. 490, 1 Den. C. C. 236, 2 Cox, C. C. 448; *State* v. *Vaigneur*, 5 Rich. L. 404.

This evidently influences Mr. Joy, who says: "But any act of the party, though done in consequence of such confession, is admissible, if it appears from a fact thereby discovered that so much of the confession as relates to it is true." Joy, Confessions, p. 81.

in England, and has been followed without question in many of the states.[4] Third, those courts that admit no part of the confession, but only the discovery of the inculpatory facts.[5] This view is the prevailing doctrine in this country. It is true that the line is not always clearly drawn. The inculpatory facts are always admissible, and, of necessity, the court must determine the connection of the accused with those facts. Did the accused have knowledge of the inculpatory facts because he was an unwilling witness to, or discovered, the crime, and is his knowledge consistent with innocence of the crime; or did the accused have knowledge of the inculpatory facts because he committed the crime, and are such facts corroboration of the involuntary confession? To satisfactorily determine either form of the question, more or less detail must be inquired into, and necessarily the line cannot be very closely drawn, so that many of the authorities cited seem to support both the second and third views above set forth.

[4] *Mosey's Case,* 1 Leach, C. L. 265 note; *Rex* v. *Jenkins,* Russ. & R. C. C. 492; *R.* v. *Cain,* Cr. & D. C. C. (Ir.) 37; *Reg.* v. *Gould,* 9 Car. & P. 364; *Reg.* v. *Berriman,* 6 Cox, C. C. 388; Georgia Crim. Code 1895, § 1008; *Belote* v. *State,* 36 Miss. 96, 116, 72 Am. Dec. 163; *Garrard* v. *State,* 50 Miss. 151; *State* v. *Simas,* 25 Nev. 432, 62 Pac. 242; *Laros* v. *Com.* 84 Pa. 202; *State* v. *Motley,* 7 Rich. L. 327; *Deathridge* v. *State,* 1 Sneed, 80; *Clemons* v. *State,* 4 Lea, 23.

[5] *State* v. *Garvey,* 28 La. Ann. 925, 26 Am. Rep. 123; *Jordan* v. *State,* 32 Miss. 382; *Murphy* v. *State,* 63 Ala. 1; *Banks* v. *State,* 84 Ala. 430, 4 So. 382; *Lowe* v. *State,* 88 Ala. 8, 7 So. 97; *Jones* v. *State,* 75 Ga. 825; *State* v. *Dooley,* 89 Iowa, 584, 57 N. W. 414; *State* v. *Mortimer,* 20 Kan. 93; *Rector* v. *Com.* 80 Ky. 468; *Belote* v. *State,* 36 Miss. 96, 72 Am. Dec. 163; *Stage's Case,* 5 N. Y. City Hall Rec. 177; *State* v. *Winston,* 116 N. C. 990, 21 S. E. 37; *State* v. *Motley,* 7 Rich. L. 327; *McGlothlin* v. *State,* 2 Coldw. 223; *Massey* v. *State,* 10 Tex. App. 645; *State* v. *Height,* 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935; *Whitney* v. *Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257, 12 Am. Crim. Rep. 170; *Com.* v. *James,* 99 Mass. 438; *State* v. *Ruck,* 194 Mo. 416, 92 S. W. 706, 5 A. & E. Ann. Cas. 976. See *State* v. *Knapp,* 70 Ohio St. 380, 71 N. E. 705, 1 A. & E. Ann. Cas. 819; *Johnson* v. *State,* 119 Ga. 257, 45 S. E. 960; *Taylor* v.

VII. How Far Extraneous Facts Reached Through an Inadmissible Confession may be Received.

§ 678. Admissibility of inculpatory facts.—The rule is settled that, notwithstanding the inadmissibility of the confession, all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony.[1] Thus, where the accused, in confessing, points out or tells where the stolen property is;[2] or, in case of homicide, states where the body can be found;[3] or gives a clue to other

Com. 19 Ky. L. Rep. 836, 42 S. W. 1125; *Com.* v. *Phillips,* 26 Ky. L. Rep. 543, 82 S. W. 286; *Whitley* v. *State,* 78 Miss. 255, 53 L.R.A. 402, 28 So. 852, 12 Am. Crim. Rep. 122; *State* v. *Middleton,* 69 S. C. 72, 48 S. E. 35.

[1] Supra, § 677a. See *Laros* v. *Com.* 84 Pa. 200; *Sampson* v. *State,* 54 Ala. 241; *Spicer* v. *State,* 69 Ala. 159; *Clemons* v. *State,* 4 Lea, 23; *Rhodes* v. *State,* 11 Tex. App. 563.

[2] *Murphy* v. *State,* 63 Ala. 1; *Garrard* v. *State,* 50 Miss. 152; *State* v. *George,* 15 La. Ann. 145; *McGlothlin* v. *State,* 2 Coldw. 223; *Stage's Case,* 5 N. Y. City Hall Rec. 177; *People* v. *Hoy Yen,* 34 Cal. 176; *Gates* v. *People,* 14 Ill. 433; *Rector* v. *Com.* 80 Ky. 468; *State* v. *Winston,* 116 N. C. 990, 21 S. E. 37; *State* v. *Mortimer,* 20 Kan. 93; *Strait* v. *State,* 43 Tex. 486; *Hudson* v. *State,* 9 Yerg. 408; *Yates* v. *State,* 47 Ark. 172, 1 S. W. 65; *Rex* v. *Warwickshall,* 1 Leach, C. L. 263, 2 East, P. C. 658; *Selvidge* v. *State,* 30 Tex. 60; *People* v. *Ah Ki,* 20 Cal. 178; *Banks* v. *State,* 84 Ala. 430, 4 So. 382; *Belote* v. *State,* 36 Miss. 96, 72 Am. Dec. 163; *State* v. *Lindsey,* 78 N. C. 499; *Van Buren* v. *State,* 24 Miss. 516; *United States* v. *Richard,* 2 Cranch, C. C. 439, Fed. Cas. No. 16,154; *Beery* v. *United States,* 2 Colo. 186, *Rice* v. *State,* 3 Heisk. 215; *State* v. *Brick,* 2 Harr. (Del.) 530; *Tucker's Case,* 5 N. Y. City Hall Rec. 164; *Jackson's Case,* 1 N. Y. City Hall Rec. 28; *Deathridge* v. *State,* 1 Sneed, 75; *Speights* v. *State,* 1 Tex. App. 551; *Reg.* v. *Gould,* 9 Car. & P. 364; *Duffy* v. *People,* 26 N. Y. 588; *State* v. *Willis,* 71 Conn. 293, 41 Atl. 820; *Rex* v. *Griffin,* Russ. & R. C. C. 152.

[3] *Gregg* v. *State,* 106 Ala. 44, 17 So. 321; *Lowe* v. *State,* 88 Ala. 8, 7 So. 97; *Cain's Case,* 1 Craw. & D. C. C. (Ir.) 37, cited in 2 Heard, C. C. 617, note; *Elizabeth* v. *State,* 27 Tex. 329; *Reg.* v. *Berriman,* 6 Cox, C. C. 388; *State* v. *Motley,* 7 Rich. L. 327; *State* v. *Crowson,* 98 N. C. 595, 4 S. E. 143; *Weller* v. *State,* 16 Tex. App. 200; 1 Phillipps, Ev. 411; *Rex* v. *Warwickshall,* 1

evidence which proves the case,[4] all such facts are admissible.[5] But few courts have questioned this rule.[6]

It is obvious that a search made as a consequence of information given by the accused must result in the discovery of the inculpatory facts, as otherwise no testimony, either as to the confession or as to the search instituted in consequence of it, is admissible.[7] In connection with the discovery of the alleged inculpatory facts, there should be proof, beyond a reasonable doubt, of the identity of the property, the body, or other fact. This is the rule with regard to larceny,[8] and

Leach, C. L. 263, 2 East, P. C. 658; *Rex* v. *Mosey,* 1 Leach, C. L. 265, note; *Rex* v. *Lockhart,* 1 Leach, C. L. 386; *Reg.* v. *Gould,* 9 Car. & P. 364; *Thurtell's Case* cited in Joy on Confessions, 84; Russell, Crimes, 861, 862; *Com.* v. *Knapp,* 9 Pick. 496, 20 Am. Dec. 491; *Duffy* v. *People,* 26 N. Y. 589; *State* v. *Brick,* 2 Harr. (Del.) 530; *State* v. *Crank,* 2 Bail. L. 67, 23 Am. Dec. 117; *State* v. *Vaigneur,* 5 Rich. L. 391; *Hudson* v. *State,* 9 Yerg. 408; *Deathridge* v. *State,* 1 Sneed, 75; *Jordan* v. *State,* 32 Miss. 382; *Belote* v. *State,* 36 Miss. 96, 72 Am. Dec. 163; *Jane* v. *Com.* 2 Met. (Ky.) 30; *Mountain* v. *State,* 40 Ala. 344; *People* v. *Hoy Yen,* 34 Cal. 176; *People* v. *Parton,* 49 Cal. 632; *Fredrick* v. *State,* 3 W. Va. 695; *Nolen* v. *State,* 14 Tex. App. 482, 46 Am. Rep. 247.

[4] *Reg.* v. *Leatham,* 8 Cox, C. C. 498, 30 L. J. Q. B. N. S. 205; *Rice* v. *State,* 3 Heisk. 215; *Strait* v. *State,* 43 Tex. 486; *Davis* v. *State,* 8 Tex. App. 510; *Massey* v. *State,* 10 Tex. App. 645; *State* v. *Mortimer,* 20 Kan. 93; *Com.* v. *Knapp,* 9 Pick. 496, 20 Am. Dec. 491; *Com.* v. *James,* 99 Mass. 438; *Jane* v. *Com.* 2 Met. (Ky.) 30; *State* v. *Garvey,* 28 La. Ann. 925, 26 Am. Rep. 123; *Mose* v. *State,* 36 Ala. 211; *Clemons* v. *State,* 4 Lea, 23.

[5] See notes 1, 2, 3, 4, this section.

[6] *State* v. *Roberts,* 12 N. C. (1 Dev. L.) 259; *Jordan* v. *State,* 32 Miss. 382; *Rusher* v. *State,* 94 Ga. 363, 47 Am. St. Rep. 175, 21 S. E. 593.

[7] *Rex* v. *Jenkins,* Russ. & R. C. C. 492; *Rex* v. *Hearne,* Car. & M. 109; *Loyd* v. *State,* 19 Tex. App. 137. See also *Kennon* v. *State,* 11 Tex. App. 356; *Rains* v. *State,* 33 Tex. Crim. Rep. 294, 26 S. W. 398; *Crowder* v. *State,* 28 Tex. App. 51, 19 Am. St. Rep. 811, 11 S. W. 835; *State* v. *Due,* 27 N. H. 256; *Daniels* v. *State,* 78 Ga. 98, 6 Am. St. Rep. 238; *Williams* v. *Com.* 27 Gratt. 997, 2 Am. Crim. Rep. 67; *Moseby* v. *Com.* — Ky. —, 113 S. W. 850. See *Jaynes* v. *People,* 44 Colo. 535, 99 Pac. 325, 16 A. & E. Ann. Cas. 787; *Brown* v. *Com.* — Ky. —, 118 S. W. 945; *State* v. *Jacques,* 30 R. I. 578, 76 Atl. 652.

[8] *State* v. *Due,* 27 N. H. 256; *State* v. *Garvey,* 28 La. Ann. 925,

in other crimes identification should be complete before admission of the inculpatory facts.[9]

But when the search reveals the inculpatory facts, and there is conclusive identification of such facts, this necessarily brings with it the reception in evidence of the accused's statements in giving the information.[10]

VIII. Admissions by Silence or Conduct.

§ 678a. Admissions are not confessions.—The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon the substantive differences of the character of the evidence educed from each. A confession is a direct acknowledgment of guilt on the part of the accused,[1] and, by the very force of the definition, excludes an admission, which, of itself, as applied in criminal law, is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction.[2]

26 Am. Rep. 123; *Whitley* v. *State,* 78 Miss. 255, 53 L.R.A. 402, 28 So. 852, 12 Am. Crim. Rep. 122; *Rex* v. *Jones,* Russ. & R. C. C. 152; *Rex* v. *Clarke,* Car. C. L. 59; *Walrath* v. *State,* 8 Neb. 80; *Williams* v. *Com.* 27 Gratt. 997, 2 Am. Crim. Rep. 67; *Jordan* v. *State,* 32 Miss. 382. See *Beery* v. *United States,* 2 Colo. 186; *Rex* v. *Griffin,* Russ. & R. C. C. 152; *State* v. *Motley,* 7 Rich. L. 327.

[9] There is on record in the nisi prius courts the fact that, in consequence of an involuntary confession, a skeleton was discovered where the accused stated that he had buried the body of the deceased, and it was afterwards conclusively shown that the skeleton was planted by the detectives who secured the involuntary confession. This is an illustration of conforming the confession to the purposes of the detectives called upon to make proof, and is a strong argument for complete identification of inculpatory facts, wherever found, apparently, at least, in conformity with the confession.

[10] *Murphy* v. *State,* 63 Ala. 1; supra, § 6772.

[1] Supra, § 622.

[2] *Ransom* v. *State,* 2 Ga. App. 826, 59 S. E. 101.

The principle of confessions has no application to admissions.[3] It is necessary to observe the distinction in every case. The loose phraseology of courts, stating that a certain fact may be construed as an admission or a confession, is misleading. Under the law, the court may instruct the jury as to the conclusive character of a confession; but, as to an admission, the instruction must be as to its weight as a circumstance in connection with other proof. Thus, silence under an accusation of crime may constitute conduct, or a circumstance from which guilt may be inferred.[4] But such silence can never have the legal effect of a confession of a crime[5].

§ 678b. Silence as consent.—At all times where rules of conduct are prescribed for the people, and not by the people, inquisitors have taken advantage of their own questions to determine that the answer is favorable to themselves. When such questions were received in silence the inquisitor exclaimed, *Qui tacet consentire videtur!* or silence gives consent. This maxim is embedded in our common conversation, but when it became applicable to judicial proceedings, like all broad maxims, it was necessarily limited by qualifications that rendered it effective only on certain conditions. Originally it was a shrewd way of causing a man to give evidence against himself, and, as it has been accurately stated, "nothing can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be, unless the evidence is of direct declarations, of that kind which naturally calls for contradiction,—some assertion made to the man with respect to his right, which by his silence he acquiesces in." [1]

[3] *Rex* v. *Warwickshall,* 1 Leach, C. L. 263.

[4] *Phelan* v. *State,* 114 Tenn. 483, 88 S. W. 1040.

[5] *State* v. *Major,* 70 S. C. 387, 50 S. E. 13; *State* v. *Edwards,* 13 S. C. 30.

[1] *Moore* v. *Smith,* 14 Serg. & R 388; *Vail* v. *Strong,* 10 Vt. 457; *Mattocks* v. *Lyman,* 16 Vt. 113;

The rule that silence gives consent may prevail in criminal cases on the broad ground that all circumstances indicating guilt are admissible, and possibly supported on the theory of admissions and conduct against interest. But the harsh rule prevails that whatever the accused may say in reply is not evidence in his favor, and his denials are rejected as hearsay assertions.[2] A few rulings assert that if the accused denies the charge, or says nothing in explanation, these declarations may be given in evidence in his favor, to go to the jury for what they are worth.[3] But the general rule is to exclude all such declarations as hearsay, as well as declarations favorable to the accused as shown by his conduct.[4]

Com. v. *Kenney,* 12 Met. 235, 46 Am. Dec. 672; *Wiedemann* v. *Walpale* [1891] 2 Q. B. 534, 40 Week. Rep. 114, 60 L. J. Q. B. N. S. 762.

[2] *Ray* v. *State,* 50 Ala. 104, 107; *United States* v. *Cross,* 9 Mackey, 365, 376; *Turner* v. *Com.* 86 Pa. 54, 71, 27 Am. Rep. 683; *State* v. *Carrington,* 15 Utah, 480, 50 Pac. 526; *People* v. *Ebanks,* 117 Cal. 652, 40 L.R.A. 269, 49 Pac. 1049; *State* v. *Vandergraff,* 23 La. Ann. 96; *State* v. *Toby,* 31 La. Ann. 756; *State* v. *Dufour,* 31 La. Ann. 804; *Oliver* v. *State,* 17 Ala. 587, 595; *Campbell* v. *State,* 23 Ala. 44, 79; *Hall* v. *State,* 40 Ala. 698, 700, 706; *Birdsong* v. *State,* 47 Ala. 68, 71, 77; *Jordan* v. *State,* 81 Ala. 20, 23, 31, 1 So. 577; *Dorsey* v. *State,* 110 Ala. 38, 20 So. 450; *White* v. *State,* 111 Ala. 92, 21 So. 330; *Vaughn* v. *State,* 130 Ala. 18, 30 So. 669; *People* v. *Montgomery,* 53 Cal. 576; *People* v. *Shaw,* 111 Cal. 171, 43 Pac. 593; *Pinkard* v. *State,* 30 Ga. 759; *Boston* v. *State,* 94 Ga. 590, 20 S. E. 98, 21 S. E. 603; *Kennedy* v. *State,* 101 Ga. 559, 28 S. E. 979; *Lewis* v. *State,* 4 Kan. 309; *Com.* v. *Hersey,* 2 Allen, 173, 177; *Dillin* v. *People,* 8 Mich. 357, 367; *State* v. *Musick,* 101 Mo. 260, 274, 14 S. W. 212; *State* v. *Smith,* 114 Mo. 406, 424, 21 S. W. 827; *State* v. *Strong,* 153 Mo. 548, 55 S. W. 78, 13 Am. Crim. Rep. 278; *State* v. *McLaughlin,* 149 Mo. 19, 50 S. W. 315; *People* v. *Rathbun,* 21 Wend. 509, 519; *State* v. *Wilcox,* 132 N. C. 1120, 44 S. E. 625; *State* v. *Vaigneur,* 5 Rich. L. 391, 403; *State* v. *Bickle,* 53 W. Va. 597, 45 S. E. 917. Compare post, §§ 1144, 1732, 1765, 1781; post, § 367.

[3] *State* v. *Warthington,* 64 N. C. 594. See *Bostan* v. *State,* 94 Ga. 590, 20 S. E. 98, 21 S. E. 603; *Green's Trial,* 7 How. St. Tr. 159, 207; *Barnard's Trial,* 19 How. St. Tr. 833. See *State* v. *Vaigneur,* 5 Rich. L. 391.

[4] *Oliver* v. *State,* 17 Ala. 587, 595; *Campbell* v. *State,* 23 Ala. 44, 79; *Hall* v. *State,* 40 Ala. 698; *Birdsong* v. *State,* 47 Ala. 71; *Jordan*

§ 679. Silence as admission.—The doctrine of silence as an admission, broadly stated, is as follows: If A, when in B's presence and hearing, makes a statement to which B listens in silence, interposing no objection, A's statement may be put in evidence against B whenever B's silence is of such a nature as to lead to the inference of assent.[1] Silence under such an

v. *State*, 81 Ala. 20, 1 So. 577; *Henry* v. *State*, 107 Ala. 22, 19 So. 23; *Dorsey* v. *State*, 110 Ala. 38, 20 So. 450; *Vaughn* v. *State*, 130 Ala. 18, 30 So. 669; *People* v. *Montgomery*, 53 Cal. 576; *People* v. *Shaw*, 111 Cal. 171, 43 Pac. 593; *Kennedy* v. *State*, 101 Ga. 559, 28 S. E. 979; *State* v. *Musick*, 101 Mo. 260, 274, 14 S. W. 212; *State* v. *Smith*, 114 Mo. 406, 21 S. W. 827; *State* v. *Strong*, 153 Mo. 548, 55 S. W. 78, 13 Am. Crim. Rep. 278; *People* v. *Rathbun*, 21 Wend. 509; *State* v. *Wilcox*, 132 N. C. 1120, 44 S. E. 625. See *State* v. *Vaigneur*, 5 Rich. L. 391; *Walker* v. *State*, 139 Ala. 56, 35 So. 1011; *Allen* v. *State*, 146 Ala. 61, 41 So. 624; *Thomas* v. *State*, 47 Fla. 99, 36 So. 161; *Sneed* v. *Territory*, 16 Okla. 641, 86 Pac. 70, 8 A. & E. Ann. Cas. 354; Wigmore, Ev. § 293.

[1] *Rex* v. *Bartlett*, 7 Car. & P. 832; *Rea* v. *Missouri*, 17 Wall. 532, 21 L. ed. 707; *State* v. *Reed*, 62 Me. 129; *Com.* v. *Call*, 21 Pick. 515, 32 Am. Dec. 284; *Com.* v. *Sliney*, 126 Mass. 49; *Kelley* v. *People*, 55 N. Y. 565, 14 Am. Rep. 342; *Wright* v. *People*, 1 N. Y. Crim. Rep. 462; *Ettinger* v. *Com.* 98 Pa. 338; *Murphy* v. *State*, 36 Ohio St. 628; *State* v. *Waltz*, 52 Iowa, 227, 2 N. W. 1102; *State* v. *Devlin*, 7 Mo. App. 32; *State* v. *Bowman*, 80 N. C. 432; *Drumright* v. *State*, 29 Ga. 430; *Kendrick* v. *State*, 55 Miss. 436; *Ford* v. *State*, 34 Ark. 649; *People* v. *McCrea*, 32 Cal. 98; *People* v. *Estrado*, 49 Cal. 171; *Noonan* v. *State*, 1 Smedes & M. 562; *Ingle* v. *State*, 1 Tex. App. 307. See *Bejarano* v. *State*, 6 Tex. App. 265; *Loggins* v. *State*, 8 Tex. App. 434; *Jeffries* v. *State*, 9 Tex. App. 598; *Robins* v. *State*, 9 Tex. App. 671; *Reg.* v. *Newman*, 1 El. & Bl. 268, Dears. C. C. 85, 22 L. J. Q. B. N. S. 156, 17 Jur. 617, 3 Car. & K. 252; Taylor, Ev. § 828. See *Neile* v. *Jakle*, 2 Car. & K. 709; *Campbell* v. *State*, 55 Ala. 80; *State* v. *Cleaves*, 59 Me. 300, 8 Am. Rep. 422; *State* v. *Reed*, 62 Me. 142. See *State* v. *Swink*, 19 N. C. (2 Dev. & B. L.) 9; *State* v. *Stone*, Rice, L. 147; *Donnelly* v. *State*, 26 N. J. L. 463; *Keith* v. *State*, 27 Ga. 483; *State* v. *Pratt*, 20 Iowa, 267; *People* v. *Ah Yute*, 53 Cal. 613, 54 Cal. 89; *Reg.* v. *Cramp*, L. R. 5 Q. B. Div. 307, 49 L. J. Mag. Cas. N. S. 44, 42 L. T. N. S. 442, 28 Week. Rep. 701, 14 Cox, C. C. 401, 44 J. P. 411; *Barton* v. *State*, 49 Tex. Crim. Rep. 121, 90 S. W. 877; *Hogsett* v. *State*, 40 Miss. 522; *McUin* v. *United States*, 17 App. D. C. 323; *Com.* v. *Harvey*, 1 Gray, 487; *State* v. *Musick*, 101 Mo. 260, 14 S. W. 212; *State* v. *Walker*, 78 Mo. 380; *State*

accusation is a circumstance to go to the jury on a question of guilt or innocence of the person who remains silent,[2] and is a presumption of his acquiescence in the truth of the statement.[3] Such statement may be made by the prosecuting witness;[4] or by an accomplice;[5] or by one of two persons acting in concert;[6] and even a confession by a joint defendant, after proof of conspiracy, made in the presence of, and implicating, and not denied by, the other, in the absence of objection may go in evidence as an admission.[7] The general rule is not af-

v. *Miller*, 49 Mo. 505; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730; *State* v. *Senn*, 32 S. C. 392, 11 S. E. 292; *Browning* v. *State*, 26 Tex. App. 432, 9 S. W. 770; *Simmons* v. *State*, 129 Ala. 41, 29 So. 929; *Levison* v. *State*, 54 Ala. 520; *Williams* v. *State*, 42 Ark. 380; *People* v. *Ah Lung*, 2 Cal. App. 278, 83 Pac. 296; *People* v. *Sullivan*, 3 Cal. App. 502, 86 Pac. 834; *People* v. *Swaile*, 12 Cal. App. 192, 107 Pac. 134; *Godwin* v. *State*, — Del. —, 74 Atl. 1101; *Anthony* v. *State*, 44 Fla. 1, 32 So. 818; *Drumright* v. *State*, 29 Ga. 430; *Moye* v. *State*, 66 Ga. 740; *Watt* v. *People*, 126 Ill. 9, 1 L.R.A. 403, 18 N. E. 340; *State* v. *Dennis*, 119 Iowa, 688, 94 N. W. 235; *State* v. *Grebe*, 17 Kan. 458; *Com.* v. *Funai*, 146 Mass. 570, 16 N. E. 458; *Com.* v. *Dewhirst*, 190 Mass. 293, 76 N. E. 1052; *Spivey* v. *State*, 58 Miss. 743; *Donnelly* v. *State*, 26 N. J. L. 601; *McCusker* v. *Carlson*, 20 N. Y. Week. Dig. 424; *M'Kee* v. *People*, 36 N. Y. 113; *State* v. *Ludwick*, 61 N. C. (Phill. L.) 401; *State* v. *Crockett*, 82 N. C. 599; *Kendrick* v. *State*, 9 Humph. 723; *State* v. *Major*, 70 S. C. 387, 50 S. E. 13; *State* v. *Dillon*, 74 Iowa, 653, 38 N. W. 525; *State* v. *Suggs*, 89 N. C. 527; *Clark* v. *State*, 117 Ga. 254, 43 S. E. 853; *Brown* v. *State*, 32 Tex. Crim. Rep. 119, 22 S. W. 596.

For note on question of uncontradicted statements in presence of accused as confession, see 25 L.R.A. (N.S.) 542.

[2] *State* v. *Belknap*, 39 W. Va. 427, 19 S. E. 507; *Haberty* v. *State*, 8 Ohio C. C. 262; *Low* v. *State*, 103 Tenn. 127, 65 S. W. 401, 15 Am. Crim. Rep. 21; *Deathridge* v. *State*, 1 Sneed, 75; *Com.* v. *Brown*, 121 Mass. 69; *Com.* v. *Galavan*, 9 Allen, 271; *Musfelt* v. *State*, 64 Neb. 445, 90 N. W. 237; *State* v. *Major*, 70 S. C. 387, 50 S. E. 13; *State* v. *Dillon*, 74 Iowa, 653, 38 N. W. 525.

[3] *State* v. *Suggs*, 89 N. C. 527.

[4] *State* v. *Worthen*, 124 Iowa, 408, 100 N. W. 330; *State* v. *Burton*, 94 N. C. 947; *State* v. *Patrick*, 107 Mo. 147, 17 S. W. 666. See *Sylvester* v. *State*, 71 Ala. 17.

[5] *Com.* v. *Call*, 21 Pick. 515, 32 Am. Dec. 284; *State* v. *Burns*, 124 Iowa, 207, 99 N. W. 721.

[6] *Robins* v. *State*, 9 Tex. App. 671; *People* v. *Estrado*, 49 Cal. 171.

[7] *State* v. *Johnson*, 35 La. Ann.

fected by the fact that the accusation acquiesced in is made by a person who is not competent as a witness.[8] So the declarations of an injured person, who afterwards died of his injuries, made in the presence of the accused, are competent evidence on the trial for the homicide.[9] The ground of admission of such statements is expressed by the courts in varying phraseology, such as, the omission to controvert the statement affords an inference of its truth; silence under the accusation is regarded as an acquiescence in its truth and an implied admission of guilt; it is not admitted because the statement was made, but because the accused impliedly ratified it and adopted it as his own statement. Such accusations are admissible in evidence, not as evidence of the truth of the accusation, but to show that it calls for a reply, and to show the acquiescence of the accused.[10]

842; *Anthony* v. *State,* 44 Fla. 1, 32 So. 818; *Sparf* v. *United States,* 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168; *Rex* v. *Bromhead,* 71 J. P. 103; *People* v. *Morley,* 8 Cal. App. 372, 97 Pac. 84; *State* v. *Bowers,* 17 Iowa, 46.

[8] *Rex* v. *Smithies,* 5 Car. & P. 332; *Rex* v. *Bartlett,* 7 Car. & P. 832; *People* v. *McCrea,* 32 Cal. 98; *Rex* v. *Bexley,* 70 J. P. 263; *Richards* v. *State,* 82 Wis. 172, 51 N. W. 652; *Spencer* v. *State,* 20 Ala. 24; *State* v. *Middleham,* 62 Iowa, 150, 17 N. W. 446; *Joiner* v. *State,* 119 Ga. 315, 46 S. E. 412; *State* v. *Record,* 151 N. C. 695, 25 L.R.A.(N.S.) 561, 65 S. E. 1010, 19 A. & E. Ann. Cas. 527; *State* v. *Jerome,* 82 Iowa, 749, 48 N. W. 722. But see *State* v. *Richardson,* 194 Mo. 326, 92 S. W. 649.

[9] *State* v. *Overton,* 75 N. C. 200; *People* v. *Young,* 108 Cal. 8, 41 Pac. 281; *Weightnovel* v. *State,* 46 Fla. 1, 35 So. 856; *Gannon* v. *People,* 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525; *State* v. *Dillon,* 74 Iowa, 653, 38 N. W. 525; *Kendrick* v. *State,* 55 Miss. 436; *Diebel* v. *State,* — Tex. Crim. Rep. —, 24 S. W. 26; *People* v. *Meyers,* 5 N. Y. Crim. Rep. 120, 7 N. Y. S. R. 217; *People* v. *McCrea,* 32 Cal. 98; *People* v. *Swaile,* 12 Cal. App. 192, 107 Pac. 134; *Kirby* v. *State,* 89 Ala. 63, 8 So. 110; *Amos* v. *State,* 123 Ala. 50, 26 So. 524; *Ackerson* v. *People,* 124 Ill. 563, 16 N. E. 847; *State* v. *Munston,* 35 La. Ann. 888; *Com.* v. *Brailey,* 134 Mass. 527; *State* v. *Rosa,* 72 N. J. L. 462, 62 Atl. 695; *Ettinger* v. *Com.* 98 Pa. 338; *Richards* v. *State,* 82 Wis. 172, 51 N. W. 652.

[10] *Davis* v. *State,* 131 Ala. 10, 31 So. 569; *Ackerson* v. *People,* 124

Where such accusations are admitted in evidence, the court should instruct the jury that such accusations or statements are limited, as evidence, to the purpose of showing that the accused acquiesced in them, but that they are not evidence of the facts stated.[11] However, such statements are more logically admissible as *res gestæ* of the offense.[12]

§ 680. Circumstances under which the accusation is made.—To give to silence the effect of an admission, the party charged must have been in a position to explain.[1] "Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or of the existence of any particular fact, it must plainly appear that the language was heard and the conduct understood." [2]

Ill. 563, 16 N. E. 847; *Merriweather* v. *Com.* 118 Ky. 870, 82 S. W. 592, 4 A. & E. Ann. Cas. 1039; *McUin* v. *United States,* 17 App. D. C. 323; *State* v. *Senn,* 32 S. C. 392, 11 S. E. 292; *People* v. *Ah Yute,* 53 Cal. 613; *People* v. *Sullivan,* 3 Cal. App. 502, 86 Pac. 834; *People* v. *Abbott,* — Cal. —, 4 Pac. 769; *People* v. *Estrado,* 49 Cal. 171; *McCusker* v. *Carlson,* 20 N. Y. Week. Dig. 424; *People* v. *Mallon,* 103 Cal. 513, 37 Pac. 512; *Watt* v. *People,* 126 Ill. 9, 1 L.R.A. 403, 18 N. E. 340; *People* v. *Koerner,* 154 N. Y. 355, 48 N. E. 730; *People* v. *Kennedy,* 164 N. Y. 456, 58 N. E. 652; *People* v. *Hughson,* 154 N. Y. 153, 47 N. E. 1092; *Rex* v. *Bromhead,* 71 J. P. 103; *Speer* v. *State,* 4 Tex. App. 474; *Cobb* v. *State,* 27 Ga. 648.

[11] *People* v. *Mallon,* 103 Cal. 513, 37 Pac. 512; *Conner* v. *State,* 17 Tex. App. 14; *Phelan* v. *State,* 114 Tenn. 483, 88 S. W. 1040; *People* v. *Cascone,* 185 N. Y. 317, 78 N. E. 287.

[12] *Surber* v. *State,* 99 Ind. 71; *State* v. *McCourry,* 128 N. C. 594, 38 S. E. 883; *State* v. *Duncen,* 116 Mo. 288, 22 S. W. 699. See *State* v. *Devlin,* 7 Mo. App. 32; *State* v. *Nash,* 10 Iowa, 81, s. c. 7 Iowa, 347. See *Sylvester* v. *State,* 71 Ala. 17.

[1] *Com.* v. *Kenney,* 12 Met. 235, 46 Am. Dec. 672; *Com.* v. *Harvey,* 1 Gray, 487; *Larry* v. *Sherburne,* 2 Allen, 35; *Drury* v. *Hervey,* 126 Mass. 519; *Donnelly* v. *State,* 26 N. J. L. 601; *Slattery* v. *People,* 76 Ill. 217, 1 Am. Crim. Rep. 29, and note, p. 31; *Sylvester* v. *State,* 71 Ala. 17; *Loggins* v. *State,* 8 Tex. App. 434; *Boyd* v. *Belton,* 8 Ir. Eq. Rep. 113; *Com.* v. *Braley,* 1 Mass. 103; *Com.* v. *Galavan,* 9 Allen, 271; *O'Hearn* v. *State,* 79 Neb. 513, 25 L.R.A. (N.S.) 542, 113 N. W. 130.

[2] *Com.* v. *Harvey,* 1 Gray, 487; *Long* v. *State,* 13 Tex. App. 211.

The doctrine, then, of acquiescence by silence or conduct, is subject to the following limitations:

First, such accusations or statements, in the presence of accused, are competent only when the accused hears them and fully comprehends their effect,[3] and this means not merely in his bodily presence, but in his hearing and understanding.[4] He must understand that he himself is accused of the criminal act,[5] and it must be shown beyond a reasonable doubt that the language was heard or the conduct understood by the accused.[6] Thus, when a person is asleep,[7] or so intoxicated as to

[3] *People* v. *Kennedy*, 164 N. Y. 456, 58 N. E. 652; *People* v. *Holfelder*, 5 N. Y. Crim. Rep. 179, 5 N. Y. S. R. 488; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730; *Spencer* v. *State*, 20 Ala. 24; *Bloomer* v. *State*, 75 Ark. 297, 87 S. W. 438; *Weightnovel* v. *State*, 46 Fla. 1, 35 So. 856; *Jones* v. *State*, 2 Ga. App. 433, 58 S. E. 559; *Simmons* v. *State*, 115 Ga. 574, 41 S. E. 983; *Jones* v. *State*, 65 Ga. 148; *Eaton* v. *Com.* 122 Ky. 7, 90 S. W. 972, 12 A. & E. Ann. Cas. 874; *Com.* v. *Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Com.* v. *Harwood*, 4 Gray, 41, 64 Am. Dec. 49; *Irving* v. *State*, 92 Miss. 662, 47 So. 518; *State* v. *Jackson*, 150 N. C. 831, 64 S. E. 376; *Frazier* v. *State*, 52 Tex. Crim. Rep. 131, 105 S. W. 508; *O'Quinn* v. *State*, 55 Tex. Crim. Rep. 18, 115 S. W. 39.

[4] *Lanergan* v. *People*, 39 N. Y. 39, 5 Abb. Pr. N. S. 113; *People* v. *Powell*, 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481.

[5] *Hanna* v. *State*, 46 Tex. Crim. Rep. 5, 79 S. W. 544; *Lumpkin* v. *State*, 125 Ga. 24, 53 S. E. 810; *Merriweather* v. *Com.* 118 Ky. 870, 82 S. W. 592, 4 A. & E. Ann. Cas. 1039.

[6] *Barton* v. *State*, 49 Tex. Crim. Rep. 121, 90 S. W. 877; *O'Quinn* v. *State*, 55 Tex. Crim. Rep. 18, 115 S. W. 39; *Bookser* v. *State*, 26 Tex. App. 593, 10 S. W. 219; *Sauls* v. *State*, 30 Tex. App. 496, 17 S. W. 1066; *Long* v. *State*, 13 Tex. App. 211; *State* v. *Blackburn*, — Del. —, 75 Atl. 536; *Weightnovel* v. *State*, 46 Fla. 1, 35 So. 856; *Irving* v. *State*, 92 Miss. 662, 47 So. 518; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730; *Hill* v. *Ætna L. Ins. Co.* 150 N. C. 1, 63 S. E. 124; *Kelley* v. *People*, 55 N. Y. 565, 14 Am. Rep. 342; *Com.* v. *Kenney*, 12 Met. 235, 46 Am. Dec. 672; *People* v. *Minisci*, 12 N. Y. S. R. 719; *People* v. *Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630, 172 N. Y. 643, 65 N. E. 1120; *Ingle* v. *State*, 1 Tex. App. 307; *Felder* v. *State*, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145; *Frazier* v. *State*, 52 Tex. Crim. Rep. 131, 105 S. W. 508; *State* v. *Baruth*, 47 Wash. 283, 91 Pac. 977; *Tate* v. *State*, 95 Miss. 138, 48 So. 13; *People* v. *Cascone*, 185 N. Y. 317, 78 N. E. 287.

[7] *Lanergan* v. *People*, 39 N. Y.

be unable to comprehend,[8] or deaf,[9] or did not understand the language spoken,[10] he cannot be prejudiced by statements or accusations made in his presence.

Second, such accusations and statements are not evidence against the accused, where he remains silent when they are uttered in the course of judicial proceedings, where he is not at liberty to interpose and contradict them, and his silence cannot be considered as an admission of their truth, even though he is a party to the action.[11]

39; supra, § 665; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730; *Bloomer* v. *State*, 75 Ark. 297, 87 S. W. 438; *Territory* v. *Big Knot On Head*, 6 Mont. 242, 11 Pac. 670; *People* v. *Izzo*, 39 N. Y. S. R. 166, 14 N. Y. Supp. 906; *State* v. *Epstein*, 25 R. I. 131, 55 Atl. 204, 15 Am. Crim. Rep. 10; *Mixon* v. *State*, — Tex. Crim. Rep. —, 31 S. W. 408.

[8] *State* v. *Perkins*, 10 N. C. (3 Hawks) 377; supra, § 676.

[9] *Tufts* v. *Charlestown*, 4 Gray, 537; *Com.* v. *Galavan*, 9 Allen, 271; *Berry* v. *State*, 10 Ga. 511.

[10] See note 7, this section.

[11] *Child* v. *Grace*, 2 Car. & P. 193; *Rex* v. *Turner*, 1 Moody, C. C. 347; *Rex* v. *Appleby*, 3 Starkie, 33; see *Simpson* v. *Robinson*, 12 Q. B. 512, 18 L. J. Q. B. N. S. 73, 13 Jur. 187; *Reg.* v. *Coyle*, 7 Cox, C. C. 74; *United States* v. *Brown*, 4 Cranch, C. C. 508, Fed. Cas. No. 14,660; *Com.* v. *Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Com.* v. *Walker*, 13 Allen, 570; *Bob* v. *State*, 32 Ala. 560; *Noonan* v. *State*, 1 Smedes & M. 562; *Brayles* v *State*, 47 Ind. 251. See *Peeople* v. *Willett*, 92 N. Y. 29, s. c. 27 Hun, 469, 1 N. Y. Crim. Rep. 355; supra, §§ 230, 668, 680; *Leggett* v. *Schwab*. 111 App. Div. 341, 97 N. Y. Supp. 805; *Kelley* v. *People*, 55 N. Y. 565, 14 Am. Rep. 342; *Broyles* v. *State*, 47 Ind. 251; *State* v. *Hale*, 156 Mo. 102, 56 S. W. 881; *State* v. *Mullins*, 101 Mo. 514, 14 S. W. 625; *Horan* v. *Brynes*, 72 N. H. 93, 62 L.R.A. 602, 101 Am. St. Rep. 670, 54 Atl. 945; *State* v. *Senn*, 32 S. C. 392, 11 S. E. 292; *State* v. *Edwards*, 13 S. C. 30; *State* v. *Gilbert*, 36 Vt. 145; *Reg.* v. *Mitchell*, 17 Cox, C. C. 503; *Com.* v. *Zorambo*, 205 Pa. 109, 54 Atl. 716, 13 Am. Crim. Rep. 392; *State* v. *Hollingsworth*, 156 Mo. 178, 56 S. W. 1087; *State* v. *Hudspeth*, 150 Mo. 12, 51 S. W. 483; *State* v. *Musick*, 101 Mo. 271, 14 S. W. 212; *United States* v. *Brown*, 4 Cranch, C. C. 508, Fed. Cas. No. 14,660; *State* v. *Smith*, 30 La. Ann. 457; *Rex* v. *Turner*, 1 Moody, C. C. 347; *Child* v. *Grace*, 2 Car. & P. 193; *McElmurray* v. *Turner*, 86 Ga. 215, 12 S. E. 359; *Rex* v. *Appleby*, 3 Starkie, 33; *Reg.* v. *Swinnerton*, Car. & M. 593; *Bell* v. *State*, 93 Ga. 557, 19 S. E. 244; *Com.* v. *Burton*, 183 Mass. 461, 67 N. E. 419; *State* v. *Good*, 132 Mo. 114, 33 S.

Third, such accusations and statements are not evidence against the accused where he remains silent when they are uttered, at a time when he is in custody or under arrest on a criminal charge, as he has the right to keep silence as to the crime, and is not called upon to reply to it, nor to contradict such statements.[12]

Fourth, such accusations and statements cannot be used as evidence against the accused where he was silent through fear, or believed that his security was best promoted by silence, or where he was silent under threats, or in the presence of an angry crowd, or had promised to keep silent, or was silent under advice of his counsel.[13]

W. 790; *State* v. *Paxton,* 126 Mo. 514, 29 S. W. 705.

[12] *Com.* v. *Walker,* 13 Allen, 570; *Com.* v. *Kenney,* 12 Met. 235, 46 Am. Dec. 672; *Com.* v. *McDermott,* 123 Mass. 440, 25 Am. Rep. 120; *Com.* v. *Brown,* 121 Mass. 69; supra, § 679; *O'Hearn* v. *State,* 79 Neb. 513, 25 L.R.A.(N.S.) 542, 113 N. W. 130; *State* v. *Sadler,* 51 La. Ann. 1397, 26 So. 390; *State* v. *Estoup,* 39 La. Ann. 906, 3 So. 124; *State* v. *Carter,* 106 La. 407, 30 So. 895; *State* v. *Diskin,* 34 La. Ann. 919, 44 Am. Rep. 448; *State* v. *Kelleher,* 201 Mo. 614, 100 S. W. 470; *State* v. *Swisher,* 186 Mo. 1, 84 S. W. 911; *State* v. *Foley,* 144 Mo. 600, 46 S. W. 733; *State* v. *Murray,* 126 Mo. 611, 29 S. W. 700; *State* v. *Howard,* 102 Mo. 142, 14 S. W. 937; *State* v. *Epstein,* 25 R. I. 131, 55 Atl. 204, 15 Am. Crim. Rep. 10; *Denton* v. *State,* 42 Tex. Crim. Rep. 427, 60 S. W. 670; *R.* v. *McCraw,* 12 Can. Crim. Cas. 253; *State* v. *Munston,* 35 La. Ann. 888; *Fulcher* v. *State,* 28 Tex. App. 465, 13 S. W. 750; *Simmons* v. *State,* 50 Tex. Crim. Rep. 527, 97 S. W. 1052; *Guinn* v. *State,* 39 Tex. Crim. Rep. 257, 45 S. W. 694; *Gardner* v. *State,* — Tex. Crim. Rep. —, 34 S. W. 945; *Pryor* v. *State,* 40 Tex. Crim. Rep. 643, 51 S. W. 375; *Funderburk* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 393; *State* v. *McCullum,* 18 Wash. 394, 51 Pac. 1044; *State* v. *Weaver,* 57 Iowa, 730, 11 N. W. 675; *Graham* v. *State,* 118 Ga. 807, 45 S. E. 616; *People* v. *Williams,* 133 Cal. 165, 65 Pac. 323; *Merriweather* v. *Com.* 118 Ky. 870, 82 S. W. 592, 4 A. & E. Ann. Cas. 1039; *Porter* v. *Com.* 22 Ky. L. Rep. 1657, 61 S. W. 16.

[13] *Com.* v. *Kenney,* 12 Met. 235, 46 Am. Dec. 672; *R.* v. *McCraw,* 12 Can. Crim. Cas. 253; *Flanagin* v. *State,* 25 Ark. 92; *Jones* v. *State,* 2 Ga. App. 433, 58 S. E. 559; *Sprouse* v. *Com.* 132 Ky. 269, 116 S. W. 344; *Slattery* v. *People,* 76 Ill. 217, 1 Am. Crim. Rep. 29; *People* v. *Elster,* — Cal. —, 3 Pac. 884; *Com.* v. *Harvey,* 1 Gray, 487; *Peo-*

Fifth, the statement or accusation must be direct, and of a character that would naturally call for action or reply,[14] and must relate to the particular offense charged,[15] and must be addressed to, and intended to affect, the accused, and not arise in conversation or discussion between third parties;[16] nor, generally, is such silence deemed to be an assent when it is explicable on other grounds than those of consciousness of guilt.[17]

ple v. *Kennedy,* 164 N. Y. 456, 58 N. E. 652; *People* v. *Cascone,* 185 N. Y. 317, 78 N. E. 287; *People* v. *Kessler,* 13 Utah, 69, 44 Pac. 97; *People* v. *Young,* 72 App. Div. 9, 76 N. Y. Supp. 275; *Geiger* v. *State,* 70 Ohio St. 400, 71 N. E. 721, 25 Ohio C. C. 742 (reversed); *People* v. *Smith,* 172 N. Y. 210, 64 N. E. 814; *Bob* v. *Smith,* 32 Ala. 560; *Reg.* v. *Jankowski* 10 Cox, C. C. 365; *Wright* v. *State,* 37 Tex. Crim. Rep. 627, 40 S. W. 491.

[14] *Crowell* v. *State,* 56 Tex. Crim. Rep. 480, 120 S. W. 897; *Raymond* v. *State,* 154 Ala. 1, 45 So. 895; *Bob* v. *State,* 32 Ala. 560; *Lawson* v. *State,* 20 Ala. 65, 56 Am. Dec. 182; *Brantley* v. *State,* 115 Ga. 229, 41 S. E. 695; *State* v. *Glahn,* 97 Mo. 679, 11 S. W. 260; *Franklin* v. *Com.* 105 Ky. 237, 48 S. W. 986; *Loggins* v. *State,* 8 Tex. App. 434; *Lumpkin* v. *State,* 125 Ga. 24, 53 S. E. 810; *Com.* v. *Trefethen,* 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; *People* v. *Koerner,* 154 N. Y. 355, 48 N. E. 730; *Phelan* v. *State,* 114 Tenn. 493, 88 S. W. 1040.

[15] *McAdory* v. *State,* 62 Ala. 154; *State* v. *Baruth,* 47 Wash. 283, 91 Pac. 977; *State* v. *Shuford,* 69 N. C. 486; *Com.* v. *Trefethen,* 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; *Bookser* v. *State,* 26 Tex. App. 593, 10 S. W. 219; *Com.* v. *Roberts,* 108 Mass. 301; *Davis* v. *State,* 85 Miss. 416, 37 So. 1018; *Reg.* v. *Newman,* 1 El. & Bl. 268, Dears. C. C. 85, 3 Car. & K. 252, 22 L. J. Q. B. N. S. 156, 17 Jur. 617; *State* v. *Jackson,* 150 N. C. 831, 64 S. E. 376; *Reg.* v. *Smith,* 18 Cox, C. C. 470; *Hanna* v. *State,* 46 Tex. Crim. Rep. 5, 79 S. W. 544; *Miller* v. *State,* 97 Ga. 653, 25 S. E. 366; *Bennett* v. *State,* 39 Tex. Crim. Rep. 650, 48 S. W. 61; *Nicks* v. *State,* 46 Tex. Crim. Rep. 241, 79 S. W. 35.

[16] *People* v. *Koerner,* 154 N. Y. 355, 48 N. E. 730; *Kelley* v. *People,* 55 N. Y. 565, 14 Am. Rep. 342; *Loggins* v. *State,* 8 Tex. App. 434; *State* v. *Young,* 99 Mo. 666, 12 S. W. 879; *State* v. *Ethridge,* 188 Mo. 352, 87 S. W. 495; *Lawson* v. *State,* 20 Ala. 65, 56 Am. Dec. 182; *Simmons* v. *State,* 115 Ga. 574, 41 S. E. 983; *Com.* v. *Kenney,* 12 Met. 235, 46 Am. Dec. 672; *Noonan* v. *State,* 1 Smedes & M. 562.

[17] *Com.* v. *Harvey,* 1 Gray, 487; *Com.* v. *Kenney,* 12 Met. 235, 46 Am. Dec. 672; *Donnelly* v. *State,* 26 N. J. L. 601; *Slattery* v. *People,* 76

§ 681. Silence where statute permits accused to testify.—A party is not, at common law, in any way bound by the testimony of witnesses called by him and examined on a trial.[1] Even under statutes permitting the parties to be witnesses, such evidence, it has been held in Pennsylvania, cannot be employed in other suits against the party introducing it.[2] But it has been otherwise held in Maine, in respect to the statements of witnesses made at a prior hearing of the same case, which statements the party is at liberty to contradict, he being entitled to be sworn as a witness in the case.[3] But silence of this kind by a defendant on the trial of a criminal issue cannot, in any view, be rightfully admitted against him, under the statutes providing that his nontestifying shall not be used against him, he not offering himself as a witness.[4] But if the defendant, having full opportunity to do so, fail, when on the stand, to controvert that which was testified against him, this may be regarded, when the matter is one within his personal knowledge, as an admission of the truth of such testimony.[5]

§ 682. Letters in possession of accused.—The fact that an unanswered letter or other paper is found in the custody of

Ill. 217, 1 Am. Crim. Rep. 29. See *State* v. *Clark*, 54 N. H. 456, 1 Am. Crim. Rep. 34; Wharton, Ev. § 680; *Com.* v. *Sliney*, 126 Mass. 49.

[1] *Melen* v. *Andrews*, Moody & M. 336, 31 Revised Rep. 736; *Rex* v. *Appleby*, 3 Starkie, 33; *Rex* v. *Turner*, 1 Moody, C. C. 347; *Child* v. *Grace*, 2 Car. & P. 193; *Reg.* v. *Swinnerton*, Car. & M. 593; *Com.* v. *Kenney*, 12 Met. 237, 46 Am. Dec. 672.

[2] See *Ayres* v. *Wattson*, 57 Pa. 360; *McDermott* v. *Hoffman*, 70 Pa. 52.

[3] *Blanchard* v. *Hodgkins*, 62 Me. 120.

[4] Post, § 435.

[5] *Comstock* v. *State*, 14 Neb. 205, 15 N. W. 355; *State* v. *Wood*, 132 Mo. 114, 33 S. W. 790; *State* v. *Paxton*, 126 Mo. 514, 29 S. W. 705; *McGuire* v. *People*, 3 Hun, 213; *State* v. *Cleaves*, 59 Me. 300, 8 Am. Rep. 422; *People* v. *Banker*, 2 Park. Crim. Rep. 26; *Casteel* v. *State*, — Ark. —, 88 S. W. 1004; *Rex* v. *Edmunds*, 6 Car. & P. 164.

a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him.[1] Were it admitted, an innocent man might, by the artifices of others, be charged with a prima facie case of guilt, which he might find it difficult to repel.[2] It is otherwise, however, when the party addressed in any way invited the sending to him of the letter;[3] or when there is any ground to infer he acted on the letter.[4] Where such tacit recognition is claimed, the whole conversation or correspondence which constitutes the recognition must be given.[5]

§ 683. Admissions by conduct.—The conduct of the accused under an accusation of crime has an evidentiary value, and where it tends to show guilt, either by implication or admission, it is competent evidence against him.[1] All that is said

[1] *United States* v. *Crandell,* 4 Cranch, C. C. 683, Fed. Cas. No. 14,885; *Com.* v. *Edgerly,* 10 Allen, 184; *People* v. *Green,* 1 Park. Crim. Rep. 11; *People* v. *Thoms,* 3 Park. Crim. Rep. 256.

[2] See *Rex* v. *Hevey,* 1 Leach, C. C. 232; *Rex* v. *Plumer,* Russ. & R. C. C. 264, 15 Revised Rep. 741; *Doe ex dem. Frankis* v. *Frankis,* 11 Ad. & El. 795, 3 Perry & D. 565, 9 L. J. Q. B. N. S. 177; *Smith* v. *Shoemaker,* 17 Wall. 630, 21 L. ed. 717; *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596; *Dutton* v. *Woodman,* 9 Cush. 262, 57 Am. Dec. 46; *Robinson* v. *Fitchburg & W. R. Co.* 7 Gray, 92; *Fearing* v. *Kimball,* 4 Allen, 125, 81 Am. Dec. 690; *Com.* v. *Edgerly,* 10 Allen, 184; *People* v. *Green,* 1 Park Crim. Rep. 11; *Waring* v. *United States Teleg. Co.* 44 How. Pr. 69; *Fairlie* v. *Denton,* 3 Car. & P. 103; *Reg.* v. *Hare,* 3 Cox, C. C. 247; *O'Hearn* v. *State,* 79 Neb. 513, 25 L.R.A.(N.S.) 542, 113 N. W. 130.

[3] *Reg.* v. *Cooper,* L. R. 1 Q. B Div. 19, 45 L. J. Mag. Cas. N. S. 15, 33 L. T. N. S. 754, 24 Week. Rep. 279, 13 Cox, C. C. 123; *Reg.* v. *Jones,* 1 Den. C. C. 551, 19 L L. J. Mag. Cas. (N. S.) 162, Temple & M. 270, 3 Car. & K. 346, 4 New Sess. Cas. 953, 14 Jur. 533, 4 Cox, C. C. 198; *Rex* v. *Burdett,* 4 Barn. & Ald. 179.

See *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596. See distinctions taken, § 695, post.

[4] *Hewitt* v. *Piggott,* 9 Car. & P. 75; *Tooke's Trial,* 25 How. St. Tr. 120; *Rex* v. *Watson,* 2 Starkie, 144; *Smith* v. *Shoemaker,* 17 Wall. 630, 21 L. ed. 717; *Com.* v. *Waterman,* 122 Mass. 43.

[5] *Mattocks* v. *Lyman,* 16 Vt. 113.

[1] *Huggins* v. *State,* 41 Ala. 393;

or done in the presence of the accused charged with the offense, explaining the conduct of the defendant, is properly admissible,[2] where there is an indication of a consciousness of guilt; and the number of such indications cannot be limited, or their character or nature defined,[3] as they vary with every case. In the same line of admission by conduct is the act of accused in hiding stolen property and in flight.[4] Where a question arose as to whether or not it was necessary to station a flagman at a railway crossing, the fact that a flagman had been so stationed by the company (he being absent at the time of the collision), is held to be an admission by the company that a flagman should be so placed.[5]

§ 683a. Admissions; questions of law and fact.—It has been held that whether or not certain conduct or acquiescence constitutes an admission is a preliminary question for the court to determine before admitting the testimony;[1] but the prevailing rule seems to be that whether or not conduct or silence is acquiescence is a question of fact for the jury, and

State v. *Major,* 70 S. C. 387, 50 S. E. 13; *State* v. *Hill,* 134 Mo. 663, 36 S. W. 223; *State* v. *Bradley,* 64 Vt. 466, 24 Atl. 1053; *People* v. *Ah Fook,* 64 Cal. 380, 1 Pac. 347; *Humphrey* v. *State,* 47 Tex. Crim. Rep. 262, 83 S. W. 187; *State* v. *Dennis,* 119 Iowa, 688, 94 N. W. 235; *Rex* v. *Bexley,* 70 J. P. 263; *State* v. *Mortensen,* 26 Utah, 312, 73 Pac. 562, 633; *People* v. *Ah Lung,* 2 Cal. App. 278, 83 Pac 296.

[2] *State* v. *Nash,* 7 Iowa, 347; *Hochreiter* v. *People,* 1 Keyes, 66; *Davis* v. *State,* 54 Tex. Crim. Rep. 236, 114 S. W. 366. See *Miller* v. *State,* 68 Miss. 221, 8 So. 273; *Rea* v. *Missouri,* 17 Wall. 532, 21 L. ed. 707; *People* v. *Van Alstine,* 57 Mich. 69, 23 N. W. 594, 6 Am. Crim. Rep. 272; *State* v. *Carroll,* 30 S. C. 85, 14 Am. St. Rep. 883, 8 S. E. 433; *Com.* v. *Brown,* 121 Mass. 69; *Com.* v. *Coughlin,* 182 Mass. 558, 66 N. E. 207; *Heard* v. *State,* 59 Miss. 545.

[3] *McAdory* v. *State,* 62 Ala. 154.

[4] See post, §§ 748–751.

[5] *Readman* v. *Conway,* 126 Mass. 374; *McGrath* v. *New York, C. & H. R. R. Co.* 63 N. Y. 522. See *Pennsylvania R. Co.* v. *Henderson,* 51 Pa. 315; *West Chester & P. R. Co.* v. *McElwee,* 67 Pa. 311; *McKee* v. *Bidwell,* 74 Pa. 218; *Russell* v. *Miller,* 26 Mich. 1.

[1] *Weightnovel* v. *State,* 46 Fla. 1, 35 So. 856.

the trial court cannot determine, as a question of law, that it amounted to an admission.[2] It is clear that no particular conduct or acquiescence can be classed as constituting a proper or improper admission, and hence it is practically impossible for a court to charge, as a matter of law, what conduct or acquiescence constitutes or does not constitute an admission. It is equally clear that the jury must pass upon the question, as a matter of fact, to determine its credibility, as in all other cases of circumstantial evidence.[3] But, in connection therewith, the trial court should instruct the jury as to the legal functions or bearing of the evidence,[4] and that it is evidence of a dangerous character and must be received with great caution,[5] and that the law does not favor confessions based upon admissions, and that such admissions alone are insufficient to convict.[6] Admissions by silence or conduct resolve themselves into a question of circumstantial evidence, admissible under the same rules, subject to the same limitations, and having only the same weight, as the infinite variety of circumstances that surround and change with each concrete case.

[2] *McCusker* v. *Carlson,* 20 N. Y. Week. Dig. 424; *Kelley* v. *People,* 55 N. Y. 565, 14 Am. Rep. 342; *State* v. *Perkins,* 10 N. C. (3 Hawks,) 377; *State* v. *Bowman,* 80 N. C. 432; *People* v. *Dole,* 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[3] *Ackerson* v. *People,* 124 Ill. 563, 16 N. E. 847; *People* v. *McCrea,* 32 Cal. 98.

[4] *Hanna* v. *State,* 46 Tex. Crim. Rep. 5, 79 S. W. 544; *White* v. *State,* 153 Ind. 689, 54 N. E. 763. See *Green* v. *State,* 97 Tenn. 50, 36 S. W. 700.

[5] *Phelan* v. *State,* 114 Tenn. 483, 88 S. W. 1040; *Amos* v. *State,* 123 Ala. 50, 26 So. 524; *Campbell* v. *State,* 55 Ala. 80; *Williams* v. *State,* 42 Ark. 380; *Ford* v. *State,* 34 Ark. 649; *People* v. *Mallon,* 103 Cal. 513, 37 Pac. 512; *Godwin* v. *State,* — Del. —. 74 Atl. 1101; *State* v. *Blackburn,* — Del. —, 75 Atl. 536.

[6] *Graham* v. *State,* 118 Ga. 807, 45 S. E. 616; *Jones* v. *State,* 2 Ga. App. 433, 58 S. E. 559; *State* v. *Glahn,* 97 Mo. 679, 11 S. W. 260.

IX. What Admissions may Prove.

§ 684. Admissions to prove contents of writings.—Whatever the accused says, or his acts, amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some writing. The reason why such parol statements are admissible without a notice to produce or account for the absence of the written statement is that they are not open to the same objection which belongs to parol evidence from other sources, where written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld, whereas what the accused admits to be true may be reasonably presumed to be so.[1] Such admissions are admissible as original evidence. The principle is the same whether the admission is by words or by acts; and a man may, by his acts, make an admission as clearly and as much in detail as he possibly could by words.[2] "There does not, on principle, seem any reason why the admissions of a prisoner should not be receivable in evidence, as well when they relate to the contents of a written document as when they amount to direct confessions of guilt. The rule is generally laid down in the broadest terms: *Optimum habemus testem confitentem reum.* Everything which the prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may seem to them to deserve." [3]

§ 685. Confessions not excluded because accused is present.—It has been also held that the rule requiring the

[1] *Slatterie* v. *Pooley*, 6 Mees. & W. 669, 1 Harr. & W. 18, 10 L. J. Exch. N. S. 8, 4 Jur. 1038.

[2] *Reg.* v. *Basingstoke*, 14 Q. B. 611.

[3] 1 Russell, Crimes, 218, note. See *Reg* v. *Welch*, 1 Den. C. C. 199.

best evidence attainable will not preclude the putting in evidence the confessions of a party, made out of court, even though he be in court, open to examination, at the time they are offered.[1]

§ 686. **Admission of marriage.**—An admission, if there be independent proof of the *corpus delicti*,[1] may prove marriage;[2] and an admission of a party that he had been married according to the laws of a foreign country may render it unnecessary, if the confession is corroborated, to prove that the marriage had been celebrated according to the laws of that country.[3]

§ 687. **Admissions not evidence of record facts.**—It is settled, however, that an admission, whether under oath on an examination, or otherwise, is not admissible to prove record facts.[1] It is at the same time competent to show by admissions the consequences of facts provable by record. Thus a witness can be asked whether he has not been in prison.[2]

X. How Confessions are to be Construed.

§ 688. **Entire confession must be proved.**—The admission, in a conversation or document, by the defendant, of a fact disadvantageous to himself, will not be received without receiving at the same time all such other parts of such con-

[1] Supra, §§ 360, 429, 433; *Clark* v. *Hougham*, 2 Barn. & C. 149, 3 Dowl. & R. 322, 1 L. J. K. B. 249; *Woolway* v. *Rowe*, 1 Ad. & El. 114; *Brubaker* v. *Taylor*, 76 Pa. 83; *Mason* v. *Poulson*, 43 Md. 162.

[1] Supra, §§ 180–182; Wharton, Ev. § 83.

[2] See *Com.* v. *Jackson*, 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74.

[3] *Reg.* v. *Newton*, 2 Moody & R. 503; *Reg.* v. *Simmonsto*, 1 Car. & K. 164, 1 Cox, C. C. 30. But see *Reg.* v. *Flaherty*, 2 Car. & K. 782; supra, § 172.

[1] Supra, §§ 153, 179; Wharton, Ev. §§ 63, 64, 541, 991.

[2] Supra, § 474.

versation or document, whether emanating from himself or from another, as may tend to explain or qualify the part first given.[1] The whole relevant context is in such case to be left to the jury, who are to say whether the facts asserted by the defendant in his favor are true.[2]

A confession will not be excluded by the fact that it is a part of a conversation, for the witness proving it may testify to what he heard, although not able to give the whole of it,[3] or the part that he does not remember.[4] Only the relevant parts of the context are to be received.[5] These rules are applicable to written confessions as well.[6]

[1] Supra, § 622j, note, 11 and 12; supra, § 627; *Rex* v. *Clewes*, 4 Car. & P. 221; *Rex* v. *Jones*, 2 Car. & P. 629; *Rex* v. *Higgins*, 3 Car. & P. 603; *Rouse* v. *Whited*, 25 N. Y. 170, 82 Am. Dec. 337; *Platner* v. *Platner*, 78 N. Y. 90; *Hanrahan* v. *People*, 91 Ill. 142; *McCulloch* v. *State*, 48 Ind. 109, 1 Am. Crim. Rep. 318; *Chambers* v. *State*, 26 Ala. 59; *Frank* v. *State*, 27 Ala. 37; *Haisten* v. *Hixon*, 3 Sneed, 691; *State* v. *Phillips*, 24 Mo. 476; *State* v. *Branstetter*, 65 Mo. 149; *State* v. *Napier*, 65 Mo. 462; *Massey* v. *State*, 1 Tex. App. 563. See *Queen's Case*, 2 Brod. & B. 294.

[2] Supra, § 622j, note 12; Wharton, Ev. §§ 1108, 1109; *Smith* v. *Blandy*, Ryan & M. 258; *Rex* v. *Higgins*, 3 Car. & P. 603; *Rex* v. *Clewes*, 4 Car. & P. 221; *Respublica* v. *M'Carty*, 2 Dall. 86, 1 L. ed. 300; *Brown* v. *Com.* 9 Leigh, 633, 33 Am. Dec. 263; *Blackburn* v. *State*, 23 Ohio St. 146; *Eiland* v. *State*, 52 Ala. 322; *Bower* v. *State*, 5 Mo. 364, 32 Am. Dec. 325; *Green* v. *State*, 13 Mo. 382; *Young* v. *State*, 2 Yerg. 292; *Crawford* v. *State*, 4 Coldw. 190; *State* v. *Worthington*, 64 N. C. 594; *Griswold* v. *State*, 24 Wis. 144; *Shrivers* v. *State*, 7 Tex. App. 450; *Brown* v. *State*, 8 Tex. App. 48; *State* v. *Underwood*, 75 Mo. 230.

[3] *Garrard* v. *State*, 50 Miss. 147; *Woolfolk* v. *State*, 85 Ga. 69, 11 S. E. 814; *Eskridge* v. *State*, 25 Ala. 30; *State* v. *Gossett*, 9 Rich. L. 428; *Coffman* v. *Com.* 10 Bush, 495, 1 Am. Crim. Rep. 293; *Clough* v. *State*, 7 Neb. 320; *Fertig* v. *State*, 100 Wis. 301, 75 N. W. 960; *State* v. *Millmeier*, 102 Iowa, 692, 72 N. W. 275; *Diehl* v. *State*, 157 Ind. 549, 62 N. E. 51. See *Berry* v. *Com.* 10 Bush, 15, 1 Am. Crim. Rep. 272.

[4] *Kendall* v. *State*, 65 Ala. 492; *State* v. *Madison*, 47 La. Ann. 30, 16 So. 566.

[5] *Garrard* v. *State*, 50 Miss. 147; *State* v. *Sorter*, 52 Kan. 531, 34 Pac. 1036; *Emery* v. *State*, 92 Wis. 146, 65 N. W. 848; *Rounds* v. *State*, 57 Wis. 45, 14 N. W. 865; *Waller* v. *People*, 175 Ill. 221, 51 N. E. 900; *Daniels* v. *State*, 57 Fla. 1, 48 So. 747.

[6] Wharton, Ev. § 1103.

While a letter can be put in evidence without the original to which it is a reply, yet where a correspondence is offered it must be given complete.[7] Where a letter is found on a party's person, addressed to him, it cannot be admitted in evidence against him without first showing that he answered the letter, or invited the writing of it, or acquiesced in its contents.[8]

The exact words of the confession need not be proved, but the substance of it must be stated.[9] A mere vague impression of what the accused said is not sufficient.[10]

XI. How Admissibility of Confessions is to be Determined.

§ 689. The character of the confession is a question for the court.—It is the province of the court, and not of the jury, to determine whether a confession be made with that degree of freedom which is necessary to make it admissible evidence.[1] And when there is a general objection that

[7] Wharton, Ev. § 1103.

[8] Supra, § 862; *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596.

[9] *Kendall* v. *State,* 65 Ala. 492; *State* v. *Hopkirk,* 84 Mo. 278; *State* v. *Madison,* 47 La. Ann. 30, 16 So. 566; *State* v. *Desroches,* 48 La. Ann. 428, 19 So. 250; *Brister* v. *State,* 26 Ala. 107; *Fertig* v. *State,* 100 Wis. 301, 75 N. W. 960; *Green* v. *Com.* 26 Ky. L. Rep. 1221, 83 S. W. 638; *Green* v. *State,* 96 Md. 384, 54 Atl. 104, 12 Am. Crim. Rep. 149; *State* v. *Berberick,* 38 Mont. 423, 100 Pac. 209, 16 A. & E. Ann. Cas. 1077; *State* v. *Lu Sing,* 34 Mont. 31, 85 Pac. 521, 9 A. & E. Ann. Cas. 344; *People* v. *Giro,* 197 N. Y. 152, 90 N. E. 432.

[10] *Berry* v. *Com.* 10 Bush, 15, 1 Am. Crim. Rep. 272.

[1] Supra, § 622i; *Reg.* v. *Gould,* 9 Car. & P. 364; *State* v. *Squires,* 48 N. H. 364; *Com.* v. *Harman,* 4 Pa. 269; *Fife* v. *Com.* 29 Pa. 429; *Nicholson* v. *State,* 38 Md. 140; *Thompson* v. *Com.* 20 Gratt. 724; *Young* v. *Com.* 8 Bush, 366; *State* v. *Fidment,* 35 Iowa, 541; *Hector* v. *State,* 2 Mo. 166, 22 Am. Dec. 454; *Boyd* v. *State,* 2 Humph. 39; *State* v. *Vann,* 84 N. C. 722; *Simon* v. *State,* 5 Fla. 285; *Brister* v. *State,* 26 Ala. 107; *Meinaka* v. *State,* 55 Ala. 47; *Whaley* v. *State,* 11 Ga. 125; *Clarke* v. *State,* 35 Ga. 75; *State* v. *Garvey,* 28 La. Ann. 925, 26 Am. Rep. 123; *Carter* v. *State,* 37

the confessions were made under threats, the court may inquire what these threats were, so as to ascertain their sufficiency in law to exclude the confessions.[2] The mode of conducting such examination is at the discretion of the court.[3] And when, on the defendant objecting to an alleged confession on the ground that it was induced by offers of favor made to him by the officer who arrested him and had him in custody, the officer is called by the prosecution and denies that he made such offers of favor, and the defendant then offers evidence to prove that he did, it is the duty of the judge to hear such evidence before admitting the confessions.[4]

If the confession is on its face voluntary, the burden is on the defendant to show it to be incompetent.[5] If a confession be received in evidence, it not appearing that any inducement had been held out, but at a later period of the trial it appears that such an inducement was held out before the making of the confession, as would render it inadmissible, the judge will order the jury to disregard it, or will strike the evidence of the confession out of his notes, and, if there be no other proof of guilt, direct an acquittal.[6] But to justify this course the evidence should be such as would have excluded the confession if offered in time.[7] Ordinarily, the testimony of the defendant, to show improper influence, should be offered

Tex. 362; *Powell* v. *State*, 44 Tex. 63; *Runnels* v. *State*, 28 Ark. 121; *Wallace* v. *State*, 28 Ark. 531; *Garrard* v. *State*, 50 Miss. 147; supra, § 626.

[2] *Whaley* v. *State*, 11 Ga. 125; *Washington* v. *State*, 53 Ala. 29.

[3] *Com.* v. *Morrell*, 99 Mass. 542.

[4] *Com.* v. *Culver*, 126 Mass. 464, 3 Am. Crim. Rep. 81; *Com.* v. *Ackert*, 133 Mass. 402; *Reg.* v. *Garner*, 2 Car. & K. 920, 1 Den. C. C. 329, 3 New Sess. Cas. 329, Temple & M. 7, 18 L. J. Mag. Cas. N. S. 1, 12 Jur. 944, 3 Cox, C. C. 175; *Nicholson* v. *State*, 38 Md. 140; *State* v. *Platte*, 34 La. Ann. 1061; *Barnes* v. *State*, 36 Tex. 356; supra, § 672.

[5] *Rufer* v. *State*, 25 Ohio St. 464. See *Nicholson* v. *State*, 38 Md. 140.

[6] *Berry* v. *State*, 10 Ga. 511; *Earp* v. *State*, 55 Ga. 136, 1 Am. Crim. Rep. 171; *Cain* v. *State*, 18 Tex. 387; *Metzger* v. *State*, 18 Fla. 481.

[7] *Woodford* v. *People*, 62 N. Y. 117, 20 Am. Rep. 464.

and received before the confession is admitted.[8] But in cases of surprise the court will permit the statement of the alleged confession to be interrupted for the purpose of showing *aliunde* that it was improperly extorted.[9]

§ 689a. Confessions; voluntary character to be decided by the judge.—The admissibility of the confession being dependent upon its voluntary character, the question of whether it is voluntary or not must be decided when the offer to introduce the confession testimony is made. The voluntary or involuntary character is a question of law, to be determined by the judge, from the facts, as a condition precedent to the admission of the confession testimony. This is the prevailing rule in the United States, and is in accordance with the elementary principles defining the functions of judge and jury.[1]

[8] *Com.* v. *Culver,* 126 Mass. 464, 3 Am. Crim. Rep. 81.

[9] *Com.* v. *Harman,* 4 Pa. 269; *Serpentine* v. *State,* 1 How. (Miss.) 256; *State* v. *Platte,* 34 La. Ann. 1061.

[1] United States—*United States* v. *Stone,* 8 Fed. 256; *Hardy* v. *United States,* 3 App. D. C. 35; *United States* v. *Nardello,* 4 Mackey, 503; *Harrold* v. *Oklahoma,* 94 C. C. A. 415, 169 Fed. 47, 17 A. & E. Ann. Cas. 868.

Alabama.—*Bonner* v. *State,* 55 Ala. 246; *Young* v. *State,* 68 Ala. 569; *Redd* v. *State,* 69 Ala. 255; *Johnson* v. *State,* 59 Ala. 37, 3 Am. Crim. Rep. 256; *Goodwin* v. *State,* 102 Ala. 87, 15 So. 571; *Jackson* v. *State,* 83 Ala. 76, 3 So. 847; *Brown* v. *State,* 124 Ala. 76, 27 So. 250; *McKinney* v. *State,* 134 Ala. 134, 32 So. 726; *Bush* v. *State,* 136 Ala. 85, 33 So. 878; *Stone* v. *State,* 105 Ala. 60, 17 So. 114; *Burton* v. *State,* 107 Ala. 108, 18 So. 285.

Arkansas.—*Corley* v. *State,* 50 Ark. 305, 7 S. W. 255; *Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123.

California.—*People* v. *Kamaunu,* 110 Cal. 609, 42 Pac. 1090; *People* v. *Ah How,* 34 Cal. 218; *People* v. *Jim Ti,* 32 Cal. 60; *People* v. *Siemsen,* 153 Cal. 387, 95 Pac. 863; *People* v. *Warren,* 12 Cal. App. 730, 108 Pac. 725; *People* v. *Cahill,* 11 Cal. App. 685, 106 Pac. 115.

Connecticut.—*State* v. *Willis,* 71 Conn. 293, 41 Atl. 820.

Florida.—*Murray* v. *State,* 25 Fla. 528, 6 So. 498; *Holland* v. *State,* 39 Fla. 178, 22 So. 298; *Gantling* v. *State,* 41 Fla. 587, 26 So. 737; *Simon* v. *State,* 5 Fla. 285; *Metzger* v. *State,* 18 Fla. 481; *Thomas* v. *State,* 58 Fla. 122, 51 So. 410.

The sole question to be determined by the trial judge is, Is the confession voluntary or involuntary? If the testimony shows

Georgia.—*Boston* v. *State,* 94 Ga. 590, 20 S. E. 98, 21 S. E. 603; *Daniels* v. *State,* 78 Ga. 98, 6 Am. St. Rep. 238; *Holsenbake* v. *State,* 45 Ga. 43.

Illinois.—*Zuckerman* v. *People,* 213 Ill. 114, 72 N. E. 741.

Indiana.—*Brown* v. *State,* 71 Ind. 470; *Houk* v. *State,* 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Thurman* v. *State,* 169 Ind. 240, 82 N. E. 64.

Iowa.—*State* v. *Fidment,* 35 Iowa, 541; *State* v. *Storms,* 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610; *State* v. *Willing,* 129 Iowa, 72, 105 N. W. 355, semble.

Kentucky.—*Dugan* v. *Com.* 102 Ky. 241, 43 S. W. 418; *Hudson* v. *Com.* 2 Duv. 531; *Howard* v. *Com.* 28 Ky. L. Rep. 737, 90 S. W. 578; *Pearsall* v. *Com.* 29 Ky. L. Rep. 222, 92 S. W. 589.

Louisiana.—*State* v. *Woods,* 124 La. 738, 50 So. 671.

Maine.—*State* v. *Grover,* 96 Me. 363, 52 Atl. 757, 12 Am. Crim. Rep. 128.

Maryland.—*Biscoe* v. *State,* 67 Md. 6, 8 Atl. 571.

Massachusetts.—*Com.* v. *Preece,* 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107; *Com.* v. *Bond,* 170 Mass. 41, 48 N. E. 756; *Com.* v. *Culver,* 126 Mass. 464, 3 Am. Crim. Rep. 81; *Com.* v. *Antaya,* 184 Mass. 326, 68 N. E. 331, 12 Am. Crim. Rep. 135; *Com.* v. *Hudson,* 185 Mass. 402, 70 N. E. 436; *Com.* v. *Knapp,* 10 Pick. 495, 20 Am. Dec. 534.

Michigan.—*People* v. *Barker,* 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539.

Minnesota.—*State* v. *Staley,* 14 Minn. 105, Gil. 75; *State* v. *Holden,* 42 Minn. 350, 44 N. W. 123.

Mississippi.—*Simmons* v. *State,* 61 Miss. 243; *Williams* v. *State,* 72 Miss. 117, 16 So. 296.

Missouri.—*Hawkins* v. *State,* 7 Mo. 190; *Hector* v. *State,* 2 Mo. 166, 22 Am. Dec. 454; *State* v. *Rush,* 95 Mo. 199, 8 S. W. 221; *Couley* v. *State,* 12 Mo. 462; *State* v. *Patterson,* 73 Mo. 695; *State* v. *Hopkirk,* 84 Mo. 278; *State* v. *Duncan,* 64 Mo. 265; *State* v. *McKenzie,* 144 Mo. 40, 45 S. W. 1117.

Montana.—*State* v. *Berberick,* 38 Mont. 423, 100 Pac. 209, 16 A. & E. Ann. Cas. 1077; *State* v. *Sherman,* 35 Mont. 512, 119 Am. St. Rep. 869, 90 Pac. 981; *State* v. *Tighe,* 27 Mont. 327, 71 Pac. 3.

New Hampshire.—*State* v. *Squires,* 48 N. H. 364.

New York.—*People* v. *Mackinder,* 80 Hun, 40, 61 N. Y. S. R. 523, 29 N. Y. Supp. 842; *People* v. *Meyer,* 162 N. Y. 357, 56 N. E. 758; *People* v. *Fox,* 50 Hun, 604, 20 N. Y. S. R. 316, 3 N. Y. Supp. 359; *People* v. *Randazzio,* 194 N. Y. 147, 87 N. E. 112.

Nevada.—*State* v. *Williams,* 31 Nev. 360, 102 Pac. 974.

New Jersey.—*State* v. *Young,* 67 N. J. L. 223, 51 Atl. 939; *State* v. *Guild,* 10 N. J. L. 163, 18 Am. Dec. 404; *Roesel* v. *State,* 62 N. J. L. 216, 41 Atl. 408; *State* v. *Mac-*

it to be involuntary, then it is excluded; if the testimony shows it to be voluntary, it is admissible. When the court rules that the confession is voluntary, and hence admissible, the same evidence, and all the circumstances that might in any way affect the credibility of the confession, must be introduced for the consideration of the jury, not that the jury can pass upon its competency, but in order that the jury may determine its weight and credibility.[2]

In deference to a line of respectable authorities, it should be here observed that where the confession testimony is con-

Queen, 69 N. J. L. 522, 55 Atl. 1006; *State* v. *Hernia,* 68 N. J. L. 299, 53 Atl. 85; *State* v. *Monich,* 74 N. J. L. 522, 64 Atl. 1016.

North Carolina.—*State* v. *Crowson,* 98 N. C. 595, 4 S. E. 143; *State* v. *Andrew,* 61 N. C. (Phill. L.) 205; *State* v. *Vann,* 82 N. C. 631; *State* v. *Efler,* 85 N. C. 585.

Ohio.—*Spears* v. *State,* 2 Ohio St. 583; *Lefevre* v. *State,* 50 Ohio St. 584, 35 N. E. 52; *Rufer* v. *State,* 25 Ohio St. 469.

Oklahoma.—*Kirk* v. *Territory,* 10 Okla. 46, 60 Pac. 797.

Oregon.—*State* v. *Wintzingerode,* 9 Or. 153; *State* v. *Rogoway,* 45 Or. 601, 78 Pac. 987, 81 Pac. 234, 2 A. & E. Ann. Cas. 431; *State* v. *Blodgett,* 50 Or. 329, 92 Pac. 820.

Pennsylvania,—*Com.* v. *Johnson,* 162 Pa. 63, 29 Atl. 280; *Fife* v. *Com.* 29 Pa. 429; *Com.* v. *Johnson,* 217 Pa. 77, 66 Atl. 233.

South Carolina.—*State* v. *Branham,* 13 S. C. 389; *State* v. *Vaigneur,* 5 Rich. L. 391; *State* v. *Moorman,* 27 S. C. 22, 2 S. E. 621; *State* v. *Workman,* 15 S. C. 540; *State* v. *Kirby,* 1 Strobh. L. 155; *State* v. *Middleton,* 69 S. C. 72, 48 S. E. 35; *State* v. *Perry,* 74 S. C. 551, 54 S. E. 764; *State* v. *Gussett,* 9 Rich. L. 435.

South Dakota.—*State* v. *Allison,* 24 S. D. 622, 124 N. W. 747; *State* v. *Landers,* 21 S. D. 606, 114 N. W. 717.

Tennessee.—*Self* v. *State,* 6 Baxt. 244; *Boyd* v. *State,* 2 Humph. 39; *Beggarly* v. *State,* 8 Baxt. 520; *Maples* v. *State,* 3 Heisk. 408.

Texas.—*Thomas* v. *State,* 35 Tex. Crim. Rep. 178, 32 S. W. 771; *Cain* v. *State,* 18 Tex. 387.

Vermont.—*State* v. *Gorham,* 67 Vt. 365, 31 Atl. 845, 10 Am. Crim. Rep. 25; *State* v. *Carr,* 53 Vt. 37.

Virginia.—*Thompson* v. *Com.* 20 Gratt. 724; *Smith* v. *Com.* 10 Gratt. 737.

Washington.—*State* v. *Washing,* 36 Wash. 485, 78 Pac. 1019.

Wisconsin.—*Hintz* v. *State,* 125 Wis. 405, 104 N. W. 110.

Wyoming.—*Clay* v. *State,* 15 Wyo. 42, 86 Pac. 17, 544.

[2] *Kirk* v. *Territory,* 10 Okla. 46, 60 Pac. 797; *Redd* v. *State,* 69 Ala. 260; *Young* v. *State,* 68 Ala. 578.

flicting, that is, the testimony adduced as showing the circumstances under which the confession itself was obtained, the question of the character of the confession may be left to the jury. Such holdings, however, are in direct conflict with the elementary principle that questions of law are to be determined by the judge, and questions of fact to be determined by the jury. The confusion has, in many cases, arisen out of a misunderstanding as to the meaning of the word "confession." The confession is the direct acknowledgment of guilt, and whether or not it is a confession is a question of law for the court. Statements or admissions contain facts from which guilt may be inferred, and the credibility of these facts is to be determined by the jury. These functions should always be kept distinct, and never be taken to mean that, after the judge has passed upon the admissibility of a confession, the jury then may also pass upon its competency and reject it. However wrong these rulings may be, they are quite numerous, as shown by the following cases.[3]

[3] United States.—*Wilson* v. *United States,* 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; *Shaffer* v. *United States,* 24 App. D. C. 417, 196 U. S. 639, 49 L. ed. 631, 25 Sup. Ct. Rep. 795.

Georgia.—*Willis* v. *State,* 93 Ga. 208, 19 S. E. 43; *Thomas* v. *State,* 84 Ga. 613, 10 S. E. 1016; *Irby* v. *State,* 95 Ga. 467, 20 S. E. 218; *Dailey* v. *State,* 80 Ga. 359, 9 S. E. 1072; *Carr* v. *State,* 84 Ga. 250, 10 S. E. 626; *Price* v. *State,* 114 Ga. 855, 40 S. E. 1015, 12 Am. Crim. Rep. 203; *Griner* v. *State,* 121 Ga. 614, 49 S. E. 700.

Iowa.—*State* v. *Storms,* 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610; *State* v. *Bennett,* 143 Iowa, 214, 121 N. W. 1021; *State* v. *Westcott,* 130 Iowa, 1, 104 N. W. 341; *State* v. *Foster,* 136 Iowa, 527, 114 N. W. 36; *State* v. *Moran,* 131 Iowa, 645, 109 N. W. 187.

Massachusetts.—*Com.* v. *Preece,* 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107; *Com.* v. *Piper,* 120 Mass. 185; *Com.* v. *Bond,* 170 Mass. 41, 48 N. E. 756; *Com.* v. *Smith,* 119 Mass. 305; *Com.* v. *Hudson,* 185 Mass. 402, 70 N. E. 436; *Com.* v. *Burroughs,* 162 Mass. 513, 39 N. E. 184; *Com.* v. *Antaya,* 184 Mass. 326, 68 N. E. 331, 12 Am. Crim. Rep. 135; *Com.* v. *Tucker,* 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127.

Michigan.—*People* v. *Flynn,* 96 Mich. 276, 55 N. W. 834; *People* v. *Howes,* 81 Mich. 396, 45 N. W.

XIA. Weight of Confessions.

§ 689b. Weight and conclusiveness.—The general rule is that confessions are not conclusive upon the accused, but can be disproved by other evidence;[1] but the state introducing

961; *People* v. *Robinson*, 86 Mich. 415, 49 N. W. 260; *People* v. *Swetland*, 77 Mich. 53, 43 N. W. 779, 8 Am. Crim. Rep. 283; *People* v. *Maxfield*, 146 Mich. 103, 108 N. W. 1087.

Mississippi.—*Garrard* v. *State*, 50 Miss. 147 (reversed). *Ellis* v. *State*, 65 Miss. 44, 7 Am. St. Rep. 634, 3 So. 188 (overruled; *Williams* v. *State*, 72 Miss. 117, 16 So. 296 (overruled.)

Missouri.—*State* v. *Stebbins*, 188 Mo. 387, 87 S. W. 460; *State* v. *Jones*, 171 Mo. 401, 94 Am. St. Rep. 786, 71 S. W. 680.

Montana.—*State* v. *Tighe*, 27 Mont. 327, 71 Pac. 3.

Nebraska.—*Heddendorf* v. *State*, 85 Neb. 747, 124 N. W. 150.

New Jersey.—*Bullock* v. *State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62.

New York.—*People* v. *Cassidy*, 133 N. Y. 612, 30 N. E. 1003; *People* v. *Meyer*, 162 N. Y. 357, 56 N. E. 758; *People* v. *Randazzio*, 194 N. Y. 147, 87 N. E. 112; *People* v. *Brasch*, 193 N. Y. 46, 85 N. E. 809; *People* v. *Zigouras*, 163 N. Y. 250, 57 N. E. 465; *People* v. *White*, 176 N. Y. 331, 68 N. E. 630.

Ohio.—*Burdge* v. *State*, 53 Ohio St. 512, 42 N. E. 594.

Pennsylvania. — *Volkavitch* v. *Com.* 9 Sadler (Pa.) 327, 12 Atl. 84; *Com.* v. *Epps*, 193 Pa. 512, 44 Atl. 570, 12 Am. Crim. Rep. 185; *Com.* v. *Van Horn*, 188 Pa. 143, 41 Atl. 469; *Com.* v. *Shaffer*, 178 Pa. 409, 35 Atl. 924; *Com.* v. *Aston*, 227 Pa. 112, 75 Atl. 1019.

South Carolina.—*State* v. *Kirby*, 1 Strobh. L. 378.

South Dakota.—*State* v. *Vincent*, 16 S. D. 62, 91 N. W. 347.

Texas.—*Cortez* v. *State*, 43 Tex. Crim. Rep. 375, 66 S. W. 453; *Morris* v. *State*, 39 Tex. Crim. Rep. 371, 46 S. W. 253; *Johnson* v. *State*, 49 Tex. Crim. Rep. 314, 94 S. W. 224; *Hamlin* v. *State*, 39 Tex. Crim. Rep. 579, 47 S. W. 656.

Vermont.—*State* v. *Jenkins*, 2 Tyler (Vt.) 377.

Washington.—*State* v. *Washing*, 36 Wash. 485, 78 Pac. 1019.

Wisconsin.—*Hintz* v. *State*, 125 Wis. 405, 104 N. W. 110.

Wyoming.—*Clay* v. *State*, 15 Wyo. 42, 86 Pac. 17, 544.

[1] *People* v. *Rulloff*, 3 Park. Crim. Rep. 401; *Com.* v. *Howe*, 9 Gray, 110; *State* v. *Blodgett*, 50 Or. 329, 92 Pac. 820; *Lester* v. *State*, 32 Ark. 727; *Simmons* v. *State*, 61 Miss. 243; *People* v. *Fox*, 50 Hun, 604, 20 N. Y. S. R. 316, 3 N. Y. Supp. 359; *Markey* v. *State*, 47 Fla. 38, 37 So. 53; *Murmutt* v. *State*, — Tex. Crim. Rep. —, 67 S. W. 508; *Sowers* v. *State*, 55 Tex. Crim. Rep. 113, 113 S. W. 148; *Jaynes* v. *People*, 44 Colo. 535, 99 Pac. 325,

the confession is bound by it to the same extent as it is bound by other evidence introduced by it.[2]

Where the confession is admitted, the jury must consider it in the light of all the surrounding circumstances, and in connection with all the other evidence in the case, and they are not bound to accept it in its entirety, but may reject such part as they believe to be untrue.[3] But the weight of the confession is always to be determined by the jury.[4]

XII. Self-Serving Declarations.

§ 690. Self-serving declarations inadmissible.—Declarations made by a defendant in his own favor unless part of the *res gestæ*, or of a confession offered by the prosecution,

16 A. & E. Ann. Cas. 787; *People* v. *Rowland*, 12 Cal. App. 6, 106 Pac. 428.

[2] *People* v. *Hare*, 57 Mich. 505, 24 N. W. 843; *State* v. *Dashman*, 153 Mo. 454, 55 S. W. 69, 14 Am. Crim. Rep. 171.

See *Montgomery* v. *State*, 128 Wis. 183, 107 N. W. 14; *Pratt* v. *State*, 59 Tex. Crim. Rep. 635, 129 S. W. 364; *Banks* v. *State*, 56 Tex. Crim. Rep. 262, 119 S. W. 847.

[3] *United States* v. *Smith*, Fed. Cas. No. 16,342a; *United States* v. *Prior*, 5 Cranch, C. C. 37, Fed. Cas. No. 16,092; *Parke* v. *State*, 48 Ala. 266; *State* v. *West*, Houst. Crim. Rep. 371; *Lacett* v. *State*, 23 Ga. 57; *Hudgins* v. *State*, 26 Ga. 350; *State* v. *Wedemeyer*, 11 La. Ann. 49; *Coon* v. *State*, 13 Smedes & M. 246; *McCann* v. *State*, 13 Smedes & M. 471; *Furst* v. *State*, 31 Neb. 403, 47 N. W. 1116; *Young* v. *State*, 2 Yerg. 292; *McHenry* v. *State*, 40 Tex. 46; *Riley* v. *State*, 4 Tex. App. 538; *Cook* v. *State*, 114 Ga. 523, 40 S. E. 703, 12 Am. Crim. Rep. 115; *Nicks* v. *State*, 40 Tex. Crim. Rep. 1, 48 S. W. 186; *United States* v. *Williams*, 103 Fed. 938; *Brewer* v. *State*, 72 Ark. 145, 78 S. W. 773; *State* v. *Brinte*, 4 Penn. (Del.) 551, 58 Atl. 258; *State* v. *Powell*, 5 Penn. (Del.) 24, 61 Atl. 966; *State* v. *Tilghman*, 6 Penn. (Del.) 54, 63 Atl. 772; *Gantling* v. *State*, 40 Fla. 237, 23 So. 857; *Kirby* v. *State*, 44 Fla. 81, 32 So. 836; *Hauk* v. *State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

[4] *State* v. *Welch*, 7 Port. (Ala.) 463; *United States* v. *Stone* (C. C.) 8 Fed. 232; *Stallings* v. *State*, 47 Ga. 572; *State* v. *Staley*, 14 Minn. 105, Gil. 75; *State* v. *Patterson*, 68 N. C. 292; *McCabe* v. *Com.* 3 Sadler (Pa.) 426, 8 Atl. 45; *Brez* v. *State*, 39 Tex. 95; *State* v. *Jenkins*, 2 Tyler, 377.

are not admissible for the defense.[1] *Nullus idoneus testis in re sua intelligitur.*[2] Hence comes the maxim, *Scriptura pro scribente nihil probat.*[3] Nor is the result changed by the statutes enabling a party to be called as a witness in his own behalf. That which he could prove by his sworn statements he is not permitted to prove by statements which are unsworn. In any view, therefore, the extrajudicial self-serving declarations of a party are inadmissible for him, with the exceptions hereafter stated, as evidence to prove his case.[4]

§ 691. Declarations as res gestæ.—When such declarations are part of the *res gestæ* they are admissible.[1] It is not, however, necessary that such declarations, to be part of the *res gestæ,* should be precisely concurrent with the act under trial; it is enough if they spring from it, and are made under circumstances which preclude the idea of design.[2] The test

[1] Supra, §§ 678a, 678b; *State* v. *Scott,* 8 N. C. (1 Hawks) 24; *State* v. *Reitz,* 83 N. C. 634; *Bland* v. *State,* 2 Ind. 608; *State* v. *Miller,* 53 Iowa, 84, 4 N. W. 838; *State* v. *Jackson,* 17 Mo. 544, 59 Am. Dec. 281; *State* v. *Van Zant,* 71 Mo. 541; *Tipper* v. *Com.* 1 Met. (Ky.) 6; *State* v. *Wisdom,* 8 Port. (Ala.) 511; *Campbell* v. *State,* 23 Ala. 44; *Corbett* v. *State,* 31 Ala. 329; *Hall* v. *State,* 40 Ala. 698; *Birdsong* v. *State,* 47 Ala. 68; *Atwell* v. *State,* 63 Ala. 61; *Newcomb* v. *State,* 37 Miss. 383; *People* v. *Wyman,* 15 Cal. 70; *Riggs* v. *State,* 6 Coldw. 517; *State* v. *Dufour,* 31 La. Ann. 804; *Golden* v. *State,* 19 Ark. 590; *Butler* v. *State,* 34 Ark. 480; *Walker* v. *State,* 13 Tex. App. 618. See §§ 262 et seq.; *Sager* v. *State,* 11 Tex. App. 110.

[2] L. 10 D. xxii. 5.

[3] See Wharton, Ev. §§ 170, 265, 1101.

[4] *State* v. *Anderson,* 10 Or. 448; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Ray* v. *State,* 50 Ala. 104; *Hall* v. *State,* 48 Ga. 607; *State* v. *Brown,* 64 Mo. 367.

[1] Supra, § 679, note; *Com.* v. *Rowe,* 105 Mass. 590; *Reg.* v. *Crowhurst,* 1 Car. & K. 370; *Reg.* v. *Smith,* 2 Car. & K. 207; *Little* v. *Com.* 25 Gratt. 921; *State* v. *Abbott,* 8 W. Va. 741; *Manier* v. *State,* 6 Baxt. 595; *O'Shields* v. *State,* 55 Ga. 696; *Roberts* v. *State,* 68 Ala. 515; *Head* v. *State,* 44 Miss. 731; *Payne* v. *State,* 57 Miss. 348; *Cotquitt* v. *State,* 34 Tex. 550; *Taliaferro* v. *State,* 40 Tex. 523; *Maddox* v. *State,* 41 Tex. 205; *State* v. *Garrand,* 5 Or. 216; supra, §§ 262, 264.

[2] *State* v. *Vincent,* 24 Iowa, 570,

is, Were the declarations the facts talking through the party, or the party's talk about the facts? Instinctiveness is a requisite, and when this obtains, the declarations are admissible.[3] Hence, a defendant's explanations, immediately upon stolen goods being found in his possession, are admissible,[4] and so are the defendant's utterances, when his right was first called in question,[5] as well as those made at the commission of the offense charged.[6] But when the declarations are distinguishable in point of time, or are open to the suspicion of being part of the defendant's plan of defense, they must be ruled out.[7] Thus, on an indictment against a prisoner for having in his possession coining tools, with intent to use them, he cannot give in evidence his declarations, as to the purpose for which he wished them made.[8] Where, also, a defendant, in conversation with a witness, admitted the existence of a particular fact which tended strongly to establish his guilt, but coupled it with an explanation which, if true, would exculpate him, it was held that the accused could not show that he had at other times made the same statement and explanation to others.[9] So, one indicted for murder cannot give in evidence his own conversations, had after going half a mile from the place of murder, when he has had time to collect himself to make out his case.[10] And so, where a defendant, indicted for

95 Am. Dec. 753; *People* v. *Vernon*, 35 Cal. 49, 95 Am. Dec. 49; *State* v. *Patterson*, 63 N. C. 520; *Neyland* v. *State*, 13 Tex. App. 536. See supra, § 264.

[3] See supra, §§ 262, 263.

[4] Supra, § 263; post, § 761; *Reg.* v. *Smith*, 2 Car. & K. 207; *Com.* v. *Millard*, 1 Mass. 6; *State* v. *Jones*, 20 N. C. 120 (3 Dev. & B. L. 122); *State* v. *Daley*, 53 Vt. 442, 38 Am. Rep. 694. See *People* v. *Dowling*, 84 N. Y. 478; *Bennett* v. *People*, 96 Ill. 602; *Lander* v. *People*, 104 Ill. 248; *Henderson* v. *State*, 70 Ala. 23, 45 Am. Rep. 72; *Payne* v. *State*, 57 Miss. 348; *McPhail* v. *State*, 9 Tex. App. 164; supra, §§ 263, 272.

[5] *Hampton* v. *State*, 5 Tex. App. 463.

[6] Supra, §§ 262, 263.

[7] *State* v. *Brown*, 64 Mo. 367. See supra, § 263. See, however, *Anderson* v. *State*, 11 Tex. App. 576.

[8] *Com.* v. *Kent*, 6 Met. 221.

[9] *Earhart* v. *Com.* 9 Leigh, 671.

[10] *Gardner* v. *People*, 4 Ill. 83.

murder, was met after the transaction, at some distance from the scene, with blood on his hands, it was held that his declarations at the time to account for the blood on his hands, and other suspicious circumstances, were not admissible;[11] and this, though there was no person present when the homicide was committed.[12]

§ 692. Accused may show capacity in which he was acting.—A party may in certain cases show by his own contemporaneous statements, that he was acting at the particular moment, not illegally, but under the direction of the law. Thus it is ruled that an officer indicted as an accessory to a burglary may, for the purpose of explaining his frequent intercourse with those indicted as principals, and to prove his own diligence and fidelity in pursuing them, give in evidence the conversations between himself and another officer as to the best means of gaining their confidence and thereby bringing them to justice, and also the information received by him in answer to inquiries made of persons whom he met while in pursuit of the burglars.[1]

§ 693. Accused's declarations as to his condition.—Another exception to the rule that self-serving declarations are inadmissible is to be found in the reception, under the limitations already noticed, of a party's declarations as to his physical or mental condition, when such are in controversy.[1]

§ 694. Weight of self-serving declarations.—When a defendant's statements in his own behalf are admissible, their

[11] *Scaggs* v. *State*, 8 Smedes & M. 722. See *Bennett* v. *People*, 96 Ill. 602; *Pharr* v. *State*, 9 Tex. App. 129, 10 Tex. App. 485; *Childress* v. *State*, 10 Tex. App. 698.

[12] *Bland* v. *State*, 2 Ind. 608.

[1] *Com.* v. *Robinson*, 1 Gray, 555. See supra, § 274.

[1] Supra, § 271–274.

weight is for the jury,[1] and they can be disproved by the prosecution.[2]

XIII. Admissions of Agents.

§ 695. When admissions of agent bind principal.—When the relation of principal and agent in a particular transaction is established, the agent's admissions may be imputed to the principal, if his agency involves the making of such admissions.[1] Hence the declarations of a messenger sent to a third party by the prisoner, if made with reference to the object of the mission, are admissible in evidence against him, where the evidence shows they were made by his authority.[2] But it should be remembered that, before the admissions of the agent can be proved, the fact of agency should first be established by other evidence.[3] And it has been questioned whether the admissions of an agent, not a co-conspirator, unless part of the *res gestæ*, can be put in evidence if the agent himself could be called to substantiate the facts admitted.[4]

§ 696. Admissions of agent in cases of criminal negligence.—It has been argued that, to impute the agent's

[1] *Tipton* v. *State*, Peck (Tenn.) 308; *Conner* v. *State*, 34 Tex. 659.

[2] *Rex* v. *Jones*, 2 Car. & P. 629.

[1] Wharton, Ev. § 1170; *Reg.* v. *Downer*, 14 Cox, C. C. 486, 43 L. T. N. S. 445, 45 J. P. 52; *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116; *Com.* v. *Boott*, Thacher, Crim. Cas. 390; *State* v. *Taylor*, 3 Brev. 243.

[2] *Browning* v. *State*, 33 Miss. 48; *Gerke* v. *California Steam Nav. Co.* 9 Cal. 251, 70 Am. Dec. 650; *Price* v. *Thornton*, 10 Mo. 135; *Toledo & W. R. Co.* v. *Goddard*, 25 Ind. 185; *Northwestern Union Packet Co.* v. *Clough*, 20 Wall. 528, 22 L. ed. 406; *Burnside* v. *Grand Trunk R. Co.* 47 N. H. 554, 93 Am. Dec. 474.

[3] Wharton, Ev. § 1183; *United States* v. *Morrow*, 4 Wash. C. C. 733, Fed. Cas. No. 15,819; *Lambert* v. *People*, 76 N. Y. 220, 32 Am. Rep. 293; *Russell* v. *State*, 71 Ala. 348.

[4] *Melville's Trial*, 29 How. St. Tr. 746; Roscoe, Crim. Ev. 8th ed. 52. See *Reg.* v. *Cooper*, L. R. 1 Q. B. Div. 19, 45 L. J. Mag. Cas. N. S. 15, 33 L. T. N. S. 754, 24 Week. Rep. 279, 13 Cox, C. C. 123, quoted supra, § 682.

act to the principal, a criminal design must be brought home to the principal.[1] But proof that a guilty intent existed on the part of the principal cannot be necessary in cases where the principal (*e. g.*, a corporation) is indicted for negligence, and the acts or declarations of the negligent agent are offered to prove the negligence.[2]

§ 697. Admissions of attorneys of record.—As a matter of practice, subject to exceptions in those cases in which a defendant is required to plead or otherwise answer in person, an attorney, by admissions made during the trial of a case, or in correspondence relating to such trial, may bind his client, in criminal as well as civil issues; and such admissions, part of a mutual plan for the trial of the case, are irrevocable by the client, except in cases of fraud or of a gross mistake.[1]

The admissions of a referee are to be in like manner limited. Thus, when the president of an insurance company refers an inquirer as to insurance to a third person, who he said was chief man, for information, this does not make admissible against the president, on an indictment against him, statements made in his absence by the bookkeeper as to the assets of the company.[2]

XIV. Admissions of Co-Conspirators.

§ 698. When admissible against others than the confessor.—The general rule is that admissions are only admissible against the party who makes them.[1] But where

[1] See *Cooper* v. *Slade*, 6 H. L. Cas. 746, 27 L. J. Q. B. N. S. 449, 4 Jur. N. S. 791, 6 Week. Rep. 461; Taylor, Ev. § 827; *Melville's Trial*, 29 How. St. Tr. 764; *Queen's Case*, 2 Brod. & B. 306, 307, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *Rex* v. *Gutch*, Moody & M. 433, 437.

[2] Wharton, Ev. § 1174.

[1] Wharton, Ev. § 1184.

[2] *Lambert* v. *People*, 6 Abb. N. C. 181, S. C. 76 N. Y. 220, 32 Am. Rep. 293.

[1] *Levison* v. *State*, 54 Ala. 520; *People* v. *Gonzales*, 136 Cal. 666, 69 Pac. 487, 12 Am. Crim. Rep. 97;

several persons are proved to have combined for the same unlawful purpose, any act done by one of the party, in pursuance of the concerted plan, with reference to the crime charged, is the act of all, and proof of such act is evidence against any and all of the others who were engaged in the same conspiracy.[2] When once the conspiracy or combination is established, the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the act or declaration of all, and therefore imputable to all. All are deemed to assent to or command what is said or done by anyone in furtherance of the common object.[3] But the competency of the evidence of such admissions is determined by the fact that a conspiracy or combination existed. Hence a foundation must first be laid by other evidence,[4] by proof suf-

Daniels v. *State,* 78 Ga. 98, 6 Am. St. Rep. 238; *Hudson* v. *Com.* 2 Duv. 531; *State* v. *Johnson,* 47 La. Ann. 1225, 17 So. 789; *Com.* v. *Hunton,* 168 Mass. 130, 46 N. E. 404; *Lynes* v. *State,* 36 Miss. 617; *People* v. *Kief,* 58 Hun, 337, 11 N. Y. Supp. 926, 12 N. Y. Supp. 896; *Morrison* v. *State,* 5 Ohio, 438; *State* v. *Carson,* 36 S. C. 524, 15 S. E. 588; *Sessions* v. *State,* 37 Tex. Crim. Rep. 62, 38 S. W. 623; *State* v. *Flowers,* 58 Kan. 702, 50 Pac. 938.

[2] *Mores* v. *Martens,* 8 Abb. Pr. 257; *Scott* v. *Baker,* 37 Pa. 330; *Lacey* v. *Porter,* 103 Cal. 597, 37 Pac. 635; *Colt* v. *Eves,* 12 Conn. 243.

For admissibility of declarations of co-conspirators as *res gestæ,* see note in 19 L.R.A. 745.

[3] *Re Clark,* 9 Blatchf. 379, Fed. Cas. No. 2,802; *American Fur Co.* v. *United States,* 2 Pet. 358, 7 L. ed. 450; *Nudd* v. *Burrows,* 91 U. S. 427, 23 L. ed. 286; *Lincoln* v. *Claflin,* 7 Wall. 132, 19 L. ed. 106; *Rea* v. *Missouri,* 17 Wall. 532, 21 L. ed. 707; *Jones* v. *Simpson,* 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; *Drake* v. *Stewart,* 22 C. C. A. 104, 40 U. S. App. 173, 76 Fed. 140; *Stewart* v. *State,* 26 Ala. 44; *Smith* v. *State,* 52 Ala. 407; *People* v. *Collins,* 64 Cal. 293, 30 Pac. 847; *McRae* v. *State,* 71 Ga. 96, 5 Am. Crim. Rep. 622; *Williams* v. *State,* 47 Ind. 568; *Com.* v. *Brown,* 14 Gray, 419; *People* v. *Pitcher,* 15 Mich. 397; *Mask* v. *State,* 32 Miss. 405; *State* v. *Daubert,* 42 Mo. 242; *State* v. *Ross,* 29 Mo. 32; *State* v. *Pike,* 51 N. H. 105; *State* v. *George,* 29 N. C. (7 Ired. L.) 321; *Com.* v. *Eberle,* 3 Serg. & R. 9; *Strady* v. *State,* 5 Coldw. 300; *Phillips* v. *State,* 6 Tex. App. 364; *State* v. *Thibeau,* 30 Vt. 100; *Ellis* v. *Dempsey,* 4 W. Va. 126.

[4] *Com.* v. *Crowninshield,* 10 Pick. 497; *Com.* v. *Ingraham,* 7 Gray, 46,

ficient in the opinion of the court to establish prima facie the fact of conspiracy between the parties. Where the evidence is sufficient in the opinion of the court to establish the prima facie case, and it is admitted, it is for the jury to say upon all the evidence, under the instructions of the court, whether or not the conspiracy existed.[5]

The evidence supporting a conspiracy is generally circumstantial; it is not necessary to prove any direct act, or even any meeting of the conspirators, as the fact of conspiracy must be collected from the collateral circumstances of each case.[6] It is for the court to say whether or not such connection has been sufficiently shown, but when that is done the doctrine applies that each party is an agent for all the others, so that an act done by one, in furthering the unlawful design, is the

Clawson v. *State,* 14 Ohio St. 234; *State* v. *Cain,* 20 W. Va. 679; *State* v. *Daubert,* 42 Mo. 242; *Browning* v. *State,* 30 Miss. 656; *Jones* v. *Com.* 2 Duv. 554; *Bowling* v. *Com.* 79 Ky. 604; *Hightower* v. *State,* 22 Tex. 605; *Myers* v. *State,* 6 Tex. App. 1; *Avery* v. *State,* 10 Tex. App. 199; *Casey* v. *State,* 37 Ark. 67.

[5] 1 East, P. C. chap. 2, § 37, p. 96; 1 Phillipps, Ev. 447, citing *Queen's Case,* 2 Brod. & B. 302, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; 2 Russell, Crimes, 697; *United States* v *Hartwell,* 3 Cliff. 221, Fed. Cas. No. 15,318; *United States* v. *McKee* 3 Dill. 546, Fed. Cas. No. 15,685; *United States* v. *Cole,* 5 McLean, 513, Fed. Cas. No. 14,832; *American Fur Co.* v. *United States,* 2 Pet. 365, 7 L. ed. 453; *Com.* v. *Brown,* 14 Gray, 419; *Ormsby* v. *People,* 53 N. Y. 472; *Danville Bank* v. *Waddill,* 31 Gratt. 469; *State* v. *Nash,* 7 Iowa, 347; *Hamilton* v. *People,* 29 Mich. 195; *State* v. *George,* 29 N. C. (7 Ired. L.) 321; *Garrard* v. *State,* 50 Miss. 147; *State* v. *Ross,* 29 Mo. 32; *Matthews* v. *State,* 6 Tex. App. 23. See *Evans* v. *People,* 90 Ill. 384; Wharton, Crim. Law, 8th ed. § 211a; *Reg.* v. *Coney,* L. R. 8 Q. B. Div. 534, 51 L. J. Mag. Cas. N. S. 66, 46 L. T. N. S. 307, 30 Week. Rep. 678, 15 Cox, C. C. 46, 46 J. P. 404. But see *Rex* v. *Hargrave,* 5 Car. & P. 170, cited supra, § 440; *Com.* v. *Crowninshield,* 10 Pick. 497; *Com.* v. *Waterman,* 122 Mass. 43; *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81; *Com.* v. *Ratcliffe,* 130 Mass. 36; 3 Starkie, Ev. 235. See Wharton, Crim. Law, 8th ed. § 1404.

[6] *Rex* v. *Parsons,* 1 W. Bl. 392; *Reg.* v. *Murphy,* 8 Car. & P. 297; *Reg.* v. *Brittain,* 3 Cox, C. C. 76; *Reg.* v. *Parnell,* 14 Cox, C. C. 505; *Reg.* v. *Duffield,* 5 Cox, C. C. 404.

act of all, and a declaration made by one, at the time, is evidence against all.[7] Thus, where two persons are proved to have obtained goods by false pretenses, evidence that one of them, in pursuit of the common aim, made the false pretenses charged, warrants the conviction of both.[8] So, if there is con-

[7] 1 East, P. C. 96; 1 Phillipps, Ev. 477; *Rex* v. *Stone*, 6 T. R. 527, 3 Revised Rep. 253; *Reg.* v. *Kerrigan*, 9 Cox, C. C. 441, Leigh & C. C. C. 383, 33 L. J. Mag. Cas. N. S. 71, 9 L. T. N. S. 843, 12 Week. Rep. 416; *Nudd* v. *Burrows*, 91 U. S. 426, 23 L. ed. 286; *United States* v. *Hinman*, 1 Baldw. 292, Fed. Cas. No. 15,370; *United States* v. *Gooding*, 12 Wheat. 467, 6 L. ed. 695; *United States* v. *Graff*, 14 Blatchf. 381, Fed. Cas. No. 15,244; *Lee* v. *Lamprey*, 43 N. H. 13; *Cam.* v. *Crowninshield*, 10 Pick. 497; *Com.* v. *Waterman*, 122 Mass. 43; *State* v. *Grady*, 34 Conn. 118; *State* v. *Soper*, 16 Me. 293, 33 Am. Dec. 665; *Aptharpe* v. *Comstock*, 2 Paige, 482; *Ormsby* v. *People*, 53 N. Y. 472; *Burns* v. *McCabe*, 72 Pa. 309, 7 Mor. Min. Rep. 1; *Clawsan* v. *State*, 14 Ohio St. 234; *People* v. *Pitcher*, 15 Mich. 397; *Williams* v. *State*, 54 Ill. 423; *Chicago, R. I. & P. R. Co.* v. *Collins*, 56 Ill. 212; *Philpot* v. *Taylor*, 75 Ill. 309; *Janes* v. *State*, 64 Ind. 473; *Martin* v. *Com.* 2 Leigh, 745; *State* v. *George*, 30 N. C. (8 Ired. L.) 324, 49 Am. Dec. 392; *Bryce* v. *Butler*, 70 N. C. 585; *State* v. *Davis*, 87 N. C. 514; *Stewart* v. *State*, 26 Ala. 44; *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95; *Bushnell* v. *City Nat. Bank*, 20 La. Ann. 464; *State* v. *Jackson*, 29 La. Ann. 354; *State* v. *Clark*, 32 Ark. 231; *State* v. *Adams*, 20 Kan. 311; *State* v. *Cole*, 22 Kan. 474; *People* v. *Geiger*, 49 Cal. 643. See *Cohea* v. *State*, 11 Tex. App. 153; *People* v. *Martin*, 47 Cal. 112.

"The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise, they should not be regarded." Field, J., *Lincaln* v. *Claflin*, 7 Wall. 138, 139, 19 L. ed. 109; *Price* v. *State*, 1 Okla. Crim. Rep. 358, 98 Pac. 447; *State* v. *Horseman*, 52 Or. 572, 98 Pac. 135; *Van Wyk* v. *People*, 45 Colo. 1, 99 Pac. 1009; *People* v. *Weiss*, 129 App. Div. 671, 114 N. Y. Supp. 236; *Weisenbach* v. *State*, 138 Wis. 152, 119 N. W. 843; *Wiley* v. *State*, 92 Ark. 586, 124 S. W. 249; *State* v. *Kennedy*, 85 S. C. 146, 67 S. E. 152; *State* v. *Dean*, 148 Iowa, 566, 126 N. W. 692; *State* v. *Flood*, 148 Iowa, 146, 127 N. W. 48; *State* v. *Bobbitt*, 228 Mo. 252, 128 S. W. 953; *State* v. *Moeller*, 20 N. D. 114, 126 N. W. 568.

[8] *Com.* v. *Harley*, 7 Met. 462.

cert between two or more to pass counterfeit notes, or any concurrent action in passing them, the declaration of one is evidence against the other; and the possession of counterfeit notes by one is possession by the other.[9] And this coresponsibility holds goods without regard to the time when the party entered the combination. He becomes subsequently responsible for everything which may be done or said by any one of the others, in furtherance of such common design.[10] Thus, on an indictment against the owner of a ship for violation of the statutes against the slave trade, evidence of the declarations of the master, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner in the conduct of the guilty enterprise, is admissible against the owner, irrespective of the question of the time of entrance of the several parties into the plot,[11] and proof of such acts and declarations in furtherance of the common design are admissible, although they occurred in the absence of the co-conspirators.[12]

[9] *United States* v. *Hinman*, 1 Baldw. 292, Fed. Cas. No. 15,370.

[10] *Watson's Trial*, 32 How. St. Tr. 7; *Brandreth's Trial*, 32 How. St. Tr. 857, 858; *Hardy's Trial*, 24 How. St. Tr. 451–453, 475; *Rex* v. *Hunt*, 3 Barn. & Ald. 566, 22 Revised Rep. 485; 1 East, P. C. 97, § 38; *Nicholls* v. *Dowding*, 1 Starkie, 81, 18 Revised Rep. 746; *American Fur Co.* v. *United States*, 2 Pet. 358, 365, 7 L. ed. 450, 453; *United States* v. *Hinman*, 1 Baldw. 292, Fed. Cas. No. 15,370; *Com.* v. *Crowninshield*, 10 Pick. 497; *Gardner* v. *People*, 4 Ill. 90; *State* v. *Haney*, 19 N. C. (2 Dev. & B. L.) 390; *Martin* v. *Com.* 2 Leigh, 745; *Kirby* v. *State*, 7 Yerg. 259; *Frank* v. *State*, 27 Ala. 38; *People* v. *Uwahah*, 61 Cal. 142.

[11] *United States* v. *Gooding*, 12 Wheat. 460, 6 L. ed. 693.

[12] *Graff* v. *People*, 208 Ill. 312, 70 N. E. 299; *Knox* v. *State*, 164 Ind. 226, 108 Am. St. Rep. 291, 73 N. E. 255, 3 A. & E. Ann. Cas. 539; *Com.* v. *Crowninshield*, 10 Pick. 497; *State* v. *Gatlin*, 170 Mo. 354, 70 S. W. 885; *United States* v. *Francis*, 144 Fed. 520; *Francis* v. *United States*, 81 C. C. A. 407, 152 Fed. 155; *State* v. *Carey*, 76 Conn. 342, 56 Atl. 632; *State* v. *Dickerhoff*, 127 Iowa, 404, 103 N. W. 350; *Howard* v. *Com.* 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533; *People* v. *McGarry*, 136 Mich. 316, 99 N. W. 147; *State* v. *Evans*, 88 Minn. 262, 92 N. W. 976; *State* v. *Gatlin*, 170 Mo. 354, 70 S. W. 885; *People* v. *Strauss*, 94 App. Div. 453, 88 N.

§ 698a. Order of testimony in conspiracy.—As it sometimes may interfere with the proper development of the case to require the trial to begin with proof of the conspiracy, in such case the prosecution may, on the trial, prove the declarations and acts of one made and done in the absence of the others, before proving the conspiracy between the defendants, though such proof will be treated as nugatory unless the conspiracy be afterwards independently established.[1]

§ 699. Declarations not admissible after the conspiracy is at an end.—When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others.[1] His confession, there-

Y. Supp. 40, 18 N. Y. Crim. Rep. 396, affirmed in 179 N. Y. 553, 71 N. E. 1135; *Com.* v. *Biddle*, 200 Pa. 640, 50 Atl. 262; *Segrest* v. *State*, — Tex. Crim. Rep. —, 57 S. W. 845; *Nelson* v. *State*, 43 Tex. Crim. Rep. 553, 67 S. W. 320; *Barber* v. *State*, — Tex. Crim. Rep. —, 69 S. W. 515.

[1] Wharton, Crim. Law, 8th ed. § 1401; *State* v. *Cardoza*, 11 S. C. 195; *Avery* v. *State*, 10 Tex. App. 199; *People* v. *Brotherton*, 47 Cal. 388; *Bloomer* v. *State*, 48 Md. 521, 3 Am. Crim. Rep. 37. See *Baker* v. *State*, 7 Tex. App. 612; *Miller* v. *Barber*, 66 N. Y. 558; *Dole* v. *Wooldredge*, 142 Mass. 161, 7 N. E. 832; *People* v. *Stokes*, 5 Cal. App. 205, 89 Pac. 997; *Barrow* v. *State*, 121 Ga. 187, 48 S. E. 950; *State* v. *Davis*, 48 Kan. 1, 28 Pac. 1092; *State* v. *Kesner*, 72 Kan. 87, 82 Pac. 720.

[1] Phil. & Am. on Ev. 215, note; Wharton, Ev. § 1206; *United States* v. *White*, 5 Cranch, C. C. 38, Fed. Cas. No. 16,675; *State* v. *Pike*, 51 N. H. 105; *Heine* v. *Com.* 91 Pa. 145; *State* v. *Cain*, 20 W. Va. 679; *Baker* v. *People*, 105 Ill. 452; *Danville Bank* v. *Waddill*, 31 Gratt. 469; *Miller* v. *Com.* 78 Ky. 15, 39 Am. Rep. 194; *State* v. *Westfall*, 49 Iowa, 328, 3 Am. Crim. Rep. 343; *Lynes* v. *State*, 36 Miss. 617; *State* v. *Duncan*, 64 Mo. 262; *Snowden* v. *State*, 7 Baxt. 482; *Strady* v. *State*, 5 Coldw. 300; *Clinton* v. *Estes*, 20 Ark. 216; *People* v. *Collins*, 48 Cal. 277; *People* v. *English*, 52 Cal. 212; *People* v. *Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People* v. *Aleck*, 61 Cal. 137; *State* v. *Soule*, 14 Nev. 453; *State* v. *McGuire*, 50 Iowa, 153; *People* v. *Opie*, 123 Cal. 294, 55 Pac. 989; *Howard* v. *State*, 109 Ga. 137, 34 S. E. 330; *Cloud* v. *Com.* 7 Ky. L. Rep. 818; *State* v. *Kennedy*, 177 Mo. 98, 75 S. W. 979; *State* v. *Myers*, 198 Mo. 225, 94 S. W. 242; *State* v. *Wells*, 33 Mont.

fore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself.[2] Even the most solemn admission made by him after the conspiracy is at an end is not evidence against accomplices.[3] Nor can the flight of one conspirator after such time be put in evidence against the others;[4] and what one of the party has been heard to say at a time other than that of the conspiracy,

291, 83 Pac. 476; *People* v. *Squire*, 6 N. Y. Crim. Rep. 475; *State* v. *Tice*, 30 Or. 457, 48 Pac. 367; *Com.* v. *Zuern*, 16 Pa. Super. Ct. 588; *Sessions* v. *State*, 37 Tex. Crim. Rep. 62, 38 S. W. 623; *Walls* v. *State*, 125 Ind. 400, 25 N. E. 457; *Powers* v. *Com.* 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494; *People* v. *Fox*, 142 Mich. 528, 105 N. W. 1111; *Goll* v. *United States*, 92 C. C. A. 171, 166 Fed. 419; *People* v. *Sidelinger*, 9 Cal. App. 298, 99 Pac. 390; *Gardner* v. *State*, 55 Tex. Crim. Rep. 394, 117 S. W. 140; *Miller* v. *State*, 139 Wis. 57, 119 N. W. 850; *Lowman* v. *State*, 161 Ala. 47, 50 So. 43; *Sorenson* v. *State*, 74 C. C. A. 468, 143 Fed. 820; *Com.* v. *Ellis*, 133 Ky. 625, 118 S. W. 973; *Sturgis* v. *State*, 2 Okla. Crim. Rep. 362, 102 Pac. 57; *Hauger* v. *United States*, 97 C. C. A. 372, 173 Fed. 54; *Wiley* v. *State*, 92 Ark. 586, 124 S. W. 249; *State* v. *Smith*, 55 Or. 408, 106 Pac. 797; *Snelling* v. *State*, 57 Tex. Crim. Rep. 416, 123 S. W. 610; *Couch* v. *State*, 58 Tex. Crim. Rep. 505, 126 S. W. 866. See *Eggleston* v. *State*, 59 Tex. Crim. Rep. 542, 128 S. W. 1105.

[2] *Rex* v. *Stone*, 6 T. R. 528, 3 Revised Rep. 253; *Rex* v. *Turner*, 1 Moody, C. C. 347; *Rex* v. *Appleby*, 3 Starkie, 33. See *Melen* v. *Andrews*, 1 Moody & M. 336, 31 Revised Rep. 736; *State* v. *Fuller*, 39 Vt. 74; *Com.* v. *Thompson*, 99 Mass. 444; *Hunter* v. *Com.* 7 Gratt. 641, 56 Am. Dec. 121; *Hudson* v *Com.* 2 Duv. 531; *Rufer* v. *State*, 25 Ohio St. 464; *People* v. *Stevens*, 47 Mich. 411, 11 N. W. 220; *People* v. *Arnold*, 46 Mich. 268, 9 N. W. 406; *State* v. *Hickman*, 75 Mo. 416; *Spencer* v. *State*, 31 Tex. 64; *Ake* v. *State*, 31 Tex. 416.

[3] *Rex* v. *Hearne*, 4 Car. & P. 215; *Rex* v. *Fletcher*, 4 Car. & P. 250; *Hall's Case*, Lewin, C. C. 110; *Rex* v. *Walkley*, 6 Car. & P. 175; *Com.* v. *Ingraham*, 7 Gray, 46; *Ormsby* v. *People*, 53 N. Y. 472; *Hook* v. *Boteter*, 3 Harr. & McH. 349; *Morrison* v. *State*, 5 Ohio, 439; *State* v. *Arnold*, 48 Iowa, 566; *State* v. *Poll*, 8 N. C. (1 Hawks) 442, 9 Am. Dec. 655; *State* v. *Haney*, 19 N. C. (2 Dev. & B. L.) 390; *State* v. *Rawles*, 65 N. C. 334; *Kirby* v. *State*, 7 Yerg. 259; *Jones* v. *Com.* 2 Duv. 554; *Lawson* v. *State*, 20 Ala. 66, 56 Am. Dec. 182; *Gore* v. *State*, 58 Ala. 391; *State* v. *Weasel*, 30 La. Ann. 919; *Brown* v. *State*, 57 Miss. 424; *People* v. *Moore*, 45 Cal. 19; *Phillips* v. *State*, 6 Tex. App. 364.

[4] *People* v. *Stanley*, 47 Cal. 113, 17 Am. Rep. 401.

as to the share which the others had in the execution of the common design, or as to the object of the conspiracy, cannot be admitted as evidence against them.[5] But the mere flight of a conspirator, after performance of an overt act, does not preclude the declarations of his co-conspirators, immediately after the act, from being put in evidence against him.[6] Nor is a confederacy in larceny terminated by the mere taking. It continues until the articles are distributed.[7] And in other offenses, acts and declarations after commission of the crime, and until the purpose of the conspiracy is complete, are admissible.[8]

§ 700. Rule not affected by parties being codefendants.—It makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former is indicted or not, or tried or not, with the latter; for the making one a codefendant does not make his acts or declarations any more evidence against another than they were before; the principle upon which they are ad-

[5] 1 Phillipps, Ev. 94; *Rex* v. *Salter,* 5 Esp. 125; *Rex* v. *Watson,* 2 Starkie, 141, 11 Eng. Rul. Cas. 145; *Rex* v. *Roberts,* 1 Campb. 399, 2 Leach, C. L. 987, note; *State* v. *Poll,* 8 N. C. (1 Hawks) 442, 9 Am. Dec. 655; *State* v. *Haney,* 19 N. C. (2 Dev. & B. L.) 390; *Kirby* v. *State,* 7 Yerg. 259. See *Rex* v. *Hunt,* 3 Barn. & Ald. 566, 22 Revised Rep. 485; *Wright* v. *State,* 43 Tex. 170; *Reg.* v. *Murphy,* 8 Car. & P. 297; *Reg.* v. *Shellard,* 9 Car. & P. 277.

[6] *Shields* v. *State,* 45 Conn. 266.

[7] *Scott* v. *State,* 30 Ala. 503; *O'Neal* v. *State,* 14 Tex. App. 582.

[8] *Rawlins* v. *State,* 124 Ga. 31, 52 S. E. 1. See s. c. 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 A. & E. Ann. Cas. 783; *Baldwin* v. *State,* 46 Fla. 115, 35 So. 220; *Carter* v. *State,* 106 Ga. 372, 71 Am. St. Rep. 262, 32 S. E. 345, 11 Am. Crim. Rep. 125; *State* v. *Soper,* 118 Iowa, 1, 91 N. W. 774; *Shotwell* v. *Com.* 23 Ky. L. Rep. 1649, 65 S. W. 820; *State* v. *Stevenson,* 26 Mont. 332, 67 Pac. 1001; *Lamb* v. *State,* 69 Neb. 212, 95 N. W. 1050; *O'Brien* v. *State,* 69 Neb. 691, 96 N. W. 649; *People* v. *Hall,* 51 App. Div. 57, 64 N. Y. Supp. 433, 15 N. Y. Crim. Rep. 29; *Long* v. *State,* 55 Tex. Crim. Rep. 55, 114 S. W. 632; *Alkon* v. *United States,* 90 C. C. A. 116, 163 Fed. 810.

missible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.[1]

§ 700a. Decoy not a co-conspirator.—A person acting as a decoy is not in law a confederate, so that his acts may be imputable to the principal.[1]

§ 701. Form of prosecution not material.—It is not material what the nature of the indictment is, provided the offense involve conspiracy. Upon an indictment for murder, for instance, if it appears that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention would be evidence against the rest.[1] But there must be such a conspiracy as would make the one party the agent of the other. Hence the admissions of A, charged with adultery with B, are not, without showing conspiracy, admissible against B.[2]

§ 702. Principal's acts admissible against accessory.—Where the accessory is tried alone before conviction of the

[1] *Rex* v. *Stone*, 6 T. R. 528, 3 Revised Rep. 253; *Rex* v. *Hearne*, 4 Car. & P. 215; *Rex* v. *Fletcher*, 4 Car. & P. 250; *Hall's Case*, 1 Lewin, C. C. 110; *Rex* v. *Walkley*, 6 Car. & P. 175; *Com.* v. *Ingraham*, 7 Gray, 46; *People* v. *Stevens*, 47 Mich. 411, 11 N. W. 220; *Lawson* v. *State*, 20 Ala. 66, 56 Am. Dec. 182; *State* v. *Weasel*, 30 La. Ann. 919; *State* v. *Carroll*, 31 La. Ann. 860. See *Banks* v. *State*, 13 Tex. App. 182; *Avery* v. *State*, 10 Tex. App. 199. See supra, § 37; *Sprinkle* v. *United States*, 73 C. C. A. 285, 141 Fed. 811; *Slaughter* v. *State*, 113 Ga. 284, 84 Am. St. Rep. 242, 38 S. E. 854; *Graff* v. *People*, 208 Ill. 312, 70 N. E. 299; *State* v. *Wackernagel*, 118 Iowa, 12, 91 N. W. 761; *State* v. *Wilson*, 72 Minn. 522, 75 N. W. 715. See *Donald* v. *State*, 21 Ohio C. C. 124.

[1] *Williams* v. *State*, 55 Ga. 391, 1 Am. Crim. Rep. 413. See supra, § 440; *Price* v. *People*, 109 Ill. 109.

[1] *Rex* v. *Stone*, 6 T. R. 528, 3 Revised Rep. 253; *Heard* v. *State*, 9 Tex. App. 1.

[2] *State* v. *McGuire*, 50 Iowa, 153.

principal, and when confederacy between the two has been shown, acts and conduct of the principal, immediately following the commission of the offense, and tending to show that he committed it, are competent evidence to prove their common guilt.[1] And generally, as soon as the confederacy is proved, the acts and declarations of the one are admissible against the other.[2]

§ 703. Declarations of co-conspirators in each other's favor.—A declaration of a conspirator in favor of a fellow conspirator cannot, from the nature of things, be put in evidence, unless part of the *res gestæ,* or part of a conversation introduced by the prosecution.[1] Such evidence, if not admissible on other grounds, is inadmissible as hearsay.[2]

XV. General Principles of Confessions.

§ 704. General conclusions.—The general distrust of confession evidence arises not from the confession itself, but from the testimony adduced to prove the confession. The danger is at this point, for a well-proved confession is conclusive, and nothing can so persuasively influence the court as the fact of a clearly proved and direct admission of guilt, but the temptation to substitute the false for the real, and to impose the false for the real, leaves the court in great doubt,

[1] *State* v. *Rand,* 33 N. H. 216. See *Baker* v. *State,* 7 Tex. App. 612; supra, § 689; *Levy* v. *People,* 80 N. Y. 329.

[2] *Reg.* v. *Pym,* 1 Cox, C. C. 340; *United States* v. *Hartwell,* 3 Cliff. 233, Fed. Cas. No. 15,318; *State* v. *Hudson,* 50 Iowa, 157; supra, §§ 237, 602.

[1] *United States* v. *Douglass,* 2 Blatchf. 207, Fed. Cas. No. 14,989; *Lyon* v. *State,* 22 Ga. 399; *Taylor* v. *State,* 11 Lea, 708; *Edwards* v. *State,* 27 Ark. 493; *Draper* v. *State,* 22 Tex. 400; *Wright* v. *State,* 10 Tex. App. 476; *State* v. *McNamara,* 3 Nev. 70.

For admissibility of declarations of co-conspirators as part of the *res gestæ,* see note in 19 L.R.A. 745.

[2] Supra, § 225.

and has led to those extreme rulings, both for and against the admission of confessions, that cannot be reconciled.

It is a very grave question as to whether or not any instruction should be given to the jury on the weight of the confession. Thus, it has been held that an instruction as to alleged confessions, stating that where they were shown to have been understandingly made and correctly remembered, and substantially repeated by the witness, they were "entitled to great weight" is erroneous, as invading the province of the jury;[1] and, on the other hand, it is not error to refuse an instruction stating that "evidence of confessions is the weakest and least to be relied on of any evidence known to be competent in law."[2]

If confessions were to be considered just as any other circumstantial evidence, it would solve many of the perplexities. The situation is best expressed in the words of Mr. Joy, which are as applicable to-day as when written in 1842: "It appears inaccurate to give to all kinds of confessions the same confidence, or to treat them alike with distrust. Like all other kinds of admissions, they admit of all shades of certainty and probability, from a solemn estoppel by matter of record to the slightest presumption arising from the most casual, suspicious, or doubtful expressions. The jury are not only entitled, but bound, to take into account all the circumstances under which a confession is made, and to give little weight to it, or to throw it out of view altogether, according as these circumstances appear to incline less or more against the admission."

[1] *State* v. *Willing*, 129 Iowa, 72, 105 N. W. 355; *People* v. *Buckley*, 143 Cal. 375, 77 Pac. 169. See *Horn* v. *State*, 12 Wyo. 80, 127, 73 Pac. 705. *Burnett* v. *People*, 204 Ill. 208, 66 L.R.A. 304, 98 Am. St. Rep. 206, 68 N. E. 505.

[2] *Griner* v. *State*, 121 Ga. 614, 49 S. E. 700. See *Calvin* v. *State*, 118 Ga. 73, 44 S. E. 848; *Perry* v. *State*, 110 Ga. 234, 36 S. E. 781.

§ 705. General principles of the law of confessions.—There are certain well-defined principles underlying the law of confessions that determine the admissibility or inadmissibility of the confession itself. First, a confession is not admissible in evidence where it is obtained by a direct temporal inducement arising out of threat or fear or hope or promise. Second, a confession is not admissible in evidence where it is made subsequent to an inadmissible confession, until it is shown that the influence that caused the first confession has ceased to operate in any way upon the accused.

A confession is admissible when made without inducement. Such a confession is not affected (a) by the mere fact that it was made where the accused was under arrest; nor (b) where it was elicited by questions assuming guilt; nor (c) by promise of collateral benefit; nor (d) procured by trick or artifice; nor (e) when made to a person in authority.

The factors to be considered by the court in determining whether or not the confession offered was elicited by improper inducement are the age, situation, and character of the accused, his mental condition as to control of his faculties, the causal connection between the inducement and the confession, the nature of the inducement, and such surrounding circumstances as are shown in the concrete case on trial.

The inculpatory facts disclosed by the confession are always admissible in evidence, without regard to the admissibility or inadmissibility of the confession itself.

CHAPTER XV.

PRESUMPTIONS.

I. General Considerations.

§ 707. Presumptions of law; definition; classes.—A presumption of law is a judicial postulate that a particular predicate is universally assignable to a particular subject.[1] A presumption of fact is a logical argument from a fact to a fact; or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful, from a fact which is proved.[2] Hence, a presumption of fact, to be valid, must rest on a fact in proof.[3]

§ 708. Classifications.—Presumptions are usually classified as follows: 1. Irrebuttable or absolute presumptions of law, *præsumptiones juris et de jure.* 2. Rebuttable or provisional presumptions of law, *præsumptiones juris.* 3. Presumptions of fact, *præsumptiones hominis;* which presumptions are always rebuttable, and are determinable by free logic.

§ 709. Presumptions not known to the Roman law.—The classical Roman law recognized only two kinds of evi-

[1] See post, § 714.

[2] Windscheid's Pandekt i, § 138.

[3] Best, Ev. 95; *Douglass* v. *Mitchell,* 35 Pa. 440; *United States* v. *Ross,* 92 U. S. 284, 23 L. ed. 708; *Manning* v. *John Hancock Mut. L. Ins. Co.* 100 U. S. 693, 25 L. ed. 761; *Rex* v. *Burdett,* 4 Barn. & Ald. 161, 22 Revised Rep. 539; *Richmond* v. *Aiken,* 25 Vt. 324; *Tanner* v. *Hughes,* 53 Pa. 289; *McAleer* v. *McMurray,* 58 Pa. 126, 6 Mor. Min. Rep. 606; *Justice* v. *Lang,* 52 N. Y. 323; *O'Gara* v. *Eisenlohr,* 38 N. Y. 296; *People ex rel. Philmot* v. *Hessing,* 28 Ill. 410; *Graves* v. *Colwell,* 90 Ill. 612; *Allison* v. *State,* 42 Ind. 354; *Hamilton* v. *People,* 29 Mich. 193, 1 Am. Crim. Rep. 618; *Frost* v. *Brown,* 2 Bay, 133; *Bach* v. *Cohn,* 3 La. Ann. 103; *Pennington* v. *Yell,* 11 Ark. 212, 52 Am. Dec. 262; *Lawhorn* v. *Carter,* 11 Bush, 7; *People* v. *Carrillo,* 54 Cal. 63; Bonnier, Traité des Preuves, ii. 387, 420. See *Mead* v. *Parker,* 115 Mass. 413, 15 Am. Rep. 110.

dence: (1) persons (*testes*), and (2) things (*instrumenta*). Both *testes* and *instrumenta* were to be weighed by the standard of logic applied to the case as it came up, and not by that of technical jurisprudence announced before the case was heard.[1] In the whole of the *corpus juris* we meet with no such expressions as *præsumptio juris* and *præsumptio hominis*.[2] By the classical Roman law, what we now call presumptions were at the highest only inferences from facts in proof.[3] The question of the force of such inference was for the logician; and though they are noticed frequently by the jurists, they are styled not *præsumptiones*, but *signa, argumenta,* or *exempla*.[4]

§ 710. Origin of present classifications.—Under the schoolmen, however, to whom we owe several ponderous treatises on presumptions and proofs, still cited as authoritative, a new era came in. There was no such thing, when the schoolmen wrote, as a practical jurisprudence, with its two distinctly marked provinces of law and fact. There were no juries, and but few competent judges; and the object of those who then wrote law books was to deprive those to whom the trial of cases was to be committed, of any discretion as to the value they were to attach to evidence produced before them. Hence, the scholastic jurists devoted themselves to constructing a series of maxims by which every case they could conceive of was to be ruled. We may take as an illustration the maxim, so frequently adopted in our own books, that an old grudge, when proved, is presumed to continue, so that a homicide committed by a person who is shown to have previously harbored a grudge against the deceased is to be considered malicious. As a general psychological proposition, we might be ready to assert the same principle even now; yet who

[1] Wharton, Ev. § 1228.

[2] Bonnier (Traite des Preuves, ii. 417).

[3] See Durant, i, c. nr, 19; Endemann, Beweislehre, § 19.

[4] See Quinct, v. c. 8.

would now undertake to say that this proposition is to rule every case of homicide in which an old grudge is proved? "Do you not know," so one familiar with human nature would argue, "that there are no two persons in whom an old grudge operates precisely in the same way? Do not some persons harbor old grudges tenaciously for years, while others speedily forget them? Do not soldiers, for instance, whose warfare is open and direct, whose enemies are impersonal, rather than personal, whose scenes of action frequently change, and who are fully absorbed in each new event as it rushes in, rapidly forget old grudges; and do not, on the other hand, secluded men, in the habit of nursing single passions in solitude, nourish old grudges for years?" "Yes, indeed," so would answer the casuist, "this is all true, so I will provide some additional rules." "A soldier," so the proviso would run, "is presumed to hold to an old grudge only until he engages in some new absorbing enterprise." "But suppose your soldier to be a man of dark purposes, who has been concerned continuously in bitter feuds of which the homicide with which he is charged is part." "For this case, also," answers the casuist, "we will provide a rule. With such persons old grudges are presumed to continue indefinitely." It is in this way the old scholastic books on presumptions were made up. Certain psychological rules, reached by an induction sometimes very imperfect, were announced as exhaustively covering the whole sphere of crime. A soldier, for instance, to take the modification of the doctrine of old grudge given above, is shown to have been involved for years in a private feud, and in apparent pursuance of this feud he commits a homicide. If so, the homicide is presumed to be malicious; and it does not avail him to show that the old grudge was really, at the time of the encounter, dormant in his breast, and was suddenly stung into unrestrainable fury by an atrocious attack. Nor was it only the domain of psychology that these presumptions

seized. They took equal possession, and with greater plausibility, of the realms of physical science. Conclusions which the science of the day regarded as established, the jurisprudence of the day treated as absolute and irrebuttable. Hence the books were filled with rules, called irrebuttable presumptions of law, many of which were false in fact, and others subject to such numerous exceptions that at the best they are only prima facie authoritative.

§ 711. Decrease of irrebuttable presumptions.—The assignment of irrebuttability to presumptions, however, is as repugnant to the practical jurisprudence of common life as it is to the philosophical jurisprudence of classical Rome. There is no such thing, so we learn when we compare criminal trials, as either an old grudge, or an evil intent, or a negligence, which reproduces itself without variation. Every new trial presents some new combinations which require independent induction. And when we come to physical laws, the impossibility of establishing irrebuttable presumptions as rules to determine each case in advance becomes still more manifest. Human nature as an aggregate may be the same now as it was in the days of the schoolmen, though in no two persons do the same phases of human nature present themselves. But physical nature is now very different from what it was in the days of the schoolmen, or even from what it was fifty years ago.[1] That a man cannot be, in the same week, in Rome and in London, was not long since an irrebuttable presumption; it is no presumption at all at present. That information cannot be passed instantaneously from one business center to another was, in the twelfth century, irrebuttably presumed; in the nineteenth century most of our important contracts are based on telegrams. That the human voice cannot be heard a mile off, so as to distinguish words, might have been ir-

[1] See Mill's Logic, i. 389.

rebuttably presumed ten years ago; at present, in all our great commercial marts, persons may converse by telephone at a distance of several miles. And under no conditions can a particular state of mind be irrebuttably assigned to any particular person. That an appropriate intent is assignable to an ideal man doing an ideal act may be speculatively true; that such an intent is to be assumed in advance of a trial cannot be practically accepted by courts having to do with real men, put on trial for acts, many of which were without motive (*e. g.,* in issues of negligence), and many of which were done suddenly, in heedlessness, in passion, in self-defense, or through necessity. Hence it is that the old presumption *juris et de jure* are gradually disappearing. This, indeed, is admitted by Mr. Best,[2] when he tells us that certain presumptions which, in earlier times, were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *præsumptiones juris tantum,* or considered as presumptions of fact to be made at the discretion of a jury.[3] The consequence is that our courts, even while holding to the old phraseology, are so far contracting the range of presumptions *juris et de jure* that, while the class is still said to exist, no perfect individuals of the class can be found. The unimpeachability of records is still spoken of as a presumption *juris et de jure;* but whatever may be the name given to this presumption, it vanishes when it is confronted by proof of fraud or oppression.[4]

§ 712. Presumptions in modern Roman law.—While in our own law *præsumptiones juris et de jure* preserve an existence which is now merely titular, in the modern Roman law, as taught by its most authoritative commentators, even this

[2] Best, Ev. § 307.

[3] Ph. & Am. Ev. 460; 1 Phillipps, Ev. 10th ed. 469.

[4] Supra, § 595. See Wharton, Ev. § 790.

titular recognition is refused. The scholastic *præsumptiones juris et de jure,* it is held by the best French and German commentators on this particular topic,[1] are resolvable into the following classes:

1. Conclusions from natural laws, the disproval of which is impossible.

2. Processual rules, enacted to facilitate litigation that in the long run is just, or to check litigation that in the long run is vexatious.

3. Fictions, which, though false, are assumed by the policy of the law.

4. Statutory presumptions, such as those introduced, by way of limitation, to quiet titles, or (as in the case of the statute of frauds) to exclude inferior and unreliable proof.[2]

§ 713. Modern classification in our own law.—The modification, just noticed, of the old classification of presumptions, avoids what is evil in that classification, and retains what is good. By getting rid of the term "irrebuttable presumptions," we not only remove a series of presumptions really rebuttable, from a category to which they do not belong, but we relieve the practical administration of justice from the embarrassments which are produced by judges applying, in their charges to juries, the term "irrebuttable" to presumptions which are open to disproof.[1] On the other hand, we retain, restoring them to their proper place, those leading axioms of law (*e. g.,* the postulates that all persons are cognizant of the law to which they are subject, and that all sane persons are responsible for their acts) which were once called presumptions

[1] See Endemann's Beweislehre, 85-94; Burckhard, Civilistiche Præsumtionen, 369, et seq.; 11 Vierteljahrschrift für Gesetzgebung, 601; Bonnier, Traité des Preuves, ii, 387-414, et seq.; supra, notes to § 708.

[2] Post, §§ 715, 716a.

[1] See Wharton, Crim. Pl. & Pr. § 794.

juris et de jure, but which are really among the necessary principles from which jurisprudence starts.

§ 714. Presumptions of law and presumptions of fact.— Dropping, therefore, the term *præsumptiones juris et de jure,* as unnecessary, as well as unphilosophical, we proceed to discuss, as the subject of the present chapter, presumptions of law in their general sense, and presumptions of fact. Our first duty will be to inquire in what these presumptions differ. And on examination, the points of difference will be found to be as follows:

1. A presumption of law derives its force from jurisprudence as distinguished from logic. A statute, for instance, may say that a mother who conceals the death of her bastard child is to be presumed to have been concerned in its destruction. This is a presumption of law, and is arbitrarily to be applied wherever such concealment is proved.

If there be no such statute, then logic, acting inductively, will have to establish a conclusion to be drawn from all the circumstances of the particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do. On the other hand, whether a particular person who carries a concealed weapon, there being no such statute, does so with an evil intent, is a question of logic (*i. e.,* probable reasoning, acting on all the circumstances of the case) with which technical jurisprudence has no concern. It is not necessary, however, to a presumption of law, that it should be established by statute, in our popular sense of that term. Statute, in its broad sense, includes judicial maxims established by the legislature. The prominent maxims of this kind are the presumptions of innocence, of knowledge of the law, and of sanity. Presumptions of law, therefore, are uniform and

constant rules, applicable only generically. Presumptions of fact, on the other hand, are conclusions drawn by free logic, applicable only specifically.[1]

2. To a presumption of law probability is not necessary; but probability is necessary to a presumption of fact. Nothing, for instance, can be more improbable than that all law-breakers know the law which they break; yet there is no person to whom this presumption is not applied. Nor is there even a faint probability that all the persons in prison at a particular time are innocent; yet, no matter how overpowering may have been the evidence adduced against him, there is no one of them who is not presumed to be innocent when he goes to his trial. On the other hand, without probability, there can be no presumption of fact. A man is not presumed to have intended an act, for instance, unless it is probable he intended it.

3. Presumptions of law relieve, either provisionally or absolutely, the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary. The presumption of innocence, for instance, makes it provisionally unnecessary for me to adduce evidence of my innocence. On the other hand, until I am proved to have done a thing, there can be no presumption against me of intent. Evidence, therefore, which is the necessary antecedent to presumptions of fact, is attached to presumptions of law only as a consequent. Presumptions of law stand at the gate of entrance, prescribing the terms on which evidence is to be received. Presumptions of fact stand at the gate of exit, determining the effect to be assigned to each fact which passes the ordeal of admissibility.

4. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presump-

[1] See *Hamilton* v. *People*, 29 Mich. 193, 1 Am. Crim. Rep. 618; *People* v. *Messersmith*, 61 Cal. 246; *Grumbine* v. *State*, 60 Md. 355.

tions of fact are inconstant and fluctuating. For instance: all persons charged with crime are presumed to be innocent. Here the condition is fixed and uniform; it involves but a single, incomplex, unvarying feature, charged with crime; it is true as to all persons embraced in the category. On the other hand, the presumption of fact, that doing involves intending, varies with each particular case, and there are no two cases which present the same features.[2] Persons charged with crime may be sane or insane; may be adults or infants; may be at liberty or under coercion; in each case, so far as concerns the presumption of law, they are persons charged with crime, and the presumption applies equally to each. But whether a person doing an act is sane or insane, is an adult or an infant, is at liberty or under coercion, is essential in determining intent. Presumptions of fact, in other words, relate to unique conditions, peculiar to each case, incapable of exact reproduction in other cases; and a presumption of fact applicable to one case, therefore, is inapplicable, in the same force and intensity, to any other case. But a presumption of law relates to whole categories of cases, to each one of which it is uniformly applicable, in anticipation of the facts developed on trial. Thus, it is a presumption of law that all persons are sane; and this presumption applies in advance, before any special facts are known to us, to all persons. But whether the defense of insanity is made out as to any particular person is an inference of fact, which we cannot safely determine until we have heard all the evidence admitted as bearing on the issue.

§ 715. Statute may declare that certain facts constitute presumptions of law.—Reference has been already made

[2] *United States* v. *Houghton*, 14 Fed. 544; *Com.* v. *Emmons*, 98 Mass. 6; *State* v. *Berhman*, 3 Hill, L. 90; *State* v. *Pitts*, 13 Rich. L. 27; *Carter* v. *State*, 20 Tex. 339; *Ivey* v. *State*, 43 Tex. 425; *Williams* v. *State*, 23 Tex. App. 70, 3 S. W. 661.

to the circumstance that the lawmaking power may attach to any particular fact or chain of facts certain legal consequences, and in this way turn a presumption of fact into a presumption of law. We may again recall, as illustrating this, the old English statutes by which it was provided that concealment by a mother of the death of her bastard child is deemed proof that she was concerned in producing its unlawful death. By statutes, also, now existing in several states, it is prescribed that a person who has been absent without being heard from for a given period shall be presumed to be dead. And as an illustration of the converse process, by which presumptions of fact are, by the lawmaking power, canceled, may be mentioned the legislation by which, in most of our states, the logical presumption of guilt arising from silence when accused is excluded from cases on trial, where a defendant declines to testify in his own behalf.

§ 715a. Statutory presumptions; constitutionality.—As we have seen in another work, statutes have been adopted providing that certain proof, admissible at common law, shall be excluded, as is the case with the statute of frauds and with stamp acts, and that certain proof, inadmissible at common law, shall be received, *e. g.*, certified copies, and books sanctioned by public authority.[1] Under the same category fall statutes providing that certain facts stated by the plaintiff on record at the beginning of a case shall be presumed to be true, unless denied by the defendant in affidavit. Statutes of this class may operate in criminal, as well as in civil, issues. The courts, in a criminal case, would be bound to exclude evidence not proved in the way the legislature prescribes, and to admit evidence which the legislature declares admissible. As illustrations of the latter class may be mentioned depositions and copies of public documents which, though inadmis-

[1] See Wharton, Ev. § 1239a; Wharton, American Law, § 494.

sible at common law, are made admissible by statute. Whether statutes assigning prima facie force to certain proof are constitutional has been questioned. It has been held that a statute providing that drinking spirituous liquors at a place shall be prima facie proof that such liquors were sold by the occupant, with intent they should be drunk on the premises, is unconstitutional;[2] and so of a statute declaring that notoriety may be prima facie proof of liquor selling.[3] On the other hand, the constitutionality of a statute making delivery of liquor prima facie proof of selling has been affirmed;[4] and so of a statute declaring sale is prima facie proof of illegality.[5] And there is no question that it is within the power of the legislature, at least as to future cases, to say that certain acts shall be penal unless innocence is affirmatively shown by the defendant, as is the case with statutes making concealment of the death of a bastard child proof of killing unless innocence is shown by the defense. The same rule is applied to statutes making it an indictable offense to carry concealed weapons, and to statutes throwing the burden of exculpation on persons keeping a house where it is reported spirituous liquors are sold.[6] These statutes are virtually statutes determining questions of evidence. If constitutional, they cannot become unconstitutional, when they are put in the shape of rules of evidence.[7]

[2] *People* v. *Lyon*, 27 Hun, 180, s. c. 1 N. Y. Crim. Rep. 400.

[3] *State* v. *Beswick*, 13 R. I. 211, 43 Am. Rep. 26.

[4] *Com.* v. *Wallace*, 7 Gray, 222. See *State* v. *Higgins*, 13 R. I. 330.

[5] *State* v. *Mellor*, 13 R. I. 667.

[6] *State* v. *Thomas*, 47 Conn. 546, 36 Am. Rep. 98.

[7] See Wharton, Crim. Law, 8th ed. § 1530; *Com.* v. *Kelly*, 10 Cush. 69; *State* v. *Beach*, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; *Santo* v. *State*, 2 Iowa, 165, 63 Am. Dec. 487; *Com.* v. *Smith*, 166 Mass. 370, 44 N. E. 503; *State* v. *Altoffer*, 2 Ohio N. P. 97, 3 Ohio S. & C. P. Dec. 288; *State* v. *Higgins*, 13 R. I. 330; *State* v. *Beswick*, 13 R. I. 211, 43 Am. Rep. 26; *State* v. *Anderson*, 5 Wash. 350, 31 Pac. 969; *State* v. *Wilson*, 9 Wash. 218, 37 Pac. 424; *State* v. *Kyle*, 14 Wash. 550, 45 Pac. 147; *Com.* v. *Yee Moy*, 166 Mass.

§ 716. Ambiguity of terms.—As is elsewhere more fully shown, much of the difficulty attending the consideration of this branch of evidence arises from the ambiguity of the terms employed.[1] It is a "presumption of law," so we are told, that the sun will rise to-morrow; and this is true, if by "law" we mean "physical law." It is a "presumption of law," we are also told, that flight is prompted by fear; and this also is true, if we mean by "law" "psychological law." The mistake is that in one premise the term "law" is used in the sense of "physical" or "psychological law," and in the other premise in the sense of juridical law, and thus an erroneous conclusion is reached.[2] "All presumptions of law," it is argued, "bind juries; that concealment argues consciousness of guilt is a presumption of law; therefore juries are bound to find that if there is concealment, there is guilt." The fallacy here is the use in one premise of the word "law" in the sense of juridical law, and in the other premise in the sense of psychological law. Again, to take an illustration to be hereafter more fully expanded, we presume, as a mere matter of logical inference, that intelligent persons intend what they do. This, we may say, is in obedience to a "law;" and this is true if by "law" we mean "psychological law." But the proposition is untrue if by "law" we mean "juridical law," since there are multitudes of cases in which intelligent persons do things unintentionally.[3]

376, 44 N. E. 1120. See *People* v. *Baum*, 133 App. Div. 481, 118 N. Y. Supp. 3.

[1] Wharton, Ev. § 239.

[2] See *Gordon* v. *People*, 33 N. Y. 501; supra, § 341.

[3] Best, Ev. §§ 322, 323.

"Unfortunately, however," says Mr. Best (Ev. § 323), "the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, sometimes as one which it was obligatory on them to make," etc., citing Phill. & Am. Ev. 460, 461; 1 Phillipps, Ev. 10th ed. 470.

II. Psychological Presumptions.

§ 717. Motives.—Psychological presumptions are those which relate to the character and motives of men. They may be grouped in two general classes: (1) Those of law, which the policy of the law attaches to all men generically. (2) Those of fact, which our knowledge of human nature leads us to draw from a particular range of facts produced in a specific case. These presumptions will now be considered in order.

§ 718. Presumption of innocence.—Every man is presumed to be innocent until the contrary be proved, and if there be a reasonable doubt as to his guilt, the jury are to give him the benefit of such doubt.[1] This is a presumption of law (*præsumptio juris*), which the law makes arbitrarily in all cases, but which, unlike the *præsumptiones juris et de jure*, may be rebutted by evidence. Between civil and criminal cases, there is in this respect an important distinction; in the former, the jury weigh the testimony, and, after striking a fair balance, decide accordingly; but in criminal cases, as we

"When such language," says Mr. Best, "is found in the judgments of the superior courts, it is not surprising that the proceedings of inferior ones should exhibit even greater inaccuracy and confusion. Nothing, for instance, is more common than to hear a jury told from the bench, that when stolen property is found in the possession of a party shortly after a theft, the law presumes him to be the thief,—a direction both wrong and mischievous, as calculated to convey to the minds of the jury the false impression that when the possession of the stolen property has been traced to the accused, their discretionary functions are at an end. Our ablest judges tell juries in such cases that they ought, as men of common sense, to make the presumption, and act upon it, unless it be rebutted, either by the facts as they appear in the evidence for the prosecution, or by the evidence or explanation of the accused."

[1] See supra, §§ 1–15.

As to presumption of innocence in habeas corpus proceedings, see note in 22 L.R.A. 678.

have had occasion to exhibit more fully in a prior chapter,[2] the testimony, in order to sustain a conviction, must be such as to satisfy the jury beyond a reasonable doubt that the prisoner is guilty of the charge alleged against him in the indictment.[3]

But the presumption of innocence and proof of guilt must always be kept separate and distinct. The presumption of innocence is a conclusion of law in favor of the accused, whereby his innocence is not only established, but continues until sufficient evidence is introduced to overcome the proof which the law has created, namely, his innocence.

When a doubt is created, it is the result of proof, and not the proof itself. Therefore the accused is entitled to instructions upon the two points, first, the presumption of innocence, and, second, upon what constitutes a reasonable doubt; and one does not supply the place of the other.[4]

§ 719. Confession and avoidance.—A difficult question arises when the case of the prosecution is made out beyond a reasonable doubt, and the defendant sets up matter of confession and avoidance. If there be a reasonable doubt as to the defense thus set up, is there to be an acquittal? Or must the defense, to avail, be sustained by a preponderance of proof? This topic is noticed in another chapter,[1] to which reference is now made.[2]

§ 719a. Presumptions of innocence not applicable to civil actions.—The rule, it is to be remembered, so far as it requires guilt to be made out beyond a reasonable doubt,

[2] Supra, § 1.

[3] See supra, § 319. See also supra, § 324; *Slocum* v. *People*, 90 Ill. 274; supra, § 329. See *Feigel* v. *State*, 85 Ind. 580.

[4] *Coffin* v. *United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394, 162 U. S. 664, 40 L. ed. 1109, 16 Sup. Ct. Rep. 943; *People* v. *Macard*, 73 Mich. 15, 40 N. W. 784.

[1] Supra, § 329–340.

[2] *Moody* v. *State*, 17 Ohio St. 110.

is limited to the single issue of guilt when charged in a criminal trial. It does not obtain in civil issues, in which a party, the object being to obtain redress in the way of damages, may be found responsible for heinous crimes on a bare preponderance of proof.[1] Nor does the rule apply to cases in which charges of crime come up collaterally on a criminal trial. A defendant, for instance, may impute contributory negligence to the prosecutor; and so far from it being requisite to this defense for such contributory negligence to be made out beyond a reasonable doubt, it will be sufficient if there be such a case of contributory negligence proved as will throw a reasonable doubt on the defendant's guilt. Or, on an indictment for homicide, the defendant sets up a killing by a third party. In this case, also, it is not necessary for the guilt of such third party to be made out beyond a reasonable doubt. It is sufficient if there is such proof presented as will throw a reasonable doubt on the defendant's guilt.

§ 720. Measure of proof to overcome presumptions.— But when a defense in itself purely extrinsic and independent is set up, all the allegations of the indictment being admitted, then, as we have seen, it is necessary that the defense should be sustained by a preponderance of proof. The principal defenses of this class that have come before the courts are: 1, License, or authority from the state; 2, *autrefois acquit* or *convict;* and 3, insanity, when the object is to obtain a verdict of lunacy.[1] On the other hand, when this defense traverses any essential allegation of the indictment, then, when the whole evidence is in, the jury, as we have seen, are to be told that to convict it is necessary that such allegation should be established beyond a reasonable doubt.[2]

[1] Wharton, Ev. § 1245.
[1] See supra, §§ 331–340.
[2] Supra, §§ 331–340. See *Chaffee* v. *United States,* 18 Wall. 516, 21 L. ed. 908; *Maher* v. *People,* 10 Mich. 212, 81 Am. Dec. 781.

§ 721. Major and minor offense.—When an offense charged in an indictment contains two degrees, malice being an ingredient of the major degree, but not of the minor, then, if the offense be proved to have been committed by the defendant, but there is a reasonable doubt as to the malice, the defendant is to be acquitted of the major offense, and may be convicted of the minor.[1] If, in other words, on an indictment for an offense containing several grades, the jury have a reasonable doubt as to the higher grade, they must acquit of the higher grade; and if they have a reasonable doubt as to the lower grade, they must acquit of the lower grade. They can convict of no grade whatever, if they have a reasonable doubt as to the defendant's guilt of such grade.[2]

§ 722. Inferences from facts.—No doubt it is sometimes said that from proof of a mere killing with a deadly instrument only murder in the second degree can be inferred.[1] But, as is elsewhere shown, no such case as that of "A killing B with a deadly weapon," viewing it simply in this meager outline, ever arose, or can arise, in a court of justice.[2] In the first place, we at least may know what kind of instrument was

[1] Supra, §§ 1, 334; *Com.* v. *York,* 9 Met. 93, 43 Am. Dec. 373; *Com.* v. *Drum,* 58 Pa. 9; *Staup* v. *Com.* 74 Pa. 458; *O'Mara* v. *Com.* 75 Pa. 424; *State* v. *Anderson,* Houst. Crim. Rep. (Del.) 38; *State* v. *Turner,* Wright (Ohio) 29; *Hill* v. *Com.* 2 Gratt. 594; *Willis* v. *Com.* 32 Gratt. 929; *State* v. *Walters,* 45 Iowa, 389; *State* v. *Laliyer,* 4 Minn. 368, Gil. 277; *Milton* v. *State,* 6 Neb. 136; *Mitchell* v. *State,* 5 Yerg. 340; *Witt* v. *State,* 6 Coldw. 5; *State* v. *Hildreth,* 31 N. C. (9 Ired. L.) 429; *Davis* v. *State,* 10 Ga. 101; *Daniel* v. *State,* 8 Smedes & M. 401, 47 Am. Dec. 93; *State* v. *Holme,* 54 Mo. 153; *State* v. *Gassert,* 65 Mo. 352; *State* v. *Evans,* 65 Mo. 574; *State* v. *Hill,* 69 Mo. 451; *State* v. *Brown,* 7 Or. 186; *Hamby* v. *State,* 36 Tex. 523; *People* v. *Milgate,* 5 Cal. 127; *Coffee* v. *State,* 3 Yerg. 283, 24 Am. Dec. 570. See *Dove* v. *State,* 3 Heisk. 348; Wharton, Homicide, §§ 34, 194; Wharton, Crim. Law, 8th ed. § 392.

[2] See supra, § 1.

[1] Post, § 764. See *State* v. *Gassert,* 65 Mo. 352; *State* v. *Evans,* 65 Mo. 574.

[2] See supra, §§ 11–29; post, § 738.

used. Was it poison? Undoubtedly, if the poisoning were malicious, we cannot withdraw the case from the category of murder in the first degree. But are not poisonous drugs frequently administered without malicious intent? Are not most medicines more or less poisonous? Hence, if we say, "Whoever deliberately administers poison acts maliciously," we state an untruth. If we say, "Whoever maliciously administers poison acts maliciously," this is a *petitio principii*. But in practical jurisprudence we are presented with no such alternative. We generally know what kind of poison is administered. We almost always know whether it was administered openly or stealthily; and there is no case that comes up for trial in which there is not a group of other circumstances each adding a new qualifying power to the reasoning by which the case is to be ruled. So it is with all other modes of killing; and hence we must conclude that the question whether an abstract killing with a deadly weapon is murder in the first or murder in the second degree is one which does not belong to practical jurisprudence, and the presentation of which to a jury can only mislead. No case can arise in which there is not some distinctive incident capable of either strengthening or weakening the proof of malicious intent. When facts exist which are consistent only with the hypothesis of murder in the first degree, then murder in the first degree is to be inferred. When facts exist which are consistent only with the hypothesis of murder in the second degree, then murder in the second degree is to be inferred. And this is entirely consistent with the proposition just stated; and when there are doubts as to whether a case falls within a higher or a lower grade, the jury as a matter of law are to incline to the merciful side, and find for the lower grade.[3]

[3] Supra, § 721. See Wharton, Crim. Law, 8th ed. § 392; *State* v. *Wingo*, 66 Mo. 181, 27 Am. Rep. 329; post, §§ 734–737, 764.

§ 723. All persons presumed to know the law.—That knowledge of the law on the part of all persons charged with crime is so far presumed that they cannot set up ignorance of the law as a defense is an axiom of jurisprudence.[1] That the axiom contains an untruth is conceded. No man, in any community, knows the law either intensively or extensively; there is no thinker, no matter how profound, who has not left some depths unfathomed; no reader, no matter how omnivorous, who has not left some details untouched. To predicate that of the ignorant which cannot be predicated of the learned specialist is absurd;[2] but predicated it is both of ignorant and learned, so far as to establish the conclusion that no one is allowed to set up ignorance of law as an excuse for wrong.[3] Were it otherwise, government would be trampled under foot. All that would be necessary to secure perfect irresponsibility would be to lapse into perfect ignorance. The more brutal becomes the criminal, the more completely will he be relieved from punishment for crime.

[1] Wharton, Crim. Law, 8th ed. § 84; 1 Hale, P. C. 42; *Reg.* v. *Price*, 3 Perry & D. 421, s. c. 11 Ad. & El. 727, 9 L. J. Mag. Cas. N. S. 49, 4 Jur. 291; *Middleton* v. *Croft*, 2 Strange, 1056, 2 Atk. 650, Cas. t. Hardw. 57, 2 Barn. K. B. 351, 2 J. Kelynge, 148; *Rex* v. *Esop*, 7 Car. & P. 456; *Reg.* v. *Good*, 1 Car. & K. 185; *Stokes* v. *Salomons*, 9 Hare, 79, 20 L. J. Ch. N. S. 343, 15 Jur. 483; *Reg.* v. *Hoatson*, 2 Car. & K. 777; *Rex* v. *Bailey*, Russ. & R. C. C. 1; *Stockdale* v. *Hansard*, 9 Ad. & El. 131, 2 Perry & D. 1, 8 L. J. Q. B. N. S. 294, 3 Jur. 905; *Re Barronet*, 1 El. & Bl. 1, Dears. C. C. 51, 22 L. J. Mag. Cas. N. S. 25, 17 Jur. 184, 1 Week. Rep. 6; *United States* v. *Learned*, 1 Abb. (U. S.) 483, Fed. Cas. No. 15,580; *The Ann*, 1 Gall. 62, Fed. Cas. No. 397; *United States* v. *Anthony*, 11 Blatchf. 200, Fed. Cas. No. 200; *Cambioso* v. *Maffet*, 2 Wash. C. C. 98, Fed. Cas. No. 2,330; *Com.* v. *Bagley*, 7 Pick. 279; *Hamilton* v. *People*, 57 Barb. 625; *State* v. *Hart*, 51 N. C. (6 Jones, L.) 389; *McGuire* v. *State*, 7 Humph. 54; *Winehart* v. *State*, 6 Ind. 30; *Black* v. *Ward*, 27 Mich. 191, 15 Am. Rep. 162; *Whitton* v. *State*, 37 Miss. 379; *Chaplin* v. *State*, 7 Tex. App. 87.

[2] See *Martindale* v. *Falkner*, 2 C. B. 720, 2 Dowl. & L. 600, 15 L. J. C. P. N. S. 91, 10 Jur. 161; *Reg.* v. *Tewkesbury*, L. R. 3 Q. B. 629; *Cutter* v. *State*, 36 N. J. L. 125; Wharton, Ev. § 1029.

[3] Wharton, Crim. Law, 8th ed. § 86.

§ 724. Knowledge admissible to prove intent.—The knowledge of law, however, which is here assumed, is practical knowledge, commensurate with the duties whose nondischarge the law, in the concrete case, condemns. A sane person who commits a wrong, for instance, is bound to know that the wrong is subject to penal consequences; if it is *malum in se,* his natural consciousness points to this, and it would be fatal to government to allow want of such natural consciousness to be a defense; if it is *malum prohibitum,* it should be known by him, for it is his duty, when he undertakes to abide in a community, to know what it prohibits, for otherwise no police laws could be enforced. It is different when we undertake to determine the motives impelling a party to an illegal act. Hence, ignorance of law may be proved, when, on indictments for malicious offenses, such ignorance goes to negative malice,[1] as where a police officer honestly mistaking the law under which he acts, intentionally, but without warrant or authority, kills an escaped convict, in which case there could be a conviction for manslaughter, but not for murder. To larceny, also, it may be a defense that the defendant acted under an honest, though erroneous, belief that he had title.[2] But except in such cases, when the object is to determine the particular intent of the defendant when doing the act charged, ignorance of the law is no excuse. And even in cases of this class, the defendant, when the indictment permits it, may be convicted of a minor grade of the offense of which negligence is the gravamen. He ought to have known better, and though he cannot, to recur to homicide as an illustration, be convicted of murder, he may, on account of his negligence, be convicted of manslaughter.[3]

[1] See *Reg.* v. *Reed,* Car. & M. 306; Wharton, Crim. Law, 8th ed. § 85a.

[2] Wharton, Crim. Law, 8th ed. § 848.

[3] Wharton, Crim. Law, 8th ed. §§ 329, et seq.

§ 725. Knowledge of facts a presumption of fact.— That a person knows what he does is also sometimes called a presumption of law. If we take presumption of law to mean something that the law declares to be universally true until rebutted, then it is not a presumption of law that all persons know what they are about; for there are many persons (*e. g.*, persons influenced by fraud or imposition) of whom the law declares just the contrary. But that a person who is *capax negotii* should set up ignorance of fact as ground of exculpation or of defense would be against the policy of the law; and hence, where there is no fraud or imposition, the law treats him as if he were cognizant of what he did. He is not supposed to have known facts of which it appears he was ignorant; but if his ignorance is negligent or culpable, or if the offense is one made by statute indictable irrespective of the perpetrator's intention at the time, then his ignorance is no defense. Hence, ignorance of fact, while it may be admissible to disprove malice (*e. g.*, when a person assaults another, erroneously believing the latter to be a burglar),[1] is not a defense to an indictment under a statute making the person doing a particular act indictable irrespective of his intention;[2]

[1] *Levett's Case,* Cro. Car. 538; *Reg.* v. *Reed,* Car. & M. 306; *Reg.* v. *Sleep,* 8 Cox, C. C. 472, Leigh & C. C. C. 44, 30 L. J. Mag. Cas. N. S. 170, 7 Jur. N. S. 979, 4 L. T. N. S. 525, 9 Week. Rep. 708; *The Marianna Flora,* 11 Wheat. 11, 6 L. ed. 407; *Yates* v. *People,* 32 N. Y. 509; *Logue* v. *Com.* 38 Pa. 265, 80 Am. Dec. 481. See Wharton, Crim. Law, 8th ed. § 88.

[2] Sedgw. Stat. Law, 2d ed. p. 84; *Reg.* v. *Gibbons,* 12 Cox, C. C. 237; *Reg.* v. *Hicklin,* L. R. 3 Q. B. 360, 37 L. J. Mag. Cas. N. S. 89, 18 L. T. N. S. 395, 16 Week. Rep. 801, 8 Eng. Rul. Cas. 60; *Reg.* v. *Smith,* 42 L. T. N. S. 160, 14 Cox, C. C. 398, 44 J. P. 314; *Reg.* v. *Prince,* L. R. 2 C. C. 154, 44 L. J. Mag. Cas. N. S. 122, 32 L. T. N. S. 700, 24 Week. Rep. 76, 13 Cox, C. C. 138, 1 Am. Crim. Rep. 1; *Hudson* v. *M'Rae,* 4 Best & S. 585, 33 L. J. Mag. Cas. N. S. 65, 9 L. T. N. S. 678, 12 Week. Rep. 80; *United States* v. *Leathers,* 6 Sawy. 17, Fed. Cas. No. 15,581; *Com.* v. *Mash,* 7 Met. 472; *Com.* v. *Thompson,* 11 Allen, 23, 87 Am. Dec. 685; *Com.* v. *Emmons,* 98 Mass. 6; *Smith* v. *Brown,* 1 Wend. 231; *People* v

or to an indictment for misconduct, when the fact of which the party charged was ignorant was one which he ought to have known.[3]

§ 726. Presumption against suicide.—All other things being equal, we are to presume, when a person is found dead, that he did not die by his own hand.[1] Yet this presumption yields at once to any inferences to be drawn from the facts of the particular case.[2]

§ 727. Presumption of good faith in business relations.—Good faith in business has been frequently declared to be a rebuttable presumption of law. This postulate, however, must be regarded as an assumption merely for the determination of the burden of proof. In criminal issues, when bad faith is one of the ingredients of the offense, it must be proved beyond a reasonable doubt.[1]

Brooks, 1 Denio, 457, 43 Am. Dec. 704; *Morris* v. *People*, 3 Denio, 381; *Halsted* v. *State*, 41 N. J. L. 552, 32 Am. Rep. 247, s. c. 39 N. J. L. 402; *State* v. *King*, 86 N. C. 603; *State* v. *Hartfiel*, 24 Wis. 60; Wharton, Crim. Law, 8th ed. § 88.

[3] *Reg.* v. *Robins*, 1 Car. & K. 456; *Reg.* v. *Woodrow*, 15 Mees. & W. 404, 2 New Sess. Cas. 346, 16 L. J. Mag. Cas. N. S. 122; *Reg.* v. *Olifier*, 10 Cox, C. C. 402; *Com.* v. *Farren*, 9 Allen, 489; *Com.* v. *Viall*, 2 Allen, 512; *Com.* v. *Nichols*, 10 Allen, 199; *Com.* v. *Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Com.* v. *Raymond*, 97 Mass. 567; *Com.* v. *Smith*, 103 Mass. 444; *Com.* v. *Wentworth*, 118 Mass. 441; *State* v. *Smith*, 10 R. I. 258; *Barnes* v. *State*, 19 Conn. 398; *People* v. *Zeiger*, 6 Park. Crim. Rep. 388; *People* v. *Reed*, 47 Barb. 235; *State* v. *Ruhl*, 8 Iowa, 444; *State* v. *Hause*, 71 N. C. 518. See Wharton, Crim. Law, 8th ed. § 88.

[1] *Morrison* v. *New York C. & H. R. R. Co.* 63 N. Y. 643; *Continental Ins. Co.* v. *Delpeuch*, 82 Pa. 225. See *Way* v. *Illinois C. R. Co.* 40 Iowa, 341; *Guardian Mut. L. Ins. Co.* v. *Hogan*, 80 Ill. 35, 22 Am. Rep. 180.

For presumption as to suicide, see also 35 L.R.A. 263.

[2] See Best, Ev. §§ 346, 347; *Weed* v. *Mutual Ben. L. Ins. Co.* 70 N. Y. 561; *Greenwood* v. *Lowe*, 7 La. Ann. 197; *Richards* v. *Kountze*, 4 Neb. 200; *Bumpus* v. *Fisher*, 21 Tex. 571; supra, §§ 1, et seq.; post, §§ 795, 796; 1 Crim. L. Mag. 25, 26.

[1] Supra, § 330. See supra, §§ 55–57.

§ 728. **Presumptions applied to documents.**—It has been sometimes said that when a document is shown to be genuine, the law presumes that it is true. But genuineness and truthfulness are so far from being convertible, that documents prepared to affect any political, social, or ecclesiastical end are from their nature *ex parte,* and are only to be received subject to such qualifications as may be supplied by a knowledge of the character and aims of their authors. It is true that if we could conceive of an ideal genuine document without any distinctive *differentia* of its own, we might speak of an ideal presumption of law that such a document is true. But there is no ideal genuine document; as soon as genuineness is established, it brings with it a series of incidents peculiar to itself, by which the inference of veracity is molded. The documents, for instance, that may be published with regard to the homicide of one of the parties to a contested election may be all genuine, but we cannot determine as to the truth of any one of them without first taking into account the prejudices of its author, and the objects he may have had in view in making the publication, and then proceeding to compare it with whatever other relevant evidence we can collect. The Roman authorities on this point speak unhesitatingly. Truth and genuineness, they insist, are not equivalent, though genuineness or falsification affords inferences of truth or falsehood. But this conclusion is a *præsumptio hominis,* or logical conclusion, as distinguished from a *præsumptio legis,* or arbitrary legal conclusion.[1]

§ 729. **Presumption of sanity.**—All persons who have reached years of discretion are regarded prima facie, by a rebuttable presumption of law (*præsumptio juris*), to be sane.[1]

[1] See Quinct. v. 5; L. 4 D. xxii. 4; L. 26, § 2, D. xvi. 3; Endemann, 258; supra, §§ 546, et seq.; Paley's Evidences, Introd. Chap.

[1] *Reg.* v. *Stokes,* 3 Car. & K. 188; *Reg.* v. *Taylor,* 3 Cox, C. C. 84; *Reg.* v. *Layton,* 4 Cox, C. C. 149; *United States* v. *Lawrence,* 4

Hence, the burden of proof, when a party sets up insanity as a defense, is on him to prove it.[2] In what way this burden is to be sustained is elsewhere discussed.[3]

As a result of the presumption of sanity in criminal cases, it is not incumbent on the state to produce affirmative evidence that sanity exists,[4] and in its practical application the party setting up insanity must produce affirmative evidence of insanity.[5] As a part of the presumption, where it is shown that the accused had lucid intervals, the presumption prevails that the criminal offense was committed during such an interval.[6] But the legal presumption of sanity in one accused of crime cannot prevail to support a conviction where, upon the whole evidence, there is a reasonable doubt as to the men-

Cranch, C. C. 514, Fed. Cas. No. 15,576; *United States* v. *McGlue,* 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *State* v. *Lawrence,* 57 Me. 574; *Com.* v. *Eddy,* 7 Gray, 583; *State* v. *Spencer,* 21 N. J. L. 196; *Lynch* v. *Com.* 77 Pa. 205, 1 Am. Crim. Rep. 283; *Boswell* v. *Com.* 20 Gratt. 860; *State* v. *Brandon,* 53 N. C. (8 Jones, L.) 463; *Weed* v. *Mutual Ben. L. Ins. Co.* 70 N. Y. 566; *State* v. *Stark,* 1 Strobh. L. 479; *Loeffner* v. *State,* 10 Ohio St. 599; *People* v. *Myers,* 20 Cal. 518. See supra, § 336.

For notes as to presumption of sanity of accused, see 36 L.R.A. 722, 727, and 24 L.R.A.(N.S.) 545.

[2] See supra, § 336.

[3] *Ibid.*

[4] *Walter* v. *People,* 32 N. Y. 147; *Ferris* v. *People,* 31 How. Pr. 140; *United States* v. *Lawrence,* 4 Cranch, C. C. 514, Fed. Cas. No. 15,576.

[5] *State* v. *Jones,* 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; *Sanders* v. *State,* 94 Ind. 147; *Duthey* v. *State,* 131 Wis. 178, 10 L.R.A.(N.S.) 1032, 111 N. W. 222; *State* v. *Jack,* 4 Penn. (Del.) 470, 58 Atl. 833; *Johnson* v. *State,* 57 Fla. 18, 49 So. 40; *State* v. *Wetter,* 11 Idaho, 433, 83 Pac. 341; *State* v. *Mitchell,* 130 Iowa, 697, 107 N. W. 804; *State* v. *Barker,* 216 Mo. 532, 115 S. W. 1102; *Thomas* v. *State,* 55 Tex. Crim. Rep. 293, 116 S. W. 600; *State* v. *Brown,* 36 Utah, 46, 24 L.R.A.(N.S.) 545, 102 Pac. 641.

[6] *Ford* v. *State,* 71 Ala. 385; *Leache* v. *State,* 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *M'Naghten's Case,* 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130. But see *Ford* v. *State,* 73 Miss. 734, 35 L.R.A. 117, 19 So. 665. See *Marshall* v. *Territory,* 2 Okla. Crim. Rep. 136, 101 Pac. 139; *State* v. *Scott,* 49 La. Ann. 253, 36 L.R.A. 721, 21 So. 271, 10 Am. Crim. Rep. 585; *Com.* v. *Palmer,* 222 Pa. 299, 19 L.R.A.(N.S.) 433, 128 Am. St. Rep. 809, 71 Atl. 100.

tal competency of the accused to distinguish between right and wrong, or to understand the nature of the act he is committing.[7]

§ 730. Insanity presumed to continue.—It has frequently been said to be a presumption of law that chronic insanity is continuous,[1] but that such presumption does not exist as to fitful and exceptional attacks.[2] This, however, is a mere *petitio principii,* it being tantamount to saying that chronic insanity is chronic, and transient insanity is transient. The presumption as to the continuance of insanity, such is the more correct statement, is one of fact, varying with the particular case.[3] And it resolves itself into the conclusion that

[7] *Davis* v. *United States,* 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *State* v. *Brown,* 36 Utah, 46, 24 L.R.A.(N.S.) 545, 102 Pac. 641.

[1] *Reg.* v. *Layton,* 4 Cox, C. C. 149; *Reg.* v. *Stokes,* 3 Car. & K. 188; *Cartwright* v. *Cartwright,* 1 Phillim. Eccl. Rep. 100; *Atty. Gen.* v. *Parnther,* 3 Bro. Ch. 441; *White* v. *Wilson,* 13 Ves. Jr. 88; *Prinsep* v. *Sombre,* 10 Moore, P. C. C. 232; *Nichols* v. *Binns,* 1 Swabey & T. 243; *Smith* v. *Tebbitt,* L. R. 1 Prob. & Div. 398, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18; *Hoge* v. *Fisher,* Pet. C. C. 163, Fed. Cas. No. 6,585; *Breed* v. *Pratt,* 18 Pick. 115; *Hix* v. *Whittemore,* 4 Met. 545; *Sprague* v. *Duel,* — Clarke, Ch. 90; *Titlow* v. *Titlow,* 54 Pa. 216, 93 Am. Dec. 691; *State* v. *Spencer,* 21 N. J. L. 196; *Carpenter* v. *Carpenter,* 8 Bush, 283; *Ballew* v. *Clark,* 24 N. C. (2 Ired. L.) 23; *State* v. *Brinyea,* 5 Ala. 244; *Saxon* v. *Whittaker,* 30 Ala. 237; *Ripley* v. *Babcock,* 13 Wis. 425; *State* v. *Reddick,* 7 Kan. 143.

[2] *Hall* v. *Warren,* 9 Ves. Jr. 605, 7 Revised Rep. 306; *White* v. *Wilson,* 13 Ves. Jr. 87; *Lewis* v. *Baird,* 3 McLean, 56, Fed. Cas. No. 8,316; *Hix* v. *Whittemore,* 4 Met. 545; *State* v. *Reddick,* 7 Kan. 143; *People* v. *Francis,* 38 Cal. 183.

[3] *Reg.* v. *Stokes,* 3 Car. & K. 188; *Reg.* v. *Layton,* 4 Cox, C. C. 149; *Sutton* v. *Sadler,* 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 88; *Smith* v. *Tebbitt,* L. R. 1 Prob. & Div. 434, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18; *Anderson* v. *Gill,* 3 Macq. Sc. App. Cas. 197; *Staples* v. *Wellington,* 58 Me. 453; *State* v. *Spencer,* 21 N. J. L. 196; *State* v. *Stark,* 1 Strobh. L. 479; *State* v. *Brinyea,* 5 Ala. 244; *People* v. *Smith,* 57 Cal. 130. See *State* v. *Vann,* 82 N. C. 631; *Ford* v. *State,* 71 Ala. 385.

when insanity of a permanent type is shown to have existed, without proof of recovery, the burden is on the party setting up sanity to prove it,[4] but that the mere fact that a party had years ago an attack of exceptional brain disease does not impose such a burden.

Two presumptions apparently combine, first, when insanity has been once established, it is presumed to continue, because it is aided by a second presumption that a state or condition once established continues until the contrary is shown. In other words, the presumption of sanity continues until insanity is established; then the reverse presumption prevails until it is overcome by proof of sanity.[5]

§ 731. Insanity; how shown; inquisition.—An inquisition of lunacy is, as to strangers, at the most only prima facie proof of business incompetency,[1] though it may conclude parties.[2] Hearsay in the neighborhood is inadmissible to prove insanity.[3] The issue of insanity is to be determined by the

As to presumption of continuance of insanity, see also notes in 35 L.R.A. 117, and 36 L.R.A. 726.

[4] *State* v. *Wilner,* 40 Wis. 304. See supra, § 63.

[5] See *Lilly* v. *Waggoner,* 27 Ill. 395; *Titcomb* v. *Vantyle,* 84 Ill. 371; *Chicago West Div. R. Co.* v. *Mills,* 91 Ill. 39; *Greenwade* v. *Greenwade,* 43 Md. 313; *Pennell* v. *Cummings,* 75 Me. 163; *Re Kehler,* 86 C. C. A. 245, 159 Fed. 55; *McReynolds* v. *Smith,* 172 Ind. 336, 86 N. E. 1009; *State ex rel. Thompson* v. *Snell,* 46 Wash. 327, 9 L.R.A.(N.S). 1191, 89 Pac. 931.

[1] See cases cited Wharton, Ev. § 1254; *Naanes* v. *State,* 143 Ind. 299, 42 N. E. 609.

[2] Supra, § 599; *Lucas* v. *Parsons,* 23 Ga. 267; *Hopson* v. *Boyd,* 6 B. Mon. 296; *Den ex dem. Aber* v. *Clark,* 10 N. J. L. 217, 18 Am. Dec. 417; *Slaughter* v. *Heath,* 127 Ga. 747, 27 L.R.A.(N.S.) 1, 57 S. E. 69; *Logan* v. *Vanarsdall,* 27 Ky. L. Rep. 822, 86 S. W. 981; *Seaborn* v. *State,* — Tex. Crim. Rep. —, 90 S. W. 649; *People* v. *Carlin,* 194 N. Y. 448, 87 N. E. 805.

It seems that in New York the inquest is conclusive as to contracts, but not as to crimes. See *Schoenberg* v. *Ulman,* 51 Misc. 83, 99 N. Y. Supp. 650.

Also see *O'Reilly* v. *Sweeney,* 54 Misc. 408, 105 N. Y. Supp. 1033.

[3] *Wright* v. *Doe,* 7 Ad. & El. 313, 2 Nev. & P. 303, 7 L. J. Exch. N. S. 340, 4 Bing, N. C. 489, 6 Scott,

facts proved in the particular case, such as prior insane conduct,[4] physical peculiarities, and hereditary tendency.[5] In arriving at a conclusion, the opinions of persons who have observed the alleged lunatic, whether such persons be experts or nonexperts, are to be considered.[6]

The burden of proof in such cases is more fully discussed in a prior chapter.[7]

§ 732. Presumption of prudence in avoiding danger.—Another psychological law (in obedience to which it may be a prima facie inference that men will act) is that persons, when advised of danger, will take ordinary care for self-pres-

58, 5 Clark & F. 670; *Lancaster County Nat. Bank* v. *Moore,* 78 Pa. 407, 21 Am. Rep. 24, overruling *Rogers* v. *Walker,* 6 Pa. 371, 47 Am. Dec. 470; *Choice* v. *State,* 31 Ga. 424; supra, § 599; *Com.* v. *Pomeroy,* 117 Mass. 143; *People* v. *Pico,* 62 Cal. 50; *State* v. *Hoyt,* 47 Conn. 518, 36 Am. Rep. 89; *Parrish* v. *State,* 139 Ala. 16, 36 So. 1012; *Choice* v. *State,* 31 Ga. 424; *Brinkley* v. *State,* 58 Ga. 296; *Grubb* v. *State,* 117 Ind. 277, 20 N. E. 257, 725; *State* v. *Lagoni,* 30 Mont. 472, 76 Pac. 1044; *Ellis* v. *State,* 33 Tex. Crim. Rep. 86, 24 S. W. 894.

See *State* v. *Windsor,* 5 Harr. (Del.) 512; *Kidder* v. *Stevens,* 60 Cal. 414; *Butler* v. *St. Louis L. Ins. Co.* 45 Iowa, 93; *McLane* v. *Elder,* — Tex. Civ. App. —, 23 S. W. 757; *Barnett* v. *State,* — Ala. —, 39 So. 778; *State* v. *Charles,* 124 La. 744, 50 So. 699, 18 A. & E. Ann. Cas. 934; *State* v. *Penna,* 35 Mont. 535, 90 Pac. 787; *Wilson* v. *State,* 58 Tex. Crim. Rep. 596, 127 S. W. 548.

[4] *United States* v. *Sharp,* Pet. C. C. 118, Fed. Cas. No. 16,264; *Lake* v. *People,* 1 Park. Crim. Rep. 495; *McLean* v. *State,* 16 Ala. 672; *People* v. *March,* 6 Cal. 543.

[5] *Reg.* v. *Oxford,* 9 Car. & P. 525; *Smith* v. *Kramer,* 1 Am. L. Reg. 353; *Baxter* v. *Abbott,* 7 Gray, 71; *Com.* v. *Andrews,* cited in 1 Wharton & S. Med. Jur. 375.

See *State* v. *Christmas,* 51 N. C. (6 Jones, L.) 471; Wharton, Crim. Law, 8th ed. §§ 64–65.

[6] Supra, §§ 417 et seq.; *Parrish* v. *State,* 139 Ala. 16, 36 So. 1012; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Braham* v. *State,* 143 Ala. 28, 38 So. 919; *Com.* v. *Fencez,* 226 Pa. 114, 75 Atl. 19; *State* v. *Constantine,* 48 Wash. 218, 93 Pac. 317; *Duthey* v. *State,* 131 Wis. 178, 10 L.R.A.(N.S.) 1032, 111 N. W. 222.

[7] Supra, § 336.

ervation.[1] This arises out of the well-known natural instinct of self-preservation, so that, in the absence of contrary evidence, the presumption is indulged that personal injuries were not self-inflicted,[2] and that an injured person was in the exercise of due care at the time of the injury.[3] In some states no such presumption arises where direct testimony is available,[4] but in the absence of such testimony the presumption will be indulged, at least to the extent of taking the case to the jury.[5] Presumptions of this class are simply inferences of fact, varying in intensity with the capacity of the subject. To an infant, but a slight degree of prudence is imputed; the degree imputed increases with the years.[6] Prudence is taught by experience, direct or indirect, and we cannot impute impru-

[1] As to the relevancy of such evidence, see supra, § 56.

[2] *Western Travelers' Acci. Asso.* v. *Holbrook,* 65 Neb. 469, 91 N. W. 276, 94 N. W. 816.

[3] *Baltimore & P. R. Co.* v. *Landrigan,* 191 U. S. 461, 474, 48 L. ed. 262, 267, 24 Sup. Ct. Rep. 137; *Hemingway* v. *Illinois C. R. Co.* 52 C. C. A. 477, 114 Fed. 843; *Atchison, T. & S. F. R. Co.* v. *Aderhold,* 58 Kan. 293, 49 Pac. 83; *Norton* v. *North Carolina R. Co.* 122 N. C. 910, 29 S. E. 886; *Grant* v. *Baker,* 12 Or. 329, 7 Pac. 318.

[4] *Bell* v. *Clarion,* 113 Iowa, 126, 84 N. W. 962; *Ames* v. *Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 640, 95 N. W. 161.

But see *Schnee* v. *Dubuque,* 122 Iowa, 459, 98 N. W. 298.

[5] *Bell* v. *Clarion,* 113 Iowa, 126, 84 N. W. 962; *Golinvaux* v. *Burlington, C. R. & N. R. Co.* 125 Iowa, 652, 101 N. W. 465; *Dalton* v. *Chicago, R. I. & P. R. Co.* 104 Iowa, 26, 73 N. W. 349; *Pennsylvania R. Co.* v. *Weber,* 76 Pa. 157, 18 Am. Rep. 407.

But see *Wilcox* v. *Rome, W. & O. R. Co.* 39 N. Y. 358, 100 Am. Dec. 440.

But the authorities are by no means uniform on the question, many holding directly that the presumption will not be indulged, and that it does not arise from the instinct of self-preservation; but the greater weight is with the rule that, in the absence of direct evidence to the contrary, a presumption prevails in favor of prudence and care. But see *Weiss* v. *Pennsylvania R. Co.* 79 Pa. 387.

[6] Wharton, Neg. §§ 310, 315; *George* v. *Los Angeles R. Co.* 126 Cal. 357, 46 L.R.A. 829, 77 Am. St. Rep. 184, 58 Pac. 819.

See *St. Louis South Western R. Co.* v. *Shiflet,* 37 Tex. Civ. App. 541, 84 S. W. 247; *Over* v. *Missouri, K. & T. R. Co.* — Tex. Civ. App. —, 73 S. W. 535; *Nagle* v. *Allegheny Valley R. Co.* 88 Pa.

dence in avoiding danger except to those who know what danger is.[7]

§ 733. Presumption of supremacy of husband.—Where both husband and wife are present and co-operate in a criminal act, it is a presumption of law, capable of being rebutted by proof however, that the wife is acting under the coercion of the husband.[1] Formerly, the crimes of treason and homi-

35, 32 Am. Rep. 413; *Wilkinson* v. *Kanawha & H. Coal & Coke Co.* 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 875; *Cahill* v. *Stone,* 153 Cal. 571, 19 L.R.A.(N.S.) 1094, 96 Pac. 84; *Ewing* v. *Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200.

[7] See Bain, Character, § 282; *Richardson* v. *Nelson,* 221 Ill. 254, 77 N. E. 583; *Chicago & J. Electric R. Co.* v. *Freeman,* 125 Ill. App. 318; *Cincinnatti, N. O. & T. P. R. Co.* v. *Sowders,* — Ky. —, 119 S. W. 203; *Tucker* v. *Buffalo Cotton Mills,* 76 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 626.

[1] See 1 Hale, P. C. 45, 47; *Reg.* v. *Manning,* 2 Car. & K. 887; *Reg.* v. *Smith,* 8 Cox, C. C. 27; *R.* v. *Stapleton,* 1 Craw. & D. C. C. (Ir.) 163; *Reg.* v. *Matthews,* 1 Den. C. C. 596, Temple & M. 337, 14 Jur. 513, 4 Cox, C. C. 214; *Reg.* v. *Cohen,* 11 Cox, C. C. 99, 18 L. T. N. S. 489, 16 Week. Rep. 941; *State* v. *Cleaves,* 59 Me. 298, 8 Am. Rep. 422; *State* v. *Harvey,* 3 N. H. 65; *State* v. *Potter,* 42 Vt. 495; *Com.* v. *Pratt,* 126 Mass. 462; *Com.* v. *Eagan,* 103 Mass. 71; *State* v. *Boyle,* 13 R. I. 537; *Goldstein* v. *People,* 82 N. Y. 231; *Quinlan* v. *People,* 6 Park. Crim. Rep. 9; *Uhl* v. *Com.* 6 Gratt. 711; *Davis* v. *State,* 15 Ohio, 72, 45 Am. Dec. 559; *People* v. *Wright,* 38 Mich. 744, 31 Am. Rep. 331; *Miller* v. *State,* 25 Wis. 384; *State* v. *Parkerson,* 1 Strobh. L. 169; *Williamson* v. *State,* 16 Ala. 431; *Mulvey* v. *State,* 43 Ala. 316, 94 Am. Dec. 684; *Rex* v. *Knight,* 1 Car. & P. 116; *Reg.* v. *Cruse,* 2 Moody, C. C. 53, 8 Car. & P. 541; *Hensley* v. *State,* 52 Ala. 10, 1 Am. Crim. Rep. 465; *State* v. *Banks,* 48 Ind. 197; *Com.* v. *Neal,* 10 Mass. 152, 6 Am. Dec. 105; *State* v. *Bentz,* 11 Mo. 27; *State* v. *Haines,* 35 N. H. 207; *State* v. *Williams,* 65 N. C. 398; *State* v. *Boyle,* 13 R. I. 537; *State* v. *Potter,* 42 Vt. 495; *Gill* v. *State,* 39 W. Va. 479, 26 L.R.A. 655, 45 Am. St. Rep. 928, 20 S. E. 568; *Miller* v. *State,* 25 Wis. 384; *State* v. *Fitzgerald,* 49 Iowa, 260, 31 Am. Rep. 148, 3 Am. Crim. Rep. 1; *State* v. *Kelly,* 74 Iowa, 589, 38 N. W. 503; *Uhl* v. *Com.* 6 Gratt. 706; *Bibb* v. *State,* 94 Ala. 31, 33 Am. St. Rep. 88, 10 So. 506; *Com.* v. *Eagan,* 103 Mass. 71; *Freel* v. *State,* 21 Ark. 212; *Edwards* v. *State,* 27 Ark. 493.

cide were excepted,[2] but this exception no longer prevails, and the presumption applies alike to felonies and misdemeanors.[3] The exceptions now apply only to those offenses which are more likely to be committed by women.[4] The presumption of coercion is not conclusive, but may be rebutted by proof that the wife acted of her own volition, or by proof showing her free concurrence in the act.[5] The presumption does not apply to acts done in the absence of the husband;[6] nor does it apply where the wife testifies in behalf of her husband, and commits perjury.[7]

[2] Wharton, Crim. Law, 10th ed. § 78.

[3] *Reg.* v. *Smith,* 8 Cox, C. C. 27; *Reg.* v. *Wardroper,* 8 Cox, C. C. 284, Bell, C. C. 249, 29 L. J. Mag. Cas. N. S. 116, 6 Jur. N. S. 232, 1 L. T. N. S. 416, 8 Week. Rep. 217; *Reg.* v. *Manning,* 2 Car. & K. 903; *Com.* v. *Gannon,* 97 Mass. 547; *Com.* v. *Welch,* 97 Mass. 593; *State* v. *Williams,* 65 N. C. 398; *State* v. *Cleaves,* 59 Me. 298, 8 Am. Rep. 422; *Com.* v. *Pratt,* 126 Mass. 462; *State* v. *Boyle,* 13 R. I. 537.

[4] *Com.* v. *Cheney,* 114 Mass. 281; *State* v. *Williams,* 65 N. C. 398; *State* v. *Jones,* 53 W. Va. 613, 45 S. E. 916.

[5] *Marshall* v. *Oakes,* 51 Me. 308; *Com.* v. *Gormley,* 133 Mass. 580; *State* v. *Shee,* 13 R. I. 535; *Tabler* v. *State,* 34 Ohio St. 127; *United States* v. *Terry,* 42 Fed. 317; *Nolan* v. *Traber,* 49 Md. 460, 33 Am. Rep. 277; *Carleton* v. *Haywood,* 49 N. H. 314; *Edwards* v. *Wessinger,* 65 S. C. 161, 95 Am. St. Rep. 789, 43 S. E. 518; *Cassin* v. *Delany,* 38 N. Y. 178.

[6] 1 Hawk. P. C. chap. 1, § 9; 1 Hale, P. C. 47; *Martin* v. *Com.* 1 Mass. 347; *Com.* v. *Neal,* 10 Mass. 152, 6 Am. Dec. 105; *Com.* v. *Butler,* 1 Allen, 4; *Com.* v. *Munsey,* 112 Mass. 287; *Com.* v. *Feeney,* 13 Allen, 560; *State* v. *Shee,* 13 R. I. 535; *Com.* v. *Gormley,* 133 Mass. 580.

[7] *Com.* v. *Moore,* 162 Mass. 441, 38 N. E. 1120.

It has been held in one case that the presumption of coercion does not now exist, placing it on the ground that when first adopted it met a condition of society which has now ceased. See *State* v. *Hendricks,* 32 Kan. 559, 4 Pac. 1050.

It cannot be conclusively urged that the enlarged property and social rights of the wife rebut the presumption of coercion. The marital control is founded on natural laws, and is as great to-day as when first applied as a limitation, and, as Mr. Blackstone correctly says, a husband's coercion is "an excuse for criminal misconduct." This, then, places on the prosecution the duty of producing evidence of the wife's willing participation in the crime, as otherwise the presumption of coercion

§ 734. Presumption that probable consequences of an act are intended.—That a man intends the probable consequences of what he does is sometimes styled a presumption of law. This, however, is an error, if, by presumption of law, is meant a presumption to be imposed by the courts as universally applicable. It is not universally true that a man intends the probable consequences of his act. A manufacturer of pistols, for instance, knows that it is probable that some of the pistols he makes may be used to kill; but the killing that results he does not, in the eye of the law, intend. Probable consequences, also, may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent. We are unable, therefore, to say of all the probable consequences of acts that they were intended by the authors of such acts. All that we can say is that most of such probable consequences were intended; and that, judging from analogy or imperfect induction,[1] such is the case with the particular consequences we have to discuss. In this sense we may speak of such consequences as presumably intended.[2] In all depart-

prevails. See *Com.* v. *Flaherty,* 140 Mass. 454, 5 N. E. 258; *Com.* v. *Hill,* 145 Mass. 305, 14 N. E. 124; *State* v. *Ma Foo,* 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222; *Goldstein* v. *People,* 82 N. Y. 231; *Franklin's Appeal,* 115 Pa. 534, 2 Am. St. Rep. 583, 6 Atl. 70; *State* v. *Harvey,* 130 Iowa, 394, 106 N. W. 938; *Com.* v. *Adams,* 186 Mass. 101, 71 N. E. 78.

[1] See supra, §§ 5–17.

[2] *Rex* v. *Brice,* Russ. & R. C. C. 450; *Reg.* v. *Cobden,* 3 Fost. & F. 833; *State* v. *Goodenow,* 65 Me. 30, 1 Am. Crim. Rep. 42; *State* v. *Gilman,* 69 Me. 163, 31 Am. Rep. 257, 3 Am. Crim. Rep. 15; *Com.* v. *McGorty,* 114 Mass. 299; *Knapp* v. *White,* 23 Conn. 529; *Quinebaug Bank* v. *Brewster,* 30 Conn. 559; *Thomas* v. *People,* 67 N. Y. 218; *People* v. *Majone,* 1 N. Y. Crim. Rep. 86–94; *Hackett* v. *Com.* 15 Pa. 95; *Jones* v. *Ricketts,* 7 Md. 108; *State* v. *Robinson,* 20 W. Va. 713, 43 Am. Rep. 799; *Ridenour* v. *State,* 38 Ohio St. 272; *Hart* v. *Roper,* 41 N. C. (6 Ired. Eq.) 349, 51 Am. Dec. 425; *State* v. *Skidmore,* 87 N. C. 509; *Hayes* v. *State,* 58 Ga. 35; *Gauldin* v. *Shehee,* 20 Ga. 531; *Ware* v. *State,* 67 Ga. 349; *Phillips* v. *State,* 68 Ala. 469; *Burke* v. *State,* 71 Ala. 377; *Whizenant* v. *State,* 71 Ala. 383; *State* v. *Redemeier,* 8 Mo. App. 1, s. c. 71 Mo. 173, 36 Am. Rep. 462; *Mears* v.

ments of jurisprudence this line of reasoning is applied. We infer that he who breaks into a house at night and steals goods intends burglary,[3] and that he who publishes a libel does so intentionally, though such inferences are open to rebuttal.[4] We infer, in such and similar cases, intent; but we infer it (even when a party is examined as to his motives) from the facts of the particular case. The process is induction from facts, not deduction from arbitrary law.[5]

§ 735. Process is one of logic.—But, as has already been noticed, these inferences, though inferences of fact varying in intensity with each particular case (not prima facie invariable, as is the presumption of innocence), are not inferences to be arbitrarily applied. The jury in such matters is to accept certain general principles of probable reasoning, which it is the duty of the court to announce, not as binding rules of law, but as logical processes, of great value in all questions of evidential induction.[1]

§ 736. Illustrations of rule.—The presumption (or inference, as it may more properly be called) immediately before us, that the natural and probable consequences of every act deliberately done were intended by its author,[1] may be

Graham, 8 Blackf. 144; *State* v. *Lautenschlager,* 22 Minn. 514. See *Filkins* v. *People,* 69 N. Y. 101, 25 Am. Rep. 143; 1 Stephens, Crim. Law, 112.

[3] *Rex* v. *Brice,* Russ. & R. C. C. 450.

[4] *Pontifex* v. *Bignold,* 3 Mann. & G. 63, 3 Scott, N. R. 390, 9 Dowl. P. C. 860, 10 L. J. C. P. N. S. 259.

[5] *Beyer* v. *People,* 86 N. Y. 369; *State* v. *Massey,* 86 N. C. 658, 41 Am. Rep. 478, overruling *State* v. *Neely,* 74 N. C. 425, 21 Am. Rep. 496, 1 Am. Crim. Rep. 636; *State* v. *Donovan,* 61 Iowa, 369, 16 N. W. 206.

See supra, § 53; *Trogdon* v. *Com.* 31 Gratt. 862.

[1] See *Fulmer* v. *Com.* 97 Pa. 503; *Farris* v. *Com.* 14 Bush, 362; *State* v. *Swayze,* 30 La. Ann. 1323; *Brown* v. *State,* 4 Tex. App. 275; *Parrish* v. *State,* 14 Neb. 60, 15 N. W. 357.

[1] *Reg.* v. *Price,* 9 Car. & P. 729; *Rex* v. *Holt,* 7 Car. & P. 518; *Rex*

copiously illustrated. Thus, on a trial for forgery, where the forgery is proved, an intent to defraud the person who would have to pay the instrument if it were genuine may be inferred, even though the instrument be so framed as not to impose upon him, and the intent to defraud be general, and not confined or in any way pointed to the person by whom, if genuine, the instrument would be paid.[2] So, the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, is the basis from which may be inferred an intent to defraud, notwithstanding the belief of the party to whom it was uttered that the prisoner had no such intent.[3] Where a killing, also, is by a person without authority, and not in public war, by an instrument likely to cause death, with deliberate aim, malice is to be inferred from the act.[4] But the inference of intent or of malice is to be drawn from the whole case, varying in force as the case varies.[5] It is wrong to say in cases of homicide, for instance, that, as a uniform presumption of law, criminal intent and malice are to be presumed from the use of a deadly weapon, for there are cases when this is not

v. *Dixon,* 3 Maule & S. 15, 4 Campb. 12, 15 Revised Rep. 381; *Rex* v. *Bailey,* Russ. & R. C. C. 1; *Rex* v. *Harvey,* 3 Dowl. & R. 464, 2 Barn. & C. 257, 2 L. J. K. B. 4, 26 Revised Rep. 337; *Com.* v. *Drew,* 4 Mass. 391; *Com.* v. *Snelling,* 15 Pick. 337; *People* v. *Cotteral,* 18 Johns. 115; *State* v. *Cooper,* 13 N. J. L. 361, 25 Am. Dec. 490; *State* v. *Mitchell,* 27 N. C. (5 Ired. L.) 350; *State* v. *Jarrott,* 23 N. C. (1 Ired. L.) 76; *State* v. *Council,* 1 Overt. 305.

[2] Wharton, Crim. Law, 8th ed. §§ 717, et seq.; *Rex* v. *Mazagora,* Russ. & R. C. C. 291; *Henderson* v. *State,* 14 Tex. 503; *Hoskins* v. *State,* 11 Ga. 92; *State* v. *Mix,* 15 Mo. 153.

[3] *Rex* v. *Sheppard,* Russ. & R. C. C. 169, 1 Leach, C. L. 226, 2 East, P. C. 967.

[4] See *Reg.* v. *Ward,* L. R. 1 C. C. 356, 41 L. J. Mag. Cas. N. S. 69, 26 L. T. N. S. 43, 20 Week. Rep. 392, 12 Cox, C. C. 123; *Thomas* v. *People,* 67 N. Y. 218; *Meyers* v. *Com.* 83 Pa. 131; *State* v. *Zeibart,* 40 Iowa, 169; *State* v. *Lautenschlager,* 22 Minn. 514.

[5] *Filkins* v. *People,* 69 N. Y. 101, 25 Am. Rep. 143; *State* v. *Painter,* 67 Mo. 84.

true.[6] Yet, in cases where the evidence shows the deliberate use by an intelligent person of a deadly weapon, in a private encounter, without authority of law, the jury may be told that malice is a proper logical inference.[7]

§ 737. Roman law to the same effect.—The Roman common law is to the same effect. *Facta læsione præsumitur dolus, donec probetur contrarium.* This is based partially on the Code and opinions of the jurists, partially on philosophical grounds. But this is simply a *"conclusio probationum,"* or inference of probable inductive reasoning from facts. And with peculiar caution do the jurists insist upon the inference being drawn from all the circumstances of the case. It is, they tell us, a process of free logic, in which we are not justified in arriving at an inference until we weigh every fact put in evidence, and as to which no preannounced inflexible rule can be declared.[1]

§ 738. Malice not to be arbitrarily presumed from killing.—We must keep in mind that the doctrine that malice and intent are presumptions of law, to be presumed from the mere act of killing, belongs, even if correct, to purely speculative jurisprudence, and cannot be applied to any case that can possibly arise before the courts. As we have just seen, in no case can the prosecution limit its proof to the mere act of killing. If killing be proved, the mode must not merely

[6] Post, § 764.

See *Reg.* v. *Welsh,* 11 Cox, C. C. 336; *Reg.* v. *Selten,* 11 Cox, C. C. 674; *Murray* v. *Com.* 79 Pa. 311; *Kingen* v. *State,* 45 Ind. 519; *Buckner* v. *Com.* 14 Bush, 601; *Farris* v. *Com.* 14 Bush, 362; *State* v. *Roane,* 13 N. C. (2 Dev. L.) 58; *State* v. *West,* 51 N. C. (6 Jones, L.) 506; *State* v. *Coleman,* 6 S. C. 185, 3 Am. Crim. Rep. 180; *Simpson* v. *State,* 59 Ala. 1, 31 Am. Rep. 1; *State* v. *Swayze,* 30 La. Ann. 1323; *Palmore* v. *State,* 29 Ark. 248; *Skidmore* v. *State,* 43 Tex. 93; *Perry* v. *State,* 44 Tex. 473; *Murray* v. *State,* 1 Tex. App. 417.

[7] Post, § 764.

[1] Collat. legg. Mos. et Rom. 1, 8.

be shown, but averred. It is not enough to aver in the indictment that "A killed B." How the killing was done must be specified. Nor is it possible to eliminate from the proof the mode; for a statement by a witness, could we imagine such evidence to be offered, that "A killed B," would be inadmissible as matter of opinion; it would be necessary to state the facts, so as to show that the way of killing was one of which the law takes cognizance. It may be said, for instance, that A, a son, killed his mother by his misconduct breaking her heart; but this would not be the subject of a criminal prosecution. What the law punishes is not killing, but particular modes of killing, and those must be averred and proved. Now, these modes, when proved, form facts from which intent is to be inferred or negatived. It is therefore announcing a proposition purely speculative and irrelevant to tell a jury that an abstract killing involves, as a matter of law, an abstract intent. It is perfectly proper, however, to tell a jury that from certain circumstances—*e. g.,* the use of a deadly weapon, repeated and severe wounds, threats—intent and malice may be rightly inferred as inferences of fact.[1] These are inferences familiar in the operation of psychological and social law; inferences the jury are bound to weigh; but in weighing which it is proper that they should be advised by the court. When we apply this test, the apparent conflict of opinions vanishes. It is true that we hear occasional utterances, as in Massachusetts, of the old doctrine that malice is to be inferred from the mere act of killing; but wherever this is done, it is followed by the admission that when the facts of killing are proved, then the malice is to be inferred from the facts. Now, as the facts of killing are always proved, the idea of abstract

[1] See *State* v. *Gilman,* 69 Me. 163, 31 Am. Rep. 257, 3 Am. Crim. Rep. 15; *Roach* v. *State,* 8 Tex. App. 478; *Brown* v. *State,* 9 Neb. 157, 2 N. W. 378; *Hawthorne* v. *State,* 58 Miss. 778; *Lacefield* v. *State,* 34 Ark. 275, 36 Am. Rep. 8.

As to presumption of malice from killing, see note in 4 L.R.A.(N.S.) 934.

malice being presumed from abstract killing has no application to the cases before the court.[2] It is a speculation like the speculations of the old schoolmen, from which it is taken, based on the supposition that there are abstract generic phenomena (*e. g.*, an abstract horse with abstract predicates); speculations which roam over all creation, without ever touching any particular real case. Should, however, the judge make the proposition not speculative, but regulative,—should he direct the jury that logical inferences of this class are presumptions of law, and tell them to presume malice from the act of killing,—then this would be error.[3]

§ 739. Nor from other hurtful act.—The fallacy which has just been noticed pervades the civil as well as the criminal

[2] See *Com.* v. *Hawkins,* 3 Gray, 463; *United States* v. *Armstrong,* 2 Curt. C. C. 446, Fed. Cas. No. 14,467.

[3] Wharton, Crim. Pl. & Pr. § 794.

See post, § 768; *Reg.* v. *Labouchere,* 14 Cox, C. C. 419 (libel); *Schull* v. *Hopkins,* — S. D. —, 29 L.R.A.(N.S.) 691, 127 N. W. 550 (libel); *Towney* v. *Simonson, W. & H. Co.* 109 Minn. 341, 27 L.R.A.(N.S.) 1035, 124 N. W. 229; *Holmes* v. *Royal Fraternal Union,* 222 Mo. 556, 26 L.R.A. (N.S.) 1080, 121 S. W. 100.

The error of using an abstract fact as a presumption, as defined in the text, is also clearly shown in those statutes concerning homicide which provide in their general phraseology that, "the killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused. In those courts, as in Colorado, where the court is permitted to give the statute itself as an instruction in criminal cases, the phrase above cited is given in nearly every trial for homicide. The error consists in the fact that where the accused sets up an alibi, or that the death was from an accident, the trial court gives as an abstract proposition the instruction that, the killing being proved, justification devolves on the accused. Now, as noted in the text, the fact of killing is always proved, and on proof of that fact, without regard to the defense, the accused is burdened by an affirmative showing under such instruction. See *Hill* v. *People,* 1 Colo. 451; *Babcock* v. *People,* 13 Colo. 523, 22 Pac. 817; *Hopps* v. *People,* 31 Ill. 392, 83 Am. Dec. 231; *Com.* v. *York,* 9 Met. 93, 43 Am. Dec. 373; *Stokes* v. *People,* 53 N. Y. 177, 13 Am. Rep. 492; *Alexander* v. *People,* 96 Ill. 96.

side of our law. Thus, we are told by an authoritative writer that "the deliberate publication of a calumny which the publisher knows to be false raises, under the plea of 'not guilty' to an action for libel, a conclusive presumption of malice." [1] Now here, again, is either a mere *petitio principii,* being equivalent to saying, "a falsehood uttered deliberately and knowingly is a falsehood uttered deliberately and knowingly," or we have exhibited to us, not a "conclusive," but a probable, presumption of malice. Undoubtedly, the fact that a document attacking the character of another is published by a mere volunteer is ground from which malice may be inferred. But this fact is not always enough to make out malice, for when the publication is privileged, then, in order to show malice, facts inconsistent with bona fides must be proved.[2] Whether there is malice, therefore, even by force of the very line of cases before us, is a question of fact, determined by the evidence in the particular case. Another illustration of the same error may be noticed in an English ruling that fraud is to be

[1] Taylor, Ev. § 71, citing *Haire* v. *Wilson,* 9 Barn. & C. 643; *Rex* v. *Shipley,* 4 Dougl. K. B. 73, 177; *Fisher* v. *Clement,* 10 Barn. & C. 475, 8 L. J. K. B. 176; *Baylis* v. *Lawrence,* 11 Ad. & El. 925, 3 Perry & D. 526, 9 L. J. Q. B. N. S. 196, 4 Jur. 652.

See Greenl. Ev. § 18.

[2] *Bromage* v. *Prosser,* 4 Barn. & C. 247, 6 Dowl. & R. 296, 1 Car. & P. 475, 3 L. J. K. B. 203, 28 Revised Rep. 241; *Spill* v. *Maule,* L. R. 4 Exch. 232, 38 L. J. Exch. N. S. 138, 20 L. T. N. S. 675, 17 Week. Rep. 805; *Whitefield* v. *Southeastern R. Co.* 1 El. Bl. & El. 115, 27 L. J. Q. B. N. S. 229, 4 Jur. N. S. 688, 6 Week. Rep. 545; *Taylor* v. *Hawkins,* 16 Q. B. 308, 20 L. J. Q. B. N. S. 313, 15 Jur. 746; *Cooke* v. *Wildes,* 5 El. & Bl. 328, 3 C. L. R. 1090, 24 L. J. Q. B. N. S. 367, 1 Jur. N. S. 610, 3 Week. Rep. 458; *Toogood* v. *Spyring,* 1 Cromp. M. & R. 181, 193, 3 L. J. Exch. N. S. 347, 4 Tyrw. 582, 9 Eng. Rul. Cas. 55; *Coxhead* v. *Richards,* 2 C. B. 569, 15 L. J. C. P. N. S. 278, 10 Jur. 984; *Wright* v. *Woodgate,* 2 Cromp. M. & R. 573, 1 Gale, 329, 1 Tyrw. & G. 12; *Gilpin* v. *Fowler,* 9 Exch. 615, 23 L. J. Exch. N. S. 152, 18 Jur. 292, 2 Week. Rep. 272; *Somerville* v. *Hawkins,* 10 C. B. 583, 20 L. J. C. P. N. S. 131, 15 Jur. 450; *Harris* v. *Thompson,* 13 C. B. 333; *Reg.* v. *Wallace,* 3 Ir. C. L. Rep. 38.

inferred wherever one man tells an untruth to another for the purpose of obtaining the latter's goods.[3] Here, again, we have the same dilemma. Either the ruling, if it means that he who intends to cheat has the intention of cheating, is a bare *petitio principii,* or it rests on a false premise, namely, that a man who, by means of an untruth, obtains another's goods, intends to cheat, in teeth of the fact that there are innumerable cases in which untruths are uttered unconsciously, or as mere brag, or as matters of opinion, in which cases it is held that the intention to cheat is not proved. In this case, also, we have the process of deduction erroneously substituted for induction, by which alone, as we have seen, conclusions as to intent can be reached.

§ 740. Combination of intentions no defense.—When the proof indicates that there were other intentions beside that laid in the indictment (*e. g.,* in stealing, beside the intention to steal, an intention to help a third person; or in homicide, beside the intent to kill, an intent to vindicate an impaired right), the existence of such cumulative intention is no defense.[1] There is no good act that is not to some extent impelled by improper motives; there is no bad act which the perpetrator does not summon up good motives to excuse. An assassination, for instance, is rarely for the exclusive purpose

[3] *Tapp* v. *Lee,* 3 Bos. & P. 371. See *Pontifex* v. *Bignold,* 3 Mann. & G. 63, 3 Scott, N. R. 390, 9 Dowl. P. C. 860, 10 L. J. C. P. N. S. 259; *Murphy* v. *Com.* 23 Gratt. 960; *Reg.* v. *Noon,* 6 Cox, C. C. 137. See *State* v. *Williams,* 69 Mo. 110.

[1] *Rex* v. *Cox,* Russ. & R. C. C. 362, 1 Leach, C. L. 71; *Rex* v. *Gillow,* 1 Moody, C. C. 85, 1 Lewin, C. C. 57; *Rex* v. *Davis,* 1 Car. & P. 306; *Reg.* v. *Bowen,* Car. & M. 149; *Reg.* v. *Hill.* 2 Moody, C. C. 30; *Rex* v. *Batt,* 6 Car. & P. 329, 4 Mor. Min. Rep. 162; *State* v. *Moore,* 12 N. H. 42; *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *People* v. *Curling,* 1 Johns. 320; *State* v. *King,* 86 N. C. 603.

See supra, § 135; Wharton, Crim. Law, 8th ed. § 119.

of satiating private hate. A bad man is to be removed from the world, or some good deeds are to be aided by part of the plunder. If, whenever good intentions are mingled with the bad intention, there could be no conviction, there could be no conviction in any case.[2]

But where any act is as consistent with good intention as with bad intention, the finding of the court ought always to favor the honest intention.[3]

The law is, no matter what may be the motives leading to a particular act, if the act is illegal, it is indictable, notwithstanding that some one or more of the motives inducing the act may be meritorious.[4]

§ 741. Presumptions arising from mutilation of documents.—From the vexed question of intent we proceed to another line of rulings, as to which variable logical inferences have been too often spoken of as constant presumptions of law. Where a document is shown to have been fraudulently altered, defaced, or destroyed, we may infer that this was done in the interests of the party to be benefited by the spoliation;[1] and should he attempt to make use of the document in its corrupted state, or to offer parol proof of its contents when it has been destroyed, the evidence will be rejected, until the destruction or mutilation be satisfactorily explained;[2] or, should the document be received in evidence, then, among

[2] See *McLain* v. *Com.* 99 Pa. 86.

[3] *State* v. *Gritzner,* 134 Mo. 512, 36 S. W. 39.

See *Louisville R. Co.* v. *Com.* 130 Ky. 738, 132 Am. St. Rep. 408, 114 S. W. 343; *United States* v. *Breese,* 173 Fed. 402.

[4] *State* v. *Moore,* 12 N. H. 42; *Perdue* v. *State,* 2 Humph. 494; *Com.* v. *Belding,* 13 Met. 10; *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *State* v. *Dineen,* 10 Minn. 407, Gil. 325; *State* v. *King,* 86 N. C. 603; *People* v. *Cornetti,* 92 N. Y. 85; *State* v. *Coleman,* 20 S. C. 441; supra, § 135.

[1] *Bott* v. *Wood,* 56 Miss. 136.

[2] *Kiser* v. *State,* 13 Tex. App. 201; *State* v. *Grant,* 74 Mo. 33.

See 75 L. T. 173.

the several probable interpretations which might be admissible, that which is most unfavorable to him will be adopted.[3] So, a spoliation of papers by a neutral vessel when captured has been held to give a strong inference of hostile purpose.[4] And, as will soon be more fully seen, wherever evidence is intentionally suppressed, we have the right to suppose, as a matter of logic, that, if produced, it would tell against the party working the suppression.[5] It may also be inferred that evidence which a defendant on trial refuses to permit to be introduced, on the ground of privilege, would not have told in his favor.[6] But this is not to be permitted to conflict with statutes providing that there is to be no presumption against a defendant for not testifying;[7] nor should the rule be strained so as to include an inference that facts thus excluded are to be regarded as proved.

There is a difference between the terms "mutilation" and "alteration" of documents. Alteration is applied to the act of a party who is interested in a document, to change the effect of the document, and it imports fraud or wrongful design.[8] Spoliation is the act of one not a party to the document, where mutilation or even destruction does not change its legal effect.[9] The presumptions following either act are against the party committing it, under the maxim, *Omnia præsumuntur contra spoliatorem,* or that all things are pre-

[3] Post, § 749; *Wilson* v. *Fulliam,* 50 Iowa, 123.

[4] *The Hunter,* 1 Dodson, Adm. 480; *The Pizarro,* 2 Wheat. 227, 4 L. ed. 226.

[5] Post, § 748; Wharton, Ev. § 1264.

[6] *People* v. *Hovey,* 92 N. Y. 555.

[7] Post, § 749.

[8] *Medlin* v. *Platte County,* 8 Mo. 235, 40 Am. Dec. 135; *Lubbering* v. *Kohlbrecher,* 22 Mo. 596; *Bank of Commerce* v. *Hoeber,* 8 Mo. App. 171.

See *United States* v. *Spalding,* 2 Mason, 478, Fed. Cas. No. 16,365.

[9] *Drum* v. *Drum,* 133 Mass. 566; *Boyd* v. *McConnell,* 10 Humph. 68; *Blair* v. *Bank of Tennessee,* 11 Humph. 84; *John* v. *Hatfield,* 84 Ind. 75.

sumed against the wrongdoer,[10] and in favor of the innocent party.[11]

§ 742. Forging evidence gives rise to prejudicial inferences.—Forgery of evidence, to adopt, with a slight change, Mr. Bentham's classification, may be effected: 1, from a view of self-exculpation; 2, maliciously, with the intention of injuring the accused or others; 3, in order to effect some speculative or moral end.[1]

§ 743. With a view to self-exculpation.—A striking illustration of this is found in the trial of Dr. Webster for the murder of Dr. Parkman, where letters were received by the police marshal of Boston, purporting to reveal the location of the body, which, upon the trial, were proved to have been written by the prisoner, in order to divert suspicion from himself, and to prevent a rigid examination of the premises where the murder was actually committed.[1] The numerous fabrications of evidence in behalf of the claimant in the Tichborne Case also had much influence in leading to the conclusion of his guilt. The same remarks apply to a forged defense of alibi. It is not an uncommon artifice to endeavor to give coherence and effect to a fabricated alibi, by assigning the events

[10] *Clifton* v. *United States*, 4 How. 242, 11 L. ed. 957; *Runkle* v. *Burnham*, 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837; *Diehl* v. *Enig*, 65 Pa. 320. See 76 Pa. 359; *Gray* v. *Haig*, 20 Beav. 219.

[11] *Thompson* v. *Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Rhoads* v. *Frederick*, 8 Watts, 448; *Downing* v. *Plate*, 90 Ill. 268; *Armour* v. *Gaffey*, 162 N. Y. 652, 57 N. E. 1103, 30 App. Div. 121, 51 N. Y. Supp. 846.

See *Isabella Gold Min. Co.* v. *Glenn*, 37 Colo. 165, 86 Pac. 349; *Knapp* v. *Edwards*, 57 Wis. 191, 15 N. W. 140.

But see *Chaffee* v. *United States*, 18 Wall. 516, 21 L. ed. 908.

[1] See Amos's Great Oyer, etc., 267.

[1] Bemis's Rep. of Webster Case, 210.

See *Gardiner* v. *People*, 6 Park. Crim. Rep. 155; *Edmund's Case*, 1 Wharton & S. Med. Jur. § 167.

of another day to that on which the offense was committed, so that the events, being true in themselves, are necessarily consistent with each other, and false only in their assignment to the day in question.[2] And while an alibi is a defense which is a constant safeguard of innocence, it is peculiarly susceptible of being fabricated as a shelter for guilt.[3] It has hence been held that the getting up by the defendant of a fictitious alibi by false personation is admissible against him on trial,[4] though such a defense must not be treated as necessarily involving guilt.[5] The same may be said of an attempt to corrupt witnesses.[6]

§ 744. With intent of injuring others.—It may be that the object of such forgery was to injure a third person, either as a means of gratifying revenge or of protecting self. A common instance of this is where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with a view of exciting suspicion of larceny against him; and a suspicion of murder may be raised by secreting a bloody weapon in like manner.[1] Forgery of this kind may be forcibly accomplished. This, Mr. Benthan[2] illustrates by a case where three men unite in a conspiracy against an innocent person; one laying hold of his hands, another putting into his pocket an article of stolen property, which the third, running up, as if by accident, during the scuffle, finds there, and denounces him to justice as a thief.[3]

[2] Wills, Circumstantial Ev. 116; 1 Crim. L. Mag. 8; 17 Alb. L. J. 40. See supra, § 333.

[3] See supra, § 333; post, §§ 749, 750.

[4] *State* v. *Williams,* 27 Vt. 724; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; supra, § 334, cases cited.

[5] *Toler* v. *State,* 16 Ohio St. 583; *State* v. *Brown,* 25 Iowa, 561; *People* v. *Malaspina,* 57 Cal. 628.

[6] *State* v. *Staples,* 47 N. H. 113, 90 Am. Dec. 565; post, § 749.

[1] Best's Theory of Pres. Proof App. Case 10, p. 102.

[2] 3 Bentham Judicial Ev. 255; 3 Bentham, Judicial Ev. 50. See Celebrated Trials, 591.

[3] 3 Bentham, Judicial Ev. 39; *R.* v. *Wescombe,* Annual Register for 1829, p. 142; Medical Jurisprudence, by Paris & Fonblanque,

§ 745. For speculative or moral end.—Fabrication of evidence may also be for the mere purpose of creating a sensation in the community. In the summer of 1879, a lady in New York was found brutally murdered in her chamber, and, though for a few days no definite traces of the murder could be found, the guilt was finally brought home to a colored man named Chastine Cox, who was subsequently convicted. But while the question was still in suspense, public interest was much roused; and a series of letters appeared in the newspapers suggesting various persons as guilty of the murder, and two witnesses were ready to testify to facts grossly exaggerated, if not fabricated, implicating the husband of the murdered woman. Were the speculations and fabrications the work of a person seeking in this way to divert attention from himself? So far from this being the case, the speculations were thrown out as guesses, something in the way in which answers to conundrums are published; and nothing would better illustrate the falsity, as an absolute rule, of the presumption now before us, than the severity with which the prosecuting authorities would have rebuked an attempt to impute the homicide to the author of one of these communications on the ground that throwing the police on a false track is a presumption of guilt on the part of those by whom the luring device was designed. So far as concerns those who concocted fabrications implicating the husband of the murdered woman, we have here further illustrations of the fact that there may be gratuitous and volunteer perjuries for a prosecution, as well as gratuitous and volunteer perjuries for a defense. In the same line may be mentioned letters containing false statements, but designed innocently for the purpose of diverting a friend from a dangerous enterprise. Mr. Bentham gives, as an analogous illustration, the incident related of the patri-

vol. iii. p. 34; 7 State Trials, p. 159; *Fitler's Case,* cited in Annual Register for 1834, p. 115; Wills, Circumstantial Ev. 112.

arch Joseph, who, with the view of creating alarm and remorse in the minds of his guilty brothers, caused a silver cup to be privately hidden in one of their sacks, and, after they had gone some distance on their journey, had them arrested as thieves and brought back. The object of suppressing evidence, also, may be to protect, not self, but another person.[1]

A fabrication of evidence by the accused always gives rise to an inference that is against him.[2] This condition frequently arises in criminal cases in connection with the defense of an alibi. But such failure to establish an alibi is merely a circumstance to be weighed and considered by the jury, and does not raise a legal presumption against the accused.[3]

§ 746. But forgery of evidence is not conclusive of guilt.—The fact of a forgery of evidence having taken place is therefore simply a circumstance from which, in con-

[1] It is related of a dissolute English statesman, then in political disgrace, who was visited by a person evidently disguised, that there was a suspicion among the police that this visitor was a foreign emissary, whom it was treason to harbor. A search warrant was issued, and the house was entered. Its master, when he faced the officers, was in obvious confusion. He begged that at least his own chamber should not be searched, and he did this with a distressed earnestness which convinced them that in that chamber they would find the person of whom they were in search. Of course, this made them more eager, and they forced their way into the room. A person was there in bed. "I will show you enough to prove to you that this is not the man you seek," said Lord Bolingbroke, for it was his house that was entered. He uncovered enough of the body to show that it was that of a woman, keeping the head concealed so that she might not be identified. His anxiety and confusion when his house was entered sprang from his desire to protect himself and his paramour from detection in a disgraceful intrigue.

[2] *Winchell* v. *Edwards,* 57 Ill. 41; *Allen* v. *United States,* 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154; *Sater* v. *State,* 56 Ind. 378.

[3] *Kilgore* v. *State,* 74 Ala. 1; *Porter* v. *State,* 55 Ala. 95, 107; *Sawyers* v. *State,* 15 Lea, 694; *Toler* v. *State,* 16 Ohio St. 583.

nection with others (proof of the *corpus delicti* being essential), guilt may be inferred.[1] Taken by itself, such proof is not inconsistent with innocence, since an innocent, though weak and timid, man, sensible that appearances are against him, and duly weighing the danger of his being detected in clandestine attempts to stifle proof, may naturally resort to this mode of averting danger.[2] Mr. Bentham, in illustrating this point, refers to a story in the Arabian Nights, which may be thus amplified: A little hunchback is accidentally choked by swallowing a fish bone. His host, to get rid of him, places him at the door of a neighboring chamber. The inhabitant of this chamber, opening the door and seeing this unwelcome encumbrance deposited there, gives the body a kick, and is shocked, on returning to the spot a few minutes after, to find the hunchback dead. To ward off suspicion from himself, he takes up the body and places it in front of a second chamber, where a similar scene is shortly afterwards enacted. Quite a number of operations of this kind are gone through with, each successive occupant endeavoring to shift, in this way, suspicion from himself on his neighbor. It may be questioned whether many innocent men over whom suspicion lowers would not do very much the same thing. A man of sagacity and courage would undoubtedly say, "This thing implicates me. I will confront the difficulty at once. I will court investigation, and settle the matter right off." But not everyone charged with crime has at his command sagacity and courage. A is found dead, apparently murdered; and B and C are charged with killing him. B, who is a man of weak character, is innocent of the murder, but thinks that if he suc-

[1] *State* v. *Collins*, 20 Iowa, 86; *State* v. *Benner*, 64 Me. 267; *Walker* v. *State*, 49 Ill. 398; *Craig ex dem. Annesley* v. *Anglesea*, 17 How. St. Tr. 1416. See *Tracy Peerage*, 10 Clark & F. 154; *Clunnes* v. *Pezzy*, 1 Campb. 8; *Lawton* v. *Sweeney*, 8 Jur. 967; Wills, Circumstantial Ev. 72.

[2] See case given by 3 Co. Inst. chap. 104, p. 232, and remarks post, § 749.

ceeds in destroying all the proof of the *corpus delicti*, his acquittal will be sure. He attempts this (*e. g.*, attempts to burn up the dead body, or to make way with other indicatory proof of a violent homicide), and attempting it unsuccessfully, the attempt is a strong article of evidence against him. C, a shrewd villian, if he makes the attempt, makes it successfully.

§ 747. **Presumption varies with case.**—While, therefore, guilt may be inferred from fabrication of a false defense, the inference is not arbitrary, but varies with the circumstances of the case. Good, as well as bad, causes have in this way been supported. If a cause is to be condemned because its advocates have forged evidence in its support, Christianity would have to be condemned, for in behalf of Christianity innumerable writings have been forged. Given a true cause, a desperate assailant, and an advocate who believes the end justifies the means, and falsehood will be resorted to to prove the truth. In litigations in which high passions are excited, the temptation to strain, if not fabricate, evidence, becomes almost irresistible. Few cases of disputed succession or legitimacy, for instance, are tried, in which suspicious evidence is not introduced on both sides; and such is almost always the case in criminal prosecutions in which warring social or political parties are enlisted. We must also remember that false defenses of this kind may be the result of the interference of ill-advised counsel or friends.[1]

§ 748. **Suppression or obstruction of evidence.**—"The suppression or destruction of pertinent evidence," it is remarked by Mr. Starkie, "is always a prejudicial circumstance of great weight; for, as no act of a rational being is performed

[1] See *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; supra, §§ 373 et seq; 1 Crim. L. Mag. 17.

without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavorably to the party in whose power it is." [1]

One of the most prejudicial facts in the trial of Captain Donnellan was that he had rinsed the phials from which Sir Theodosius Boughton had taken the draught which was alleged to have caused his death. And in another conspicuous English case of poisoning, the contents of the stomach of the deceased, which had been placed in a jug for examination, were clandestinely thrown by the defendant into a vessel containing a quantity of water. The defendant was acquitted on the ground of the insufficiency of the evidence of the *corpus delicti;* but, besides the tampering with the contents of the stomach, evidence was given of other suspicious facts and declarations strongly indicative of conscious guilt.[2]

Filing away the engraving from articles of plate; cutting out the marks on linen; shoeing a horse backwards, as was

[1] 1 Starkie, Ev. p. 437. See *Edmund's Case,* 1 Wharton & S. Med. Jur. § 167; *Leeds* v. *Cook,* 4 Esp. 256, 6 Revised Rep. 855; *Gray* v. *Haig,* 20 Beav. 219; *Moriarty* v. *London, C. & D. R. Co.* L. R. 5 Q. B. 314, 39 L. J. Q. B. N. S. 109, 22 L. T. N. S. 163, 18 Week. Rep. 625; *Curlewis* v. *Corfield,* 1 Q. B. 814, 1 Gale & D. 489, 6 Jur. 259; *Owen* v. *Flack,* 2 Sim. & Stu. 606, 4 L. J. Ch. 202; *Bell* v. *Frankis,* 4 Mann. & G. 446, 5 Scott, N. R. 460, 11 L. J. C. P. N. S. 300; *Sutton* v. *Davenport,* 27 L. J. C. P. N. S. 54; *State* v. *Knapp,* 45 N. H. 148; *Thayer* v. *Stearns,* 1 Pick. 109; *Com.* v. *Webster,* 5 Cush. 316, 52 Am. Dec. 711; *Grimes* v. *Kimball,* 3 Allen, 518; *Joannes* v. *Bennett,* 5 Allen, 169, 81 Am. Dec. 738; *People* v. *Rathbun,* 21 Wend. 509; *Meyer* v. *Barker,* 6 Binn. 228; *Reed* v. *Dickey,* 1 Watts, 152; *Page* v. *Stephens,* 23 Mich. 357; *People* v. *Marion,* 29 Mich. 31; *Jones* v. *State,* 64 Ind. 473; *Scott* v. *State,* 64 Ind. 400; *Winchell* v. *Edwards,* 57 Ill. 41; *Dickerson* v. *State,* 48 Wis. 288, 4 N. W. 321; *Revel* v. *State,* 26 Ga. 275; *Betts* v. *State,* 66 Ga. 508; *Blevins* v. *Pope,* 7 Ala. 371; *Bell* v. *Hearne,* 10 La. Ann. 515; *Lucas* v. *Brooks,* 23 La. Ann. 117; *Kiser* v. *State,* 13 Tex. App. 201. See *Barker* v. *Ray,* 2 Russ. Ch. 73; post, § 749.

For notes as to presumption from suppression or destruction of evidence, see 14 L.R.A. 470, and 34 L.R.A. 581.

[2] *Rex* v. *Donnall,* Wills, Circumstantial Ev. 146; *Rex* v. *Thomas,* Wills, Circumstantial Ev. 146.

the case in a remarkable arson case in New Jersey, so as to reverse the tracks; and the removal, or endeavor to remove, from the person or clothes stains of blood or other marks, together with other instances of obliteration or distorting of marks of identity, may be enumerated under this head. So, having a large quantity of counterfeit coin in possession, many of each sort being of the same date and made in the same mold, and each piece being wrapped in a separate piece of paper, and the whole hidden in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit, and intended to utter it.[3]

In the great number of poison cases so industriously collected by Hitzig,[4] there are several in which it was attempted, by the premature interment of human remains, to conceal the offense, the pretext being that this was rendered necessary by the state of the body. In one case, the presumption arising from a hurried burial was sought to be rebutted by antedating the time of death, and an ingenious, but perilous, network of letters and funeral notices was spread while the intended victim was still in full health. He stumbled unawares upon his own funeral paraphernalia, and was fortunately able, not only to read the mourning notes, but to prevent their necessity. Dr. Hitzig gives in full the trial of a woman who, under the pretext of a family custom, was enabled to direct no less than seven precipitate interments in her own immediate household, no one suspecting that the usage which she thus so vigorously followed was but a trick to cover the violent death of victims whom she appeared tenderly to lament.

Thus, any attempt to suppress evidence is a circumstance

[3] *Reg.* v. *Jarvis,* 33 Eng. L. & Eq. Rep. 567, Dears, C. C. 552, 25 L. J. Mag. Cas. N. S. 30, 1 Jur. N. S. 1114, 7 Cox, C. C. 53, 4 Week. Rep. 85.

[4] Neue Pitaval, von Dr. J. C. Hitzig und Dr. W. Haring.

to go to the jury, as a basis from which guilt may be inferred.[5]

§ 749. **Inference when evidence is withheld.**—The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence in all cases in which it could be produced.[1] When, on the refusal of a party to produce on trial papers which have been called for, the opposite party introduces parol evidence of the contents of the papers, then, if there be doubt, the probable interpretation less favorable to the suppressing party will be adopted,[2] provided the matter be not one which is part of the proper case of the prosecution.[3] The noncalling of a witness, however, will not justify an arbitrary presumption of suppression,[4]

[5] *State* v. *Chamberlain,* 89 Mo. 129, 1 S. W. 145; *Hubbard* v. *State,* 65 Neb. 805, 91 N. W. 869; *State* v. *Rozum,* 8 N. D. 548, 80 N. W. 477; *State* v. *Dickson,* 78 Mo. 438; *United States* v. *Randall,* Deady, 524, Fed. Cas. No. 16,118; *McMeen* v. *Com.* 114 Pa. 300, 9 Atl. 878.

[1] See cases cited supra, §§ 341, 741; *Rex* v. *Burdett,* 4 Barn. & Ald. 161, 22 Revised Rep. 539; *Wentworth* v. *Lloyd,* 10 H. L. Cas. 589, 33 L. J. Ch. N. S. 688, 10 Jur. N. S. 961, 10 L. T. N. S. 767; *United States* v. *Schindler,* 18 Blatchf. 227, 10 Fed. 547; *Durgin* v. *Danville,* 47 Vt. 95; *State* v. *Moon,* 41 Wis. 684, 2 Am. Crim. Rep. 64; *Blatch* v. *Archer,* Cowp. pt. 1, pp. 63, 65; *Wallace* v. *Harris,* 32 Mich. 394. See *Armory* v. *Delamire,* 1 Strange, 505, 10 Mor. Min. Rep. 66; *Reg.* v. *Jarvis,* Dears. C. C. 552, 7 Cox, C. C. 53, 25 L. J. Mag. N. S. 30, 1 Jur. N. S. 1114, 4 Week. Rep. 85; *Atty. Gen.* v. *Windsor,* 24 Beav. 679, 27 L. J. Ch. N. S. 320, 4 Jur. 518, 6 Week. Rep. 220; *Shoenberger* v. *Hackman,* 37 Pa. 87; *Mordecai* v. *Beal,* 8 Port. (Ala.) 529.

[2] *Cooper* v. *Gibbons,* 3 Campb. 363; *Crisp* v. *Anderson,* 1 Starkie, 35, 18 Revised Rep. 744; *Hanson* v. *Eustace,* 2 How. 653, 11 L. ed. 416; *Clifton* v. *United States,* 4 How. 242, 11 L. ed. 957; *United States* v. *Flemming,* 18 Fed. 907; *Barber* v. *Lyon,* 22 Barb. 622; *Cross* v. *Bell,* 34 N. H. 83; *Life & F. Ins. Co.* v. *Mechanic's F. Ins. Co.* 7 Wend. 31; *Shortz* v. *Unangst,* 3 Watts & S. 45.

[3] *State* v. *Wilborne,* 87 N. C. 529; supra, §§ 341, 741.

[4] *Scovil* v. *Baldwin,* 27 Conn. 316; *State* v. *Johnson,* 76 Mo. 121. See Wharton, Crim. Pl. & Pr. 565; supra, § 448; *State* v. *Cousins,* 58 Iowa, 250, 12 N. W. 281.

unless such witness be important and be under the party's especial control;[5] and under the statute no presumption is to be drawn from the fact that a defendant does not offer himself for examination.[6]

Attempts to prevent a witness from attending are admissible as facts from which unfavorable inferences may be legitimately drawn.[7] Indicatory proof, however, may be destroyed by the inadvertent interference of third parties.[8]

While the accused in a criminal case may rely upon the presumption of innocence, and any failure on his part to offer evidence is not an admission of guilt, or even a presumption against him,[9] still, where it appears that he has within his power evidence which is not available to the state, which would show the actual facts, his suppression of such evidence warrants the jury in drawing an inference that its production would be unfavorable to him.[10]

§ 750. Inferences from attempts to escape.—When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from a conscious-

[5] *Williams* v. *Com.* 91 Pa. 493; *People* v. *Hovey,* 1 N. Y. Crim. Rep. 180, 283; *State* v. *Rosier,* 55 Iowa, 517, 8 N. W. 345.

[6] Supra, § 435.

[7] *State* v. *Barron,* 37 Vt. 57; *State* v. *Staples,* 47 N. H. 113, 90 Am. Dec. 565; *Adams* v. *People,* 9 Hun, 89; *People* v. *Pitcher,* 15 Mich. 397.

[8] Post, § 777.

[9] *State* v. *Carr,* 25 La. Ann. 407.

[10] *United States* v. *Carter,* 217 U. S. 286, 54 L. ed. 769, 30 Sup. Ct. Rep. 515, 19 A. & E. Ann. Cas. 594; *Davis* v. *State,* 4 Ga. App. 441, 61 S. E. 843; *Maxey* v. *State,* 76 Ark. 276, 88 S. W. 1009; *Robertson* v *State,* 40 Fla. 509, 24 So. 474; *Com.* v. *Minsing,* 202 Mass. 121, 88 N. E. 918; *State* v. *Marren,* 17 Idaho, 766, 107 Pac. 993; *Lee* v. *State,* 156 Ind. 541, 60 N. E. 299; *Daty* v. *State,* 7 Blackf. 427; *State* v. *Grebe,* 17 Kan. 458; *State* v. *McAllister,* 24 Me. 139; *People* v. *Hendrickson,* 53 Mich. 525, 19 N. W. 169; *People* v. *Dyle,* 21 N. Y. 578; *People* v. *Hovey,* 92 N. Y. 554; *State* v. *Smallwood,* 75 N. C. 104; *Com.* v. *McMahon,* 145 Pa. 413, 22 Atl. 971; *Taylor* v. *Com.* 90 Va. 109, 17 S. E. 812; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *United States* v. *Schindler,* 18 Blatchf. 227, 10 Fed. 547.

ness of guilt; and though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred. Hence, it is admissible for the prosecution to show that the prisoner advised an accomplice to break jail and escape;[1] or that he offered to bribe one of his guards;[2] or that he killed an officer of justice when making such attempt;[3] or that he attempted to bribe or intimidate witnesses.[4] So with flight to which no proper motive can be assigned,[5] and with acts of disguise,[6] concealment of person, family, or goods, and similar *ex post facto* indications of a desire to evade prosecution.[7] But it must be remembered that while these acts are indicative of fear, they may spring from causes very different from that of conscious guilt.[8] "Many men are naturally of weak nerve, and, under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive, facts, will be adduced in evidence against

[1] Byles, Bills, 449; *People* v. *Rathbun*, 21 Wend. 509; *Fanning* v. *State*, 14 Mo. 386. See *State* v. *Mallon*, 75 Mo. 355.

[2] *Whaley* v. *State*, 11 Ga. 123.

[3] *Revel* v. *State*, 26 Ga. 275. See *Hall* v. *People*, 39 Mich. 717; *Murdock* v. *State*, 68 Ala. 567.

[4] See *People* v. *Pitcher*, 15 Mich. 397; *State* v. *Staples*, 47 N. H. 113, 90 Am. Dec. 565.

[5] *Batten* v. *State*, 80 Ind. 394; *Waite* v. *State*, 13 Tex. App. 169; *People* v. *Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *Fox* v. *People*, 95 Ill. 71; *State* v. *Hudson*, 50 Iowa, 157; *Cummins* v. *People*, 42 Mich. 142, 3 N. W. 305; *Mathews* v. *State*, 9 Tex. App. 138; *State* v. *Frederic*, 69 Me. 400, 3 Am. Crim. Rep. 78.

[6] *E. g.*, use of an alias. *People* v. *Hope*, 62 Cal. 291.

[7] Mittermaier, Deutsch. St. § 12; *Lanahan* v. *Com.* 84 Pa. 80; *Ryan* v. *People*, 79 N. Y. 593; *Dean* v. *Com.* 4 Gratt. 541; *Hittner* v. *State*, 19 Ind. 48; *Waybright* v. *State*, 56 Ind. 122; *Barron* v. *People*, 73 Ill. 256; *State* v. *James*, 45 Iowa, 412; *McMath* v. *State*, 55 Ga. 303; *Sylvester* v. *State*, 71 Ala. 17; *State* v. *Beatty*, 30 La. Ann. 1266; *State* v. *Dufour*, 31 La. Ann. 804; *Gose* v. *State*, 6 Tex. App. 121; *Fanning* v. *State*, 14 Mo. 386; *People* v. *Pitcher*, 15 Mich. 397; *State* v. *Hudson*, 50 Iowa, 157; *Burris* v. *State*, 38 Ark. 221; *People* v. *Lockwing*, 61 Cal. 380.

[8] Wills, Circumstantial Ev. 70.

him; he may feel his inability to procure legal advice to conduct his defense, or to bring witnesses from a distance to establish it; he may be assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him; add to all this, more or less vexation must necessarily be experienced by all who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive." [9] The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred; but this should be qualified by a general statement of the countervailing considerations incidental to a comprehensive view of the question.[10] To this effect is the charge of Abbott, J., in Donnall's Case, where he told the jury that "a person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight."[11] So it is proper to keep in mind, as we have seen, the influence which might have been exerted upon the accused by the character of the tribunal before whom, and the mode of criminal procedure in the country where the trial is to take place.[12] Hence is it that conduct exhibiting indications of guilt should not be received by the court, unless there be satisfactory evidence that a crime has

[9] Best, Ev. 5th ed. 578; *Swan* v. *People,* 98 Ill. 610. Compare Lister's Life of Clarendon, ii. §§ 415 et seq.; Uhden's N. E. Theoc. (Conant's Tr.) 97.

[10] *State* v. *Williams,* 54 Mo. 170; *Levison* v. *State,* 54 Ala. 520; *Crookham* v. *State,* 5 W. Va. 510. See *State* v. *Baxter,* 82 N. C. 602.

[11] Trial of Robert Saule Donnall, London, 1817.

[12] Best, Presumptions, p. 322; *Tyner* v. *State,* 5 Humph. 383.

been committed. And in all cases the circumstances explaining or excusing flight are to be taken into consideration.[13]

Nevertheless, the effort of the accused to escape or otherwise to evade justice is a circumstance admissible in evidence against him, from which guilt may be inferred.[14] However, the court should always carefully instruct upon this class of evidence, and take into consideration any fact that explains or qualifies or limits such circumstances, or shows them in any way to be consistent with innocence. The harsh rule prevails that the exemplary conduct of the accused in refusing to escape is never admissible in evidence.[15]

§ 751. Inference from actions and conduct of accused.— For the same purpose, confusion, prevarication,[1] and embarrassment on the accused's part, when charged with the crime, may be put in evidence against him,[2] and so of stolidity

[13] Post, § 751; *Kennedy* v. *Com.* 14 Bush, 341.

[14] *Carr* v. *State,* 45 Fla. 11, 34 So. 892; *State* v. *Wrand,* 108 Iowa, 73, 78 N. W. 788; *State* v. *Dunn,* 116 Iowa, 219, 89 N. W. 984; *People* v. *Keep,* 123 Mich. 231, 81 N. W. 1097; *Williams* v. *State,* 69 Neb. 402, 95 N. W. 1014; *Kennedy* v. *State,* 71 Neb. 765, 99 N. W. 645; *Andrews* v. *State,* — Tex. Crim. Rep. —, 83 S. W. 188; *Delaney* v. *State,* 48 Tex. Crim. Rep. 594, 90 S. W. 642; *State* v. *Morgan,* 22 Utah, 162, 61 Pac. 527; *State* v. *Lambert,* 104 Me. 394, 71 Atl. 1092, 15 A. & E. Ann. Cas. 1055; *People* v. *Mar Gin Suie,* 11 Cal. App. 42, 103 Pac. 951; *State* v. *Osborne,* 54 Or. 289, 103 Pac. 62, 20 A. & E. Ann. Cas. 627; *State* v. *Rodgers,* 40 Mont. 248, 106 Pac. 3; *People* v. *Crowley,* 13 Cal. App. 322, 109 Pac. 493.

[15] *State* v. *Bickle,* 53 W. Va. 597, 45 S. E. 917; *Kennedy* v. *State,* 101 Ga. 559, 28 S. E. 979; *State* v. *Green,* 229 Mo. 642, 129 S. W. 700. See post, § 752.

[1] *State* v. *Williams,* 27 Vt. 724; *People* v. *Arnold,* 43 Mich. 303, 38 Am. Rep. 182, 5 N. W. 385; *Curry* v. *State,* 7 Tex. App. 267.

[2] See *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *Com.* v. *Goodwin,* 14 Gray, 55; *State* v. *Reed,* 62 Me. 129; *M'Kee* v. *People,* 36 N. Y. 113; *Levison* v. *State,* 54 Ala. 520; *Handline* v. *State,* 6 Tex. App. 347; *People* v. *Ah Yute,* 53 Cal. 613, 54 Cal. 89; Wharton & S. Med. Jur. § 805; *Noftsinger* v. *State,* 7 Tex. App. 301. See *Tooney* v. *State,* 8 Tex. App. 452; *Gaitan* v. *State,* 11 Tex. App. 544.

and indifference,[3] and of whatever would sustain an inference as to complicity in the offense charged;[4] though it is not admissible for the accused to show that several days after the outrage was discovered, he appeared surprised when it was announced to him, such evidence being self-serving.[5] But it should always be remembered how delusive this species of evidence is. "Blushing" has been declared to be an evidence of guilt; but many guilty men never blush at all, and some innocent men would blush at the mere idea that they are being looked at to see if they are blushing. "Terror" also has been noticed; but nervousness is not always an incident of guilt, nor the absence of nervousness always an incident of innocence. "Confusion" is as likely to mark the deportment of an innocent person unused to be made a public spectacle, as that of a guilty person inured to such exposure.[6]

§ 752. Evidence explaining flight.—The defendant will not be permitted to give evidence to account for his flight unless the prosecution prove the flight as tending to establish guilt;[1] nor can he show that he refused to avail himself of an opportunity of flight.[2] And in such case evidence of subsequent public excitement, to justify an anticipation of evidence,

[3] *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636.

[4] *McAdory* v. *State,* 62 Ala. 154. See *State* v. *Fowler,* 52 Iowa, 103, 2 N. W. 983; *State* v. *McLane,* 15 Nev. 345; *Sindram* v. *People,* 88 N. Y. 196.

[5] *Campbell* v. *State,* 23 Ala. 44. Contra, *Bouldin* v. *State,* 8 Tex. App. 332.

[6] *Lowenstein's Case* (Pamph. Albany, 1874, p. 331). See *Russell* v. *State,* 53 Miss. 367. Cf. Ram, Facts, 3d Am. ed. 113; supra, § 462; 3 Bentham, Judicial Ev. 157, 158; 1 Crim. L. Mag. 23; Lodge's Life of Hamilton, p. 212.

[1] *State* v. *Hays,* 23 Mo. 287; *People* v. *Ah Choy,* 1 Idaho, 317.

[2] *People* v. *Rathbun,* 21 Wend. 509; *Com.* v. *Hersey,* 2 Allen, 173; *Gardiner* v. *People,* 6 Park. Crim. Rep. 155; *Campbell* v. *State,* 23 Ala. 44; *Ford* v. *State,* 71 Ala. 385; *People* v. *Montgomery,* 53 Cal. 576.

and thus rebut a presumption of guilt from flight, is admissible, if the excitement existed before the flight.[3]

§ 753. Inferences from antecedent preparations.—Presumptions resting on antecedent preparations are not presumptions of law, but mere inferences of fact, as to which it is the judge's duty, not to declare a positive rule, but simply to notice the processes of reasoning by which a just conclusion may be reached.[1] Evidence of preparation is always admissible for the prosecution; evidence to explain it is always admissible for the defense.[2] Among the facts admissible as affording in this way a basis of induction are the purchasing, the collecting, the fashioning instruments of mischief, of which numerous cases are elsewhere given,[3] and of which a familiar illustration is to be found in the admission of evidence on a trial for burglary to prove that the defendant had manufactured or procured the burglarious instruments.[4] Under the same head fall cases where the evidence shows a repairing to

[3] *State* v. *Phillips*, 24 Mo. 475; *Plummer* v. *Com.* 1 Bush, 76; *Golden* v. *State*, 25 Ga. 527; *Arnold* v. *State*, 9 Tex. App. 435; *Kennedy* v. *Com.* 14 Bush, 341. See 3 Wharton & S. Med. Jur. 4th ed. 1884, § 827.

[1] Supra, § 49.

[2] *State* v. *Pike*, 65 Me. 111; *State* v. *Curran*, 51 Iowa, 112, 49 N. W. 1006, 3 Am. Crim. Rep. 405; *Long* v. *State*, 52 Miss. 23; *Howard* v. *State*, 8 Tex. App. 53; *Taylor* v. *State*, 14 Tex. App. 340.

[3] Supra, § 49; post, § 799; *State* v. *Kinsauls*, 126 N. C. 1095, 36 S. E. 31; *Jones* v. *State*, — Tex. Crim. Rep. —, 42 S. W. 294; *People* v. *Gleason*, 122 Cal. 370, 55 Pac. 123; *State* v. *Wintzingerode*, 9 Or. 153; *State* v. *Rider*, 95 Mo. 474, 8 S. W. 723; *Perry* v. *State*, 102 Ga. 365, 30 S. E. 903; *Burgess* v. *State*, 93 Ga. 304, 20 S. E. 331; *Sanders* v. *State*, 131 Ala. 1, 31 So. 564; *State* v. *Doherty*, 72 Vt. 381, 82 Am. St. Rep. 951, 48 Atl. 658; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *Ford* v. *State*, 71 Ala. 385; *Rush* v. *State*, — Tex. Crim. Rep. —, 76 S. W. 927; *People* v. *Cuff*, 122 Cal. 589, 55 Pac. 407; *State* v. *Fuller*, 114 N. C. 885, 19 S. E. 797; *Ludwig* v. *Com.* 22 Ky. L. Rep. 1108, 60 S. W. 8; *Com.* v. *Roach*, 108 Mass. 289.

[4] *People* v. *Larned*, 7 N. Y. 445. See *Com.* v. *Wilson*, 2 Cush. 590; *State* v. *Morris*, 47 Conn. 179; *People* v. *Winters*, 29 Cal. 658.

the spot destined to be the scene of crime; and acts done with the view of paving the way to the guilty enterprise.[5] For the same purpose it is admissible, on an indictment for arson, to prove a prior insurance of the property, as well as other attempts to destroy it, the object being to defraud the underwriters.[6]

To rebut the inferences arising from such apparent preparation, the accused may give in evidence any circumstance tending to show innocent motives.[7] Thus, the accused may show that the apparent preparations were in expectation of trouble with a party now deceased,[8] or he may show that it was his custom to carry weapons;[9] and his declarations or explanations at the time of his preparations are admissible in his own behalf.[10]

The relevancy of such evidence cannot be limited by, nor encompassed within, the statement of any particular rule. Both in admissibility and in rebuttal the extent of such testi-

[5] *Com.* v. *Costley,* 118 Mass. 1.

[6] Supra, §§ 49, et seq.; *Com.* v. *Bradford,* 126 Mass. 42. See *Com.* v. *McCarthy,* 119 Mass. 354; *State* v. *Dubois,* 49 Mo. 573.

[7] *State* v. *Shuff,* 9 Idaho, 115, 72 Pac. 664, 13 Am. Crim. Rep. 443; *People* v. *Williams,* 17 Cal. 142; *Creswell* v. *State,* 14 Tex. App. 1; *Marnoch* v. *State,* 7 Tex. App. 269; *State* v. *Noble,* 66 Iowa, 541, 24 N. W. 34; *Fenwick* v. *State,* 63 Md. 239; *Long* v. *State,* 52 Miss. 23. See *Pettis* v. *State,* 47 Tex. Crim. Rep. 66, 81 S. W. 312; *Aaron* v. *State,* 31 Ga. 167; *People* v. *Lee Chuck,* 74 Cal. 30, 15 Pac. 322; *People* v. *Jackson,* 111 N. Y. 362, 19 N. E. 54; *Irby* v. *State,* 25 Tex. App. 203, 7 S. W. 705; *State* v. *Claire,* 41 La. Ann. 191, 6 So. 129; *Smith* v. *State,* 46 Tex. Crim. Rep. 267, 108 Am. St. Rep. 991, 81 S. W. 712, 936; *State* v. *Kennade,* 121 Mo. 405, 26 S. W. 347; *State* v. *Taylor,* 126 Mo. 531, 29 S. W. 598; *State* v. *Hough,* 138 N. C. 663, 50 S. E. 709; *Ringo* v. *State,* 54 Tex. Crim. Rep. 561, 114 S. W. 119; *Mathison* v. *State,* 87 Miss. 739, 40 So. 801; *State* v. *Stockett,* 115 La. 743, 39 So. 1000; *State* v. *Clifford,* 59 W. Va. 1, 52 S. E. 981; *Johnson* v. *Com.* 29 Ky. L. Rep. 442, 93 S. W. 581.

[8] *State* v. *Claire,* 41 La. Ann. 191, 6 So. 129; *Long* v. *State,* 52 Miss. 23; *State* v. *Doris,* 51 Or. 136, 16 L.R.A.(N.S.) 660, 94 Pac. 44.

[9] *Creswell* v. *State,* 14 Tex. App. 1.

[10] *State* v. *Claire,* 41 La. Ann. 191, 6 So. 129; *Taliaferro* v. *State,* 40 Tex. 523.

mony can be limited only by the ramifications of human conduct. While no two cases are exactly alike, the principle is the same, namely, that any conduct or action of the accused in connection with the offense, not too remote, is admissible, from which there may come a logical inference of intent, preparation, premeditation, or motive, to commit the offense charged.[11]

§ 754. Acts to ward off suspicion.—In the same connection may be noticed false representations as to the state of another person's health, with the intention of preparing the relatives for the event of sudden death, and to diminish the surprise and alarm which attend its occurrence;[1] and letters addressed to the writer by himself for the purpose of diverting suspicion.[2] It may also be noticed that persons contemplating secret assassination are apt, as part of their scheme, to throw out dark hints, spread rumors, and utter prophesies relative to the impending fate of their intended victims.[3]

How far the suppression or concoction of evidence, after a crime has been committed, serves to point out the perpetrator, has been already considered.[4]

§ 755. Such proof is open to rebuttal.—It should be remembered, as Mr. Bentham reminds us, that there may be infirmative hypotheses which may make preparations apparently designed for a particular crime, consistent with innocence of that crime. Thus, to adopt, with some modifications, Mr. Best's paraphrase of Mr. Bentham:[1] The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken. His intention may either have been al-

[11] Post, § 755.

[1] Wills, Circumstantial Ev. p. 112; supra, §§ 742, et seq.; *Jones* v. *State*, 4 Tex. App. 436.

[2] *Whitaker's Case*, post. § 849.

[3] 1 Starkie, Ev. 3d ed. 565, 566.

[4] Supra, §§ 742 et seq.

[1] Best, Ev. § 456.

together innocent, or, if criminal, directed towards a different object. 1. Thus, a person may be poisoned, and another, innocent of his death, may have purchased a quantity of the same poison a short time before for the purpose of destroying vermin. So, predictions of approaching mischief to an individual who is afterwards found murdered may frequently be explained on the ground that the accused was really speaking the conviction of his own mind, without any criminal intention. Sometimes the most affectionate relatives indulge in predictions of this class in regard to a member of their family whom they would surrender their lives to save. Prophecies of death, also, are often the offspring of superstition or political prejudice. 2. A might purchase a sword or pistol for the purpose of fighting a duel with B, but, before the time of the meeting, the weapon might be purloined or stolen by C, in order to assassinate D. Or, to take a still broader case, A manufactures guns in quantities to support a filibustering movement, forbidden by our laws, and one of these guns is used by a purchaser to gratify private animosity. But even when preparations have been made with the intention of committing the identical offense charged, or previous attempts have been made to commit it, two things remain to be considered:[2] (a) The intention may have been changed or abandoned before execution. Until a deed is done, there is always a *locus pœnitentiæ;*[3] and the possibility of a like criminal design having been harbored and carried into execution by other persons must not be overlooked.[4] (b) The intention to commit the crime may have existed throughout, but the criminal may have been anticipated by others.[5]

[2] 3 Bentham, Judicial Ev. 74.

[3] Wharton, Crim. Law, 8th ed. § 187.

[4] Wharton, Crim. Law, 8th ed. § 160.

[5] Wharton, Crim. Law, 8th ed. § 309.

§ 756. Defendant's declarations of intent and threats admissible for prosecution.—Declarations of intention and threats are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not, but because from them, in connection with other circumstances, and on proof of the *corpus delicti,* guilt may be logically inferred. Evidence of this kind, for this purpose, is always competent,[1] as where the prisoner, a negro, said he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night;[2] where it was said: "I am determined to kill the man who injured me;"[3] where the prisoner had declared, the day before the murder, that he would certainly shoot the deceased;[4] and where the language of the defendant was: "I will split down any fellow that is saucy."[5] Threats against a class may be put in evidence as explaining the character of an attack on an individual belong-

[1] Archbold, Crim. Pr. & Pl. 283; *United States* v. *Neverson,* 1 Mackey, 152; *State* v. *Wentworth,* 37 N. H. 196; *State* v. *Alford,* 31 Conn. 40; *State* v. *Hoyt,* 46 Conn. 330; *Stephens* v. *People,* 4 Park. Crim. Rep. 396; *La Beau* v. *People,* 34 N. Y. 223; *Mimms* v. *State,* 16 Ohio St. 221; *State* v. *Green,* 1 Houst. Crim. Rep. (Del.) 217; *Heath* v. *Com.* 1 Rob. (Va.) 735; *Jones* v. *State,* 64 Ind. 473; *Scott* v. *State,* 64 Ind. 400; *Guetig* v. *State,* 66 Ind. 94, 32 Am. Rep. 99; *State* v. *Rash,* 34 N. C. (12 Ired. L.) 382, 55 Am. Dec. 420; *Fulton* v. *State,* 58 Ga. 224; *Everett* v. *State,* 62 Ga. 65; *Johnson* v. *State,* 17 Ala. 618; *Faulk* v. *State,* 52 Ala. 415; *Myers* v. *State,* 62 Ala. 599; *Ross* v. *State.* 62 Ala. 224; *Sylvester* v. *State,* 71 Ala. 17; *Redd* v. *State,* 68 Ala. 492; *Marler* v. *State,* 68 Ala. 580; *Maxwell* v. *State,* 3 Heisk. 420; *Jackson* v. *State,* 6 Baxt. 452; *State* v. *Crowley,* 33 La. Ann. 782; *State* v. *Edwards,* 34 La. Ann. 1012; *State* v. *Talbott,* 73 Mo. 347; *Aycock* v. *State,* 2 Tex. App. 381; *Washington* v. *State,* 8 Tex. App. 377; *Clampitt* v. *State,* 9 Tex. App. 27; *People* v. *Hong Ah Duck,* 61 Cal. 387; *Evans* v. *State,* 62 Ala. 6. See *Abernethy* v. *Com.* 101 Pa. 322; 3 Bentham, Judicial Ev. 75.

As to evidence of antecedent threats on trial for homicide, see also note in 3 L.R.A.(N.S.) 523.

[2] *Jim* v. *State,* 5 Humph. 146.

[3] *Burgess* v. *Com.* 2 Va. Cas. 484.

[4] *Com.* v. *Smith,* 7 Smith's Laws (Pa.) 697.

[5] *Respublica* v. *Bob,* 4 Dall. 146, 1 L. ed. 777.

ing to this class,[6] though to make threats admissible there must be some kind of individuation, showing that the person injured was in some sense within the scope of the threats.[7] Several considerations, however, have already been adverted to, which divert the application of evidence of antecedent preparations, which apply with equal force to threats.[8] In addition to these it is important to keep in mind Mr. Bentham's cautions: 1st. The words supposed to be declaratory of criminal intention may have been misunderstood or misinterpreted. 2d. It does not necessarily follow, because a man avows an intention to commit a crime, that such intention really exists in his mind. The words may have been uttered in a transient fit of anger, or through bravado, or with a view of intimidating, annoying, or extorting money, or with other collateral objects. Dr. Parkman, for instance, may have frequently been the object of threats or curses of this kind from irritated debtors, and yet it was from a man who used neither that his death proceeded. 3d. Another person, really desirous of committing the offense, may have used the threats as a screen to avert suspicion from himself.[9] 4th. It must be recollected that the tendency of a threat or declaration of this nature is to frustrate its own accomplishment.[10] By threatening a man, you put him on his guard, and force him to have recourse to such means of protection as the force of the law, or any extrajudicial powers which he may have at his command, may be capable of affording him. Still, however, such threats, as observed by Mr. Bentham, when specific, "by the testimony of experience are but too often sooner or later realized. To

[6] *Hopkins* v. *Com.* 50 Pa. 9, 88 Am. Dec. 518; *Dixon* v. *State*, 13 Fla. 636; *Burke* v. *State*, 71 Ala. 377.

[7] Supra, § 29; See *State* v. *Hymer*, 15 Nev. 49; Horrigan & T. Self-Defense, 589, 612-615; 3 Va. L. J. 65; *Abernethy* v. *Com.* 101 Pa. 322.

[8] See *Reg.* v. *Hagan*, 12 Cox, C. C. 357; *State* v. *Brown*, 64 Mo. 367.

[9] Causes Celebres, 5, 437.

[10] Bentham, quoted in Best, Presumptions, 315.

the intention of producing terror, and nothing but terror, succeeds, under favor of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief, and, in pursuance of that intention, the mischievous act."

§ 757. Deceased's threats admissible for defense.—Can evidence to the effect that the deceased, prior to a homicide, threatened the defendant's life, be received? and if so, is it a prerequisite to the proof of such threats that they should be shown to have been communicated to the defendant? Certainly, if such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of a hostile demonstration by deceased, then it is irrelevant.[1] If A threatens B's life, and the threat is known to B, B's duty is to have A arrested by due process of law, not to shoot him; the right of self-defense being conditioned on an apparent actual attack.[2] On the other hand, if the question is as to which party in the encounter is the assailant, then it is admissible to prove by the prior declarations of either, that the attack was one he intended to make. Threats to this effect by the defendant are always, as has been seen, admissible;[3] and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of such threats by the deceased.[4]

[1] *Hughey* v. *State*, 47 Ala. 97; *Green* v. *State*, 69 Ala. 7; *State* v. *Leonard*, 6 La. Ann. 420; *State* v. *Mullen*, 14 La. Ann. 577; *Evans* v. *State*, 44 Miss. 762; *Harris* v. *State*, 47 Miss. 318; *State* v. *Hays*, 23 Mo. 287; *State* v. *Guy*, 69 Mo. 430; *State* v. *Nett*, 50 Wis. 524, 7 N. W. 344; *State* v. *Hall*, 9 Nev. 58; *Myers* v. *State*, 33 Tex. 525; *Carter* v. *State*, 8 Tex. App. 372.

[2] Wharton, Crim. Law, 8th ed. § 488; *State* v. *Eaton*, 75 Mo. 587; *State* v. *Kilgore*, 70 Mo. 546. See Wharton, Homicide, Bowlby's 3d ed. § 242, note 2; *Hoover* v. *State*, 35 Tex. Crim. Rep. 343, 33 S. W. 337.

[3] See supra, § 756.

[4] *Com.* v. *Wilson*, 1 Gray, 337; *People* v. *Shorter*, 4 Barb. 460, s. c. 2 N. Y. 197, 51 Am. Dec. 286; *Pat-*

It is true that by some courts it has been insisted that to make the deceased's threats prior to the encounter admissible, they must be proved to have been brought to the knowledge of the defendant.[5] But it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew beforehand that his life was threatened, it might be argued that he should have applied to the law for redress;[6] if he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper,

terson v. *People,* 46 Barb. 625; *People* v. *Rector,* 19 Wend. 569; *Stokes* v. *People,* 53 N. Y. 164, 13 Am. Rep. 492; *Collins* v. *State,* 32 Iowa, 36; *Cornelius* v. *Com.* 15 B. Mon. 539; *Rapp* v. *Com.* 14 B. Mon. 615; *Powell* v. *State,* 19 Ala. 577; *Monroe* v. *State,* 5 Ga. 85; *Dupree* v. *State,* 33 Ala. 380, 73 Am. Dec. 422; *Powell* v. *State,* 52 Ala. 1; *Howell* v. *State,* 5 Ga. 48; *People* v. *Scoggins,* 37 Cal. 677; *Campbell* v. *People,* 16 Ill. 17, 61 Am. Dec. 49; *Schnier* v. *People,* 23 Ill. 17; *Williams* v. *People,* 54 Ill. 422; *State* v. *Moelchen,* 53 Iowa, 310, 5 N. W. 186; *State* v. *Pearce,* 15 Nev. 188; *State* v. *Thawley,* 4 Harr. (Del.) 562; *State* v. *Abbott,* 8 W. Va. 741; *De Forest* v. *State.* 21 Ind. 23; *Roberts* v. *State,* 68 Ala. 156; *Green* v. *State,* 69 Ala. 7; *State* v. *Sloan,* 47 Mo. 604; *State* v. *Hays,* 23 Mo. 287; *State* v. *Keene,* 50 Mo. 359; *State* v. *Taylor,* 64 Mo. 358; *State* v. *Horris,* 76 Mo. 361; *State* v. *Adams,* 76 Mo. 355, 4 Am. Crim. Rep. 392; *State* v. *Nett,* 50 Wis. 524, 7 N. W. 344; *Pitman* v. *State,* 22 Ark. 354; *Harris* v. *State,* 34 Ark. 469; *Meyers* v. *State,* 14 Tex. App. 35; *King* v. *State,* 9 Tex. App. 515.

[5] *Powell* v. *State,* 19 Ala. 577; *Newcomb* v. *State,* 37 Miss. 383; *State* v. *Jackson,* 17 Mo. 544, 59 Am. Dec. 281; *State* v. *Harris,* 59 Mo. 550; *State* v. *Elkins,* 63 Mo. 159; *State* v. *Taylor,* 64 Mo. 358; *State* v. *Dumphey,* 4 Minn. 438, Gil. 340; *Coker* v. *State,* 20 Ark. 53; *State* v. *Brown,* 22 Kan. 222; *People* v. *Henderson,* 28 Cal. 465; *People* v. *Lombard,* 17 Cal. 316. See *State* v. *Ridgely,* 2 Harr. & McH. 120, 1 Am. Dec. 372; *Combs* v. *State,* 75 Ind. 215; *Peterson* v. *State,* 50 Ga. 142; *Atkins* v. *State,* 16 Ark. 568; *Pridgen* v. *State,* 31 Tex. 420; *State* v. *Gregor,* 21 La. Ann. 473; *State* v. *McCoy,* 29 La. Ann. 593; *People* v. *Campbell,* 59 Cal. 243, 43 Am. Rep. 257; *People* v. *Alivtre,* 55 Cal. 263; *State* v. *Ryan,* 30 La. Ann. 1176; *State* v. *Cooper,* 32 La. Ann. 1084; *State* v. *Fisher,* 33 La. Ann. 1344. See *State* v. *Vance,* 32 La. Ann. 1177.

[6] See Wharton, Homicide, Bowlby's 3d ed. § 242, notes 3, 4; *United States* v. *Outerbridge,* 5 Sawy. 620, Fed. Cas. No. 15,978.

whether such proof consist of preparations or declarations, is pertinent to show that the attack was made by the deceased. The question whether A (the defendant) or B (the deceased) was the aggressor in the fatal collision is to be determined; and if, in such case, A's threats are admissible to prove that A was the aggressor, B's threats, by the same reasoning, are admissible to prove that B was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and, if so, with what motive, his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence. And so it has been frequently held.[7] They are, however, inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger.[8] It need scarcely be added that all

[7] Wharton, Homicide, Bowlby's 3d ed. § 243, note 1; *Wiggins* v. *Utah*, 93 U. S. 465, 23 L. ed. 941, 4 Am. Crim. Rep. 494; *State* v. *Goodrich*, 19 Vt. 116, 47 Am. Dec. 676; *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492; *Campbell* v. *People*, 16 Ill. 17, 61 Am. Dec. 49; *Holler* v. *State*, 37 Ind. 57, 10 Am. Rep. 74; *Little* v. *State*, 6 Baxt. 491, cited Horrigan & T. Self-Defense, 487; *State* v. *Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *Keener* v. *State*, 18 Ga. 194, 63 Am. Dec. 269 (limited to self-defense in *Lingo* v. *State*, 29 Ga. 470); *Burns* v. *State*, 49 Ala. 370, 1 Am. Crim. Rep. 324; *Hoye* v. *State*, 39 Ga. 718; *Pitman* v. *State*, 22 Ark. 354; *Palmore* v. *State*, 29 Ark. 248; *Davidson* v. *People*, 4 Colo. 145. See *Lyon* v. *Hancock*, 35 Cal. 372; *People* v. *Swenson*, 49 Cal. 388; *People* v. *Travis*, 56 Cal. 251; *Com.* v. *Andrews*, cited in Wharton, Homicide, § 627; *People* v. *Taing*, 53 Cal. 602; *State* v. *Norton*, 82 N. C. 628; *State* v. *Skidmore*, 87 N. C. 509.

[8] Wharton, Homicide, Bowlby's 3d ed. § 243, note 2; *Turpin* v. *State*, 55 Md. 462; *Payne* v. *State*, 60 Ala. 80; *Roberts* v. *State*, 68 Ala. 156; *Sylvester* v. *State*, 71 Ala. 17; *Edwards* v. *State*, 47 Miss. 851; *Holly* v. *State*, 55 Miss. 424; *Kendrick* v. *State*, 55 Miss. 436; *State* v. *Maloy*, 44 Iowa, 104; *State* v. *Elliott*, 45 Iowa, 486, 2 Am. Crim. Rep. 322; *State* v. *Harris*, 59 Mo. 550; *State* v. *Alexander*, 66 Mo. 148; *State* v. *Hall*, 9 Nev. 58; *State* v. *Ferguson*, 9 Nev. 106; *People* v. *Stack*, 1 Idaho, 218; *Morgan* v. *Com.* 14 Bush, 106. See *Blackburn* v. *State*, 23 Ohio St. 146, cited supra, § 24; *Nevling* v. *Com.* 98 Pa. 322; *Brownell* v. *People*, 38 Mich. 736; *People* v. *Carl-*

threats which are part of the *res gestæ* are *per se* admissible.[9]

§ 758. Inferences from possession of stolen goods.— When we take up the presumption arising from the possession of stolen goods, we have again to deplore the looseness of phraseology which assigns one term, "presumption," to processes so very different as fictions, presumptions of law, and inferences. Of the confusion which thus arises, the "presumption" now before us is the most striking illustration. It is really an inference of fact; but frequently, from the notion that inferences and presumptions of law are convertible, it has been declared to be a presumption of law.[1] But the difference will at once be seen by recurring to the distinct processes of reasoning which are thus invoked. The presumption of law, granting its minor premise, establishes a certainty. It says, for instance: "All persons under seven years are presumed incapable of crime; A is under seven years; he is therefore incapable of crime." If A is under seven years, then the conclusion is a certainty, and the jury must be directed so to find. This, in fact, is deductive reasoning, in which the major premise is matter of law, and in which all that remains to the jury is to find as to the truth of the minor premise. But in inferences such as those immediately before us, the process is inductive, and neither major nor minor premise is matter of law.[2] Thus, in the case of the inference from receiving stolen property, the reasoning is as follows:—

"The proportion of guilty persons holding stolen goods to

ton, 57 Cal. 83, 40 Am. Rep. 112; 4 Southern L. Rev. N. S. p. 261.

[9] *Reg.* v. *Edwards,* 12 Cox, C. C. 230; *Thomas* v. *State,* 11 Tex. App. 315; supra, § 262; Wharton, Homicide, Bowlby's 3d ed. § 243, notes 4-7; *Wilson* v. *State,* 140 Ala. 43, 37 So. 93.

[1] See *Dreyer* v. *State,* 11 Tex. App. 503.

For presumption as to burglary from possession of recently stolen property, see note in 12 L.R.A. (N.S.) 200.

[2] See supra, § 716, note 3, remarks by Mr. Best.

innocent is two to one: A holds stolen goods; therefore the probability of his guilt is two to one." Now, as to this process, it is to be remarked: 1. That the major premise is a statement which is of no value unless it is based upon a large observation of facts; 2, that the conclusion is only a probability; and, 3. that no case arises in which the question comes up pure and simple, for in all cases the fact of possession is mixed with some other qualifying fact or inference.

Taking up, then, the point immediately before us, we may say that a court may properly tell the jury that the possession by a party of stolen goods is a fact from which his complicity in the larceny may be inferred.[3] But the possession must be personal;[4] must be recent;[5] must be unex-

[3] *Knickerbocker* v. *People,* 43 N. Y. 177; *Stover* v. *People,* 56 N. Y. 315; *Goldstein* v. *People,* 82 N. Y. 231; *Mimms* v. *People,* 16 Ohio St. 221; *Smathers* v. *State,* 46 Ind. 447; *Smith* v. *State,* 58 Ind. 340, 2 Am. Crim. Rep. 372; *Waters* v. *People,* 104 Ill. 544; *State* v. *Brown,* 25 Iowa, 561; *State* v. *Golden,* 49 Iowa, 48; *State* v. *Hessians,* 50 Iowa, 135; *Crilley* v. *State,* 20 Wis. 232; *Gregory* v. *Richards,* 53 N. C. (8 Jones, L.) 410; *Tucker* v. *State,* 57 Ga. 503; *Foster* v. *State,* 52 Miss. 695; *State* v. *Gray,* 37 Mo. 463; *State* v. *Creson,* 38 Mo. 372; *Neubrandt* v. *State,* 53 Wis. 89, 9 N. W. 824; *Lewis* v. *State,* 4 Kan. 296; *People* v. *Hurley,* 60 Cal. 74, 44 Am. Dec. 55; *Early* v. *State,* 9 Tex. App. 476; *State* v. *Kelly,* 73 Mo. 608; *State* v. *Sidney,* 74 Mo. 390. See *State* v. *Richart,* 57 Iowa, 245, 10 N. W. 657.

[4] *Reg.* v. *Hughes,* 14 Cox, C. C. 223, 39 L. T. N. S. 292.

[5] *Rex* v. *Rickman,* 2 East, P. C. 1035; *Cockin's Case,* 2 Lewin, C. C. 235; *Rex* v. *Dewhurst,* cited in 2 Starkie, Ev. 614; *Rex* v. ——, 2 Car. & P. 459; *Reg.* v. *Evans,* 2 Cox, C. C. 270; *Rex* v. *Adams,* 3 Car. & P. 600; *Rex* v. *Partridge,* 7 Car. & P. 551; *Reg.* v. *Harris,* 8 Cox, C. C. 333; *Reg.* v. *Hughes,* 14 Cox, C. C. 223, 39 L. T. N. S. 292; *State* v. *Merrick,* 19 Me. 398; *Com.* v. *Millard,* 1 Mass. 6; *Com.* v. *Montgomery,* 11 Met. 534, 45 Am. Dec. 227; *State* v. *Raymond,* 46 Conn. 345; *Davis* v. *People,* 1 Park. Crim. Rep. 447; *Stover* v. *People,* 56 N. Y. 315; *Sloan* v. *People,* 47 Ill. 76; *Comfort* v. *People,* 54 Ill. 404; *Smith* v. *People,* 103 Ill. 82; *Engleman* v. *State,* 2 Ind. 91, 52 Am. Dec. 494; *People* v. *Walker,* 38 Mich. 156; *Gablick* v. *People,* 40 Mich. 292, 3 Am. Crim. Rep. 244; *People* v. *Gordon,* 40 Mich. 716; *Warren* v. *State,* 1 G. Greene, 106; *State* v. *Taylor,* 25 Iowa, 273; *State* v. *Em-*

plained;[6] and must involve a distinct and conscious assertion of property by the defendant.[7] If the explanation involves a falsely disputed identity or other fabricated evidence, the in-

erson, 48 Iowa, 172; *Heed* v. *State,* 25 Wis. 421; *Hughes* v. *State,* 8 Humph. 75; *Hunt* v. *Com.* 13 Gratt. 757, 70 Am. Dec. 443; *State* v. *Adams,* 2 N. C. (1 Hayw.) 463; *State* v. *Graves,* 72 N. C. 482, 1 Am. Crim. Rep. 429; *State* v. *Reynolds,* 87 N. C. 544; *State* v. *Jennett,* 88 N. C. 665; *State* v. *Rights,* 82 N. C. 675; *State* v. *Bennet,* 2 Treadway, Const. 692; *McAfee* v. *State,* 68 Ga. 823; *Jones* v. *State,* 30 Miss. 653, 64 Am. Dec. 175; *State* v. *Wolff,* 15 Mo. 168; *Belote* v. *State,* 36 Miss. 96, 72 Am. Dec. 163; *State* v. *Floyd,* 15 Mo. 349; *State* v. *Lange,* 59 Mo. 418; *State* v. *Hill,* 65 Mo. 84; *Yates* v. *State,* 37 Tex. 202, 1 Am. Crim. Rep. 434; *Perry* v. *State,* 41 Tex. 485; *Beck* v. *State,* 44 Tex. 430; *People* v. *Kelly,* 28 Cal. 423; *People* v. *Swinford,* 57 Cal. 86; *People* v. *Williams,* 57 Cal. 108; *People* v. *Hurley,* 60 Cal. 75, 44 Am. Rep. 55. See *State* v. *Snell,* 46 Wis. 524, 1 N. W. 225, 3 Am. Crim. Rep. 260; *Reg.* v. *Smith,* 3 Fost. & F. 123,—Bramwell, B.; *Stuart* v. *People,* 42 Mich. 255, 258, 3 N. W. 863; *State* v. *Raymond,* 46 Conn. 345.

[6] *Reg.* v. *Evans,* 2 Cox, C. C. 270; *Reg.* v. *Dibley,* 2 Car. & K. 818; *State* v. *Merrick,* 19 Me. 398; *Dillon* v. *People,* 1 Hun, 670, 4 Thomp. & C. 205; *Jones* v. *People,* 12 Ill. 259; *State* v. *Brady,* 27 Iowa, 126; *State* v. *New,* 22 Minn. 76; *State* v. *Graves,* 72 N. C. 482, 1 Am. Crim. Rep. 429; *Curtis* v. *State,* 6 Coldw. 9; *Sartorious* v. *State,* 24 Miss. 602; *State* v. *Brown,* 75 Mo. 317.

[7] *State* v. *Merrick,* 19 Me. 398, 1 Benn. & H. C. C. 360; *Reg.* v. *Mansfield,* Car. & M. 142; *Reg.* v. *Hinley,* 2 Moody & R. 524, 1 Cox, C. C. 12; *State* v. *Bishop,* 51 Vt. 287, 31 Am. Rep. 690; *Com.* v. *Randall,* 119 Mass. 107; *State* v. *Williams,* 47 N. C. (2 Jones, L.) 194; *Davis* v. *State,* 50 Miss. 86; *Hall* v. *State,* 8 Ind. 439; *Turbeville* v. *State,* 42 Ind. 490; *Bailey* v. *State,* 52 Ind. 462, 21 Am. Rep. 182; *State* v. *Walker,* 41 Iowa, 217, 1 Am. Crim. Rep. 432; *State* v. *Hessians,* 50 Iowa, 135; *State* v. *En,* 10 Nev. 279; *Garcia* v. *State,* 26 Tex. 209, 82 Am. Dec. 605; *Thomas* v. *State,* 43 Tex. 658. See *Gose* v. *State,* 6 Tex. App. 121; *Conner* v. *State,* 6 Tex. App. 457; *Jorasco* v. *State,* 8 Tex. App. 540; *Lowe* v. *State,* 11 Tex. App. 253; *Williams* v. *State,* 11 Tex. App. 275; *Gonzales* v. *State,* 13 Tex. App. 48; *Tyler* v. *State,* 13 Tex. App. 205; *Flores* v. *State,* 13 Tex. App. 665; *Smith* v. *State,* 13 Tex. App. 507; *Reg.* v. *Knight,* Leigh & C. C. C. 378, 9 L. T. N. S. 808, 9 Cox, C. C. 437. But see *State* v. *Kelley,* 9 Mo. App. 512; *Boykin* v. *State,* 34 Ark. 443; *Ingalls* v. *State,* 48 Wis. 647, 4 N. W. 785; *People* v. *Whitson,* 43 Mich. 419, 5 N. W. 454; *State* v. *Bruce,* 24 Me. 71.

ference increases in strength;[8] and so where the goods are part of a mass of stolen property,[9] and where the case is that of a forged instrument held by one claiming under it.[10] But in any view the question is one of fact.[11]

§ 759. Possession must be recent.—The possession, as has been just noticed, must be recent. But what is "recent?" The cases on this point, as heretofore given, are very numerous, and on a general view of their contents we are led to the conclusion that "recent," as here uesd, is a term incapable of exact definition, and that what is recent varies, within a certain range, with the conditions of each particular case. There are, however, additional circumstances, the presence or absence of which tends to expand or contract this particular inference of guilt.[1] These will be now noticed.

§ 760. Inferences where property possesses identifying marks.—Has the article in the defendant's possession such earmarks as made it his duty, on its coming into his hands, to seek out its owner?[1] For, supposing even that he found it, yet, if it has such earmarks, he is guilty of larceny if he do not return it to the party whose property he is thus notified it is.[2] Hence the question of "recent" is much affected by that

[8] Stephen's Digest Crim. Law, art. 308; *Reg.* v. *Evans,* 2 Cox, C. C. 270; *Reg.* v. *Dibley,* 2 Car. & K. 818; *Reg.* v. *Burton,* Dears, C. C. 282, 23 L. J. Mag. Cas. N. S. 52, 18 Jur. 157, 2 Week. Rep. 230, 6 Cox, C. C. 293; *State* v. *Bennet,* 2 Treadway Const. 692.

[9] See supra, § 44; *Bowman's Trial,* 1 Alison, Crim. Law, 314; *Webb* v. *State,* 8 Tex. App. 115.

[10] *Com.* v. *Talbot,* 2 Allen, 161.

[11] *People* v. *Titherington,* 59 Cal. 598.

[1] *Ingalls* v. *State,* 48 Wis. 647. See *State* v. *Jennett,* 88 N. C. 665.

[1] See *Com.* v. *Tolliver,* 119 Mass. 312; *Brown* v. *Com.* 76 Pa. 319; *McNair* v. *State,* 14 Tex. App. 79.

[2] Wharton, Crim. Law, 8th ed. § 901; *Reg.* v. *Dredge,* 1 Cox, C. C. 235; *Reg.* v. *Burton,* Dears. C. C. 282, 23 L. J. Mag. Cas. N. S. 52, 18 Jur. 157, 2 Week. Rep. 230, 6 Cox, C. C. 293; Roscoe, Crim. Ev. 8th ed. § 19. See *Reg.* v. *Hooper,* 1 Fost. & F. 85.

of marks of this class. Thus, a book without any name upon it, or any mark to identify it as belonging to any particular private owner, may innocently be picked up at a bookstall within a few hours after it was stolen. Yet, notwithstanding the "recentness" of the stealing, no jury would or should convict a person in whose possession the book was found, although he should be unable to remember the bookstall at which he bought it, or in anyway to corroborate his story. For the purchase of secondhand books at bookstalls is of such every-day occurrence, and in a large city bookstalls are so numerous, and so easily confused in the memory, that it would be both irrational and unsafe to convict of larceny simply because the defendant had in his possession, shortly after it was stolen, a book which had nothing on its face to show that it had been taken feloniously from any particular owner. It would be otherwise, however, with a book of marked appearance and peculiar value, containing an owner's name. Recent possession, also, of an ordinary coin, amounts to but little; it is otherwise as to possession of a collection of coins which are unique and rare.[3]

§ 761. Accused's explanation of possession.—What the accused said on the discovery of the goods with him is admissible in his favor, if made instantaneously and without opportunity of concoction, as part of the *res gestæ*.[1] So far as concerns subsequent explanations, it may be noticed that the law in this respect has been materially affected by the statutes authorizing the examination of defendants in their own behalf. Under the old law it was appropriate to speak of un-

[3] *People* v. *Getty*, 49 Cal. 581. See *People* v. *Noregea*, 48 Cal. 123, 1 Am. Crim. Rep. 123.

[1] Supra, §§ 263, 691; *Davis* v. *People*, 1 Park. Crim. Rep. 447; *Bennett* v. *People*, 96 Ill. 602; *Henderson* v. *State*, 70 Ala. 23, 45 Am. Rep. 72; *Payne* v. *State*, 57 Miss. 348; *McPhail* v. *State*, 9 Tex. App. 164; *Sitterlee* v. *State*, 13 Tex. App. 587; *Flores* v. *State*, 13 Tex. App. 665.

explained inferences, because, as to the accused, all inferences were unexplained. He could not open his lips, and so far as he was concerned, the inference was rendered far less cogent by the fact that his silence was compulsory. Hence, the law, when any considerable period of time—say one, two, or three months—elapsed between the stealing of an article and its discovery, was prompt to invoke other counter and canceling inferences, *e. g.*, "from certain facts it may be inferred that the defendant bought the article bona fide, or that it was put in his house as a trap, and, as he cannot tell us, we must give him the benefit of this supposition." But now, when the defendant can tell us, and he declines to do so, it may be argued in jurisdictions where such argument is not forbidden by statute, that the term "recent," in this relation, is not to be so sharply defined.[2] In any view, the inference to be drawn from the possession of stolen goods is not one of law, but of probable reasoning, as to which the court may lay down logical tests for the guidance of the jury, but can impose no positive binding rule.[3] And good character may outweigh the presumption.[4]

The inference of stealing may be rebutted by counter inferences indicating that the property was obtained honestly.[5] Thus, where the defendant was charged with stealing a shawl

[2] See *McDonel* v. *State*, 90 Ind. 327.

[3] See *People* v. *Chambers*, 18 Cal. 383; *People* v. *Brown*, 48 Cal. 253; *People* v. *Cleveland*, 49 Cal. 578; *Durrett* v. *State*, 62 Ala. 434; Wills, Circumstantial Ev. p. 57; supra, §§ 263, 691; *Reg.* v. *Crowhurst*, 1 Car. & K. 370; *Reg.* v. *Wilson*, 26 L. J. Mag. Cas. N. S. 45; Roscoe, Crim. Ev. 8th ed. 21; 3 Wharton & S. Med. Jur. 4th ed. 1884, § 858.

[4] *State* v. *Butterfield*, 75 Mo. 297; *People* v. *Hurley*, 60 Cal. 74, 44 Am. Rep. 55.

[5] *Grimes* v. *State*, 68 Ind. 193; *Shackleford* v. *State*, 2 Tex. App. 385; *Dixon* v. *State*, 2 Tex. App. 530; *Heath* v. *State*, 7 Tex. App. 464; *Taylor* v. *State*, 7 Tex. App. 659. See *State* v. *Butterfield*, 75 Mo. 297.

and vest on June 1st, 1870, and the shawl was found in his possession on July 12th, it was held admissible for him to offer any evidence from which it might be inferred that he obtained the shawl by purchase.[6]

§ 762. Inferences in embezzlement and murder.—In cases of larceny and embezzlement, similar inferences may be drawn from sudden accessions of property by persons previously poor.[1] In homicide, it is in like manner admissible to trace to the defendant articles of property connected with the deceased.[2] A remarkable case of this kind occurred in Philadelphia, in 1845, on the trial of a German named Papènburg for murder. Towards the close of the case a handkerchief was accidentally drawn from a coat which it was proved he had worn on the night of the offense. On this handkerchief was penciled, apparently in blood, the profile of a broken hatchet, which was proved to have belonged to the deceased prior to the fatal blow. Still this was dangerous evidence, deriving its force from the improbability of the counter presumption that the coat had been so placed, between the homicide and the trial, as to admit of the handkerchief being slipped in by a third person,—a feat which Boynton's Case, already stated, shows to be not unprecedented.

On a trial for murder, there having been evidence that the murdered woman had money, and that the prisoners had spoken of robbing her, the account of her administrator was, in

[6] *Way* v. *State*, 35 Ind. 409. See *People* v. *Dowling*, 84 N. Y. 478; supra, §§ 263, 691; *Allen* v. *State*, 71 Ala. 5.

[1] See *Com.* v. *Montgomery*, 11 Met. 534, 45 Am. Dec. 227, cases cited; *Betts* v. *State*, 66 Ga. 508; *State* v. *Grebe*, 17 Kan. 458; *McCoy* v. *State*, 44 Tex. 616; *Foster* v. *State*, 1 Tex. App. 531.

[2] *Rex* v. *Burdett*, 4 Barn. & Ald. 95, 22 Revised Rep. 539; *Reg.* v. *Courvoisier*, Wills, Circumstantial Ev. 186, 495; *Williams* v. *Com.* 29 Pa. 102; *State* v. *Babb*, 76 Mo. 501; *State* v. *Red*, 53 Iowa, 69, 4 N. W. 831. See supra, § 628.

Pennsylvania, held admissible to show that he found no money.[3]

§ 763. Inferences in burglary.—Where the charge is burglary, it is held that mere possession of the stolen goods, unaccompanied by other suspicious circumstances, is not enough to give prima facie evidence of the burglary.[1] But it is otherwise when there is indicatory evidence on collateral points.[2]

III. Inferences from Mechanism of Crime.

§ 764. Inference from instrument used.—Undoubtedly, we find it constantly stated that from a deadly instrument the law presumes a deadly design.[1] But in the first place, this, so

[3] *Howser* v. *Com.* 51 Pa. 332. But see *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; post, § 784.

[1] *Davis* v. *People,* 1 Park. Crim. Rep. 447; *Jones* v. *People,* 6 Park. Crim. Rep. 126; *Walker* v. *Com.* 28 Gratt. 969, 3 Am. Crim. Rep. 264; *People* v. *Gordon,* 40 Mich. 716; *Stuart* v. *People,* 42 Mich. 255, 3 N. W. 863; *State* v. *Shaffer,* 59 Iowa, 290, 13 N. W. 306, 4 Am. Crim. Rep. 83; *State* v. *Reid,* 20 Iowa, 413. See *Frank* v. *State,* 39 Miss. 705; *Bryan* v. *State,* 62 Ga. 179; *People* v. *Ah Sing,* 59 Cal. 400; *Reg.* v. *Exall,* 4 Fost. & F. 922, — Pollock, C. B. See, as qualifying this, *Reg.* v. *Langmead,* 9 Cox, C. C. 467, Leigh & C. C. C. 427, 10 L. T. N. S. 350. Compare Wharton, Crim. Law, 8th ed. § 813. See also note in 12 L.R.A.(N.S.) 200.

[2] *Knickerbocker* v. *People,* 57 Barb. 365; *Methard* v. *State,* 19 Ohio St. 363; *Breese* v. *State,* 12 Ohio St. 146, 80 Am. Dec. 340. See *Brown* v. *State,* 61 Ga. 311; *Smith* v. *State,* 62 Ga. 663.

[1] Supra, § 736. See Fost. C. L. 255; 1 East, P. C. 340; *State* v. *Knight,* 43 Me. 11; *United States* v. *Cornell,* 2 Mason, 91, Fed. Cas. No. 14,868; *Com.* v. *Drew,* 4 Mass. 391; *Com.* v. *York,* 9 Met. 93, 43 Am. Dec. 373; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *State* v. *Zellers,* 7 N. J. L. 220; *Respublica* v. *Bob,* 4 Dall. 145, 1 L. ed. 776; *Com.* v. *Honeyman,* Addison (Pa.) 148; *State* v. *Town,* Wright (Ohio) 75; *Davis* v. *State,* 25 Ohio St. 369; *Hill* v. *Com.* 2 Gratt. 594; *Kriel* v. *Com.* 5 Bush, 362; *Mitchell* v. *State,* 5 Yerg. 340; *McDermott* v. *State,* 89 Ind. 187; *Murphy* v. *People,* 37 Ill. 447;

far as it concerns the logical process, is a mere *petitio principii;* the design being held deadly because the instrument is deadly, and the instrument being held deadly because the design is deadly. And in the second place, the use of the term "law" is ambiguous, and is likely to mislead. If it be said that the use of a weapon likely to inflict a mortal blow implies, as a presumption of law, in its technical sense, a deadly design, this is an error; and *a fortiori* is it so when it is said that the use of such weapon implies a malicious design. There is no such thing, as we have already noticed, as a purely abstract

Davidson v. *People,* 90 Ill. 222; *State* v. *Decklotts,* 19 Iowa, 447; *State* v. *Shippey,* 10 Minn. 224, Gil. 178, 88 Am. Dec. 70; *State* v. *Johnson,* 48 N. C. (3 Jones, L.) 266; *State* v. *Irwin,* 2 N. C. (1 Hayw.) 112; *State* v. *Merrill,* 13 N. C. (2 Dev. L.) 269; *State* v. *Bowman,* 80 N. C. 432; *State* v. *Peters,* 2 Rice's Dig. 106; *State* v. *Smith,* 2 Strobh. L. 77, 47 Am. Dec. 589; *Clements* v. *State,* 50 Ala. 117; *Eiland* v. *State,* 52 Ala. 322; *Hadley* v. *State,* 55 Ala. 31; *De Arman* v. *State,* 71 Ala. 351; *Woodsides* v. *State,* 2 How. (Miss.) 656; *Green* v. *State,* 28 Miss. 689; *Riggs* v. *State,* 30 Miss. 637; *Dixon* v. *State,* 13 Fla. 636; *Henson* v. *State,* 112 Ala. 41, 21 So. 79; *Sylvester* v. *State,* 72 Ala. 201; *McElroy* v. *State,* 75 Ala. 9; *People* v. *Bushton,* 80 Cal. 160, 22 Pac. 127, 549; *Vann* v. *State,* 83 Ga. 44, 9 S. E. 945. See *Smith* v. *State,* 73 Ga. 31; *Gallery* v. *State,* 92 Ga. 463, 17 S. E. 863; *People* v. *Wolf,* 95 Mich. 625, 55 N. W. 357; *Bishop* v. *State,* 62 Miss. 289; *Jeff* v. *State,* 37 Miss. 321, s. c. 39 Miss. 593; *State* v. *Musick,* 101 Mo. 260, 14 S. W. 212; *State* v. *Doyle,* 107 Mo. 36, 17 S. W. 751; *Thomas* v. *People,* 67 N. Y. 218. But see *People* v. *Downs,* 56 Hun, 5, 8 N. Y. Supp. 521; *Kilpatrick* v. *Com.* 31 Pa. 198; *Chalk* v. *State,* 35 Tex. Crim. Rep. 116, 32 S. W. 534; *Wilson* v. *State,* 140 Ala. 43, 37 So. 93; *People* v. *Besold,* 154 Cal. 363, 97 Pac. 871; *State* v. *Di Guglielma,* 4 Penn. (Del.) 336, 55 Atl. 350; *State* v. *Mills,* 6 Penn. (Del.) 497, 69 Atl. 841; *State* v. *Underhill,* 6 Penn. (Del.) 491, 69 Atl. 880; *McLeod* v. *State,* 128 Ga. 17, 58 S. E. 83; *Fallon* v. *State,* 5 Ga. App. 659, 63 S. E. 806; *Nelson* v. *State,* 4 Ga. App. 223, 60 S. E. 1072; *State* v. *Dillingham,* 143 Iowa, 282, 121 N. W. 1074; *State* v. *Maioni,* 78 N. J. L. 339, 74 Atl. 526, 20 A. & E. Ann. Cas. 204; *State* v. *McKay,* 150 N. C. 813, 63 S. E. 1059; *Com.* v. *Palmer,* 222 Pa. 299, 19 L.R.A.(N.S.) 483, 128 Am. St. Rep. 809, 71 Atl. 100; *United States* v. *Fitzgerald,* 2 Philippine, 419; *Denearner* v. *State,* 58 Tex. Crim. Rep. 624, 127

killing;[2] no killing can be proved in a court of justice except in the concrete, accompanied by such circumstances as enable us, as a matter of probable reasoning, to determine whether the killing was or was not malicious. An executioner, under mandate of law, hangs a convict; here the instrument of death is deadly, but no malice is inferred. In the same category fall by far the greater number of violent deaths which history records; those of persons killed in the due course of legitimate war. On the other hand, when a person without authority, and with the appearance of deliberation, shoots another, we infer, as a presumption of fact (not of law), design. There is no *petitio principii* in this. We do not say that the killing was designed because it was designed. What we say is this: Taking aim at another with a gun, by a person without authority, and not in public war, and then firing, ordinarily implies an intent to kill; this was a case of such firing without authority; therefore this implies an intent to kill. Or, to vary the incidents: for a strong man, in possession of his senses, persistently and violently to kick a child on its vital parts, can be explained only on the hypothesis of malice; this was such a case; therefore this case can be explained only on the hypothesis of malice. Or, again: to lock a child up in a room, and knowingly to leave him without food for a week, implies malice; this the defendant did; therefore, in this case, malice is to be inferred. We cannot, in this case, leave out the word "knowingly;" for such a locking up might be accidental, in which case there would be no inference of malice. Yet "knowledge" in such a case is not a presumption of law, but an inference of inductive reasoning, to be drawn from a series of facts. It is incorrect, therefore, to tell a jury that malice, when the weapon is deadly, is a presumption of law. But

S. W. 201; *State* v. *Medley*, 66 W. Va. 216, 66 S. E. 358, 18 A. & E. Ann. Cas. 761.

[2] See supra, §§ 10, 734–738.

while telling them that whether there is or is not malice is a point to be determined by a scrutiny of all the facts in the case, it is proper to remind them that there are certain rules of probable reasoning which it is right for them to keep in view. And one of these rules is that when a responsible person, without authority, and under such circumstances as indicate deliberation, without apparent provocation or necessity, wounds another in a vital part with a deadly weapon, then malice is to be inferred.[3]

[3] See *Reg.* v. *Noon,* 6 Cox, C. C. 137; *Reg.* v. *Selten,* 11 Cox, C. C. 674; *Reg.* v. *Welsh,* 11 Cox, C. C. 336; *Reg.* v. *Ward,* L. R. 1 C. C. 356, 41 L. J. Mag. Cas. N. S. 69, 26 L. T. N. S. 43, 20 Week. Rep. 392, 12 Cox, C. C. 123; *United States* v. *Cornell,* 2 Mason, 91, Fed. Cas. No. 14,868; *United States* v. *McGlue,* 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *United States* v. *Mingo,* 2 Curt. C. C. 1, Fed. Cas. No. 15,781; *United States* v. *Armstrong,* 2 Curt. C. C. 446, Fed. Cas. No. 14,467; *State* v. *Gilman,* 69 Me. 163, 51 Am. Rep. 257, 3 Am. Crim. Rep. 15; *Com.* v. *York,* 9 Met. 93, 43 Am. Dec. 373, Wilde, J., dissenting; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *People* v. *McLeod,* 1 Hill, 377, 37 Am. Dec. 328; *People* v. *Clark,* 7 N. Y. 385; *People* v. *Sullivan,* 7 N. Y. 396; *People* v. *Kirby,* 2 Park. Crim. Rep. 28; *Thomas* v. *People,* 67 N. Y. 218; *State* v. *Zellers,* 7 N. J. L. 220; *Respublica* v. *Bob,* 4 Dall. 146, 1 L. ed. 777; *Com.* v. *Honeyman,* Addison (Pa.) 148; *Com.* v. *M'Fall,* Addison (Pa.) 257; *Com.* v. *Lewis,* Addison (Pa.) 282; *O'Mara* v. *Com.* 75 Pa. 424; *Lanahan* v. *Com.* 99 Pa. 80; *McLain* v. *Com.* 99 Pa. 86; *State* v. *Bowen,* Houst. Crim. Rep. (Del.) 91; *State* v. *Manluff,* Houst. Crim. Rep. (Del.) 208; *State* v. *Roane,* 13 N. C. (2 Dev. L.) 58; *State* v. *Merrill,* 13 N. C. (2 Dev. L.) 269; *State* v. *Johnson,* 48 N. C. (3 Jones, L.) 266; *State* v. *West,* 51 N. C. (6 Jones, L.) 506; *State* v. *Smith,* 2 Strobh. L. 77, 47 Am. Dec. 589; *Clarke* v. *State,* 35 Ga. 75; *Frazer* v. *State,* 55 Ga. 325, 1 Am. Crim. Rep. 315; *Hogan* v. *State,* 61 Ga. 43; *Hanvey* v. *State,* 68 Ga. 612; *Russell* v. *State,* 68 Ga. 785; *Holland* v. *State,* 12 Fla. 117; *Seaborn* v. *State,* 20 Ala. 15; *Clem* v. *State,* 31 Ind. 480; *Bradley* v. *State,* 31 Ind. 492; *Miller* v. *State,* 37 Ind. 432; *Murphy* v. *People,* 37 Ill. 447; *Hurd* v. *People* 25 Mich. 405; *Wellar* v. *People,* 30 Mich. 16, 1 Am. Crim. Rep. 276; *State* v. *Decklotts,* 19 Iowa, 447; *State* v. *Hoyt,* 13 Minn. 132, Gil. 125; *Anderson* v. *State,* 3 Heisk. 86; *Seals* v. *State,* 3 Baxt. 459; *McAdams* v. *State,* 25 Ark. 405; *Ex parte Wray,* 30 Miss. 673; *Jeff* v. *State,* 39 Miss. 593; *Barcus* v. *State,* 49 Miss. 17, 19

However, courts differ as to when the inference applies, or whether it applies at all, from the character of the weapon. A careful examination of the cases will show that the court evidently took into consideration the surrounding circumstances and the use of the weapon, rather than the character of the weapon itself. A common chair [4] was held to be a deadly weapon where used to crush the skull of the deceased, and the court here adds: "Many things that are not ordinarily held weapons yet become deadly by the manner of their use." So intent to kill was presumed where accused made a violent assault upon the deceased, whom he knew to have heart disease.[5] Some courts hold that no legal presumption arises from the use of a deadly weapon, but it merely warrants an inference by the jury of an intent to kill.[6] Other

Am. Rep. 1, 1 Am. Crim. Rep. 249; *Hawthorne* v. *State,* 58 Miss. 778; *State* v. *Evans,* 65 Mo. 574; *State* v. *Alexander,* 66 Mo. 148; *Isaacs* v. *State,* 25 Tex. 174; *People* v. *Barry,* 31 Cal. 357; *State* v. *Bertrand,* 3 Or. 61.

See *State* v. *Wingo,* 66 Mo. 181, 27 Am. Rep. 329; supra, § 721; *Farris* v. *Com.* 14 Bush, 362; *State* v. *Davis,* 14 Nev. 407; *Walker* v. *State,* 7 Tex. App. 627; *United States* v. *McClare,* 17 Month. L. Rep. 439; *Kingen* v. *State,* 45 Ind. 518; supra, § 671; *Maher* v. *People,* 10 Mich. 212, 81 Am. Dec. 781; *Coffee* v. *State,* 3 Yerg. 283, 24 Am. Dec. 570; *Floyd* v. *State,* 3 Heisk. 342; *Hamby* v. *State,* 36 Tex. 523; supra, §§ 734 et seq.; *Stokes* v. *People,* 53 N. Y. 164, 13 Am. Rep. 492; *Com.* v. *Sturtivant,* Appendix to Wharton, Homicide, 742.

See post, § 773; *Larkin* v. *State,* 163 Ind. 375, 71 N. E. 959; *Sullivan* v. *State,* 102 Ala. 135, 48 Am. St. Rep. 22, 15 So. 264; *Halderman* v. *Territory,* 7 Ariz. 120, 60 Pac. 876; *Green* v. *State,* 45 Ark. 281; *Perryman* v. *State,* 114 Ga. 545, 40 S. E. 746; *Davison* v. *People,* 90 Ill. 221; *People* v. *Wolf,* 95 Mich. 625, 55 N. W. 357; *State* v. *Greenleaf,* 71 N. H. 606, 54 Atl. 38; *State* v. *Bowles,* 146 Mo. 6, 69 Am. St. Rep. 598, 47 S. W. 892; *People* v. *Minisci,* 12 N. Y. S. R. 719; *State* v. *Capps,* 134 N. C. 622, 46 S. E. 730; *Carr* v. *State,* 21 Ohio, C. C. 43, 11 Ohio C. D. 353; *State* v. *Bertrand,* 3 Or. 61; *United States* v. *Mingo,* 2 Curt. C. C. 1, Fed. Cas. No. 15,781; *State* v. *Keith,* 9 Nev. 15.

[4] *Birdwell* v. *State,* — Tex. Crim. Rep. —, 48 S. W. 583.

[5] *State* v. *Baldes,* 133 Iowa, 158, 110 N. W. 440.

[6] *Fitch* v. *State,* 37 Tex. Crim. Rep. 500, 36 S. W. 584; *Danforth*

courts hold that the presumption arises when the deadly weapon is used in a way that is calculated to produce death, or upon a vital part of the body.[7] But the general rule is that the presumption of malice applies where the homicide is committed with a deadly instrument, unless the contrary appears from the evidence.[8]

v. *State*, 44 Tex. Crim. Rep. 105, 69 S. W. 159; *State* v. *Lee*, — Del. —, 74 Atl. 4; *Ewing* v. *Com.* 129 Ky. 237, 111 S. W. 352; *Hardin* v. *State*, 51 Tex. Crim. Rep. 559, 103 S. W. 401.

[7] *Rigsby* v. *State*, — Ind. —, 91 N. E. 925.

See *Spencer* v. *State*, 59 Tex. Crim. Rep. 217, 128 S. W. 118; *Simpson* v. *State*, 56 Ark. 8, 19 S. W. 99; *People* v. *Batting*, 49 How. Pr. 392; *Cross* v. *State*, 55 Wis. 261, 12 N. W. 425; *State* v. *Tabor*, 95 Mo. 585, 8 S. W. 744; *State* v. *McKenzie*, 102 Mo. 620, 15 S. W. 149; *State* v. *Keener*, 225 Mo. 488, 125 S. W. 747.

[8] This holding is supported by the great weight of authority, and while only one case is cited from each jurisdiction, yet the others are in accord. See *Ross* v. *State*, 62 Ala. 224; *Halderman* v. *Territory*, 7 Ariz. 120, 60 Pac. 876; *Sweeney* v. *State*, 35 Ark. 585; *People* v. *Langton*, 67 Cal. 427, 7 Pac. 843, 7 Am. Crim. Rep. 439; *United States* v. *Crow Dog*, 3 Dak. 106, 14 N. W. 437; *State* v. *Davis*, 9 Houst. (Del.) 407, 33 Atl. 55; *Gallery* v. *State*, 92 Ga. 463, 17 S. E. 863; *State* v. *Gillick*, 7 Iowa, 287; *Head* v. *State*, 44 Miss. 731; *State* v. *Evans*, 65 Mo. 574; *Schlencker* v. *State*, 9 Neb. 241, 1 N. W. 857; *State* v. *Keith*, 9 Nev. 15; *State* v. *Utley*, 132 N. C. 1022, 43 S. E. 820; *State* v. *Bertrand*, 3 Or. 61; *McCue* v. *Com.* 78 Pa. 185, 21 Am. Rep. 7, 1 Am. Crim. Rep. 268; *State* v. *Levelle*, 34 S. C. 120, 27 Am. St. Rep. 799, 13 S. E. 319; *Wright* v. *State*, 9 Yerg. 342; *Watts* v. *State*, 30 Tex. App. 533, 17 S. W. 1092; *State* v. *McDonnell*, 32 Vt. 491; *Hill* v. *Com.* 2 Gratt. 594; *State* v. *Morrison*, 49 W. Va. 210, 38 S. E. 481; *Ross* v. *State*, 8 Wyo. 351, 57 Pac. 924; *Hadley* v. *State*, 55 Ala. 31; *Futch* v. *State*, 90 Ga. 472, 16 S. E. 102; *Jackson* v. *State*, 53 Ga. 195; *People* v. *Barry*, 31 Cal. 357; *Holland* v. *State*, 12 Fla. 117; *Hornsby* v. *State*, 94 Ala. 55, 10 So. 522; *Jordan* v. *State*, 79 Ala. 9; *Monteith* v. *State*, 161 Ala. 18, 49 So. 777; *State* v. *Moore*, — Del. —, 74 Atl. 1112; *State* v. *Hayden*, 131 Iowa, 1, 107 N. W. 929; *State* v. *Prolow*, 98 Minn. 459, 108 N. W. 873; *State* v. *Fowler*, 151 N. C. 731, 66 S. E. 567; *Com.* v. *Gibson*, 211 Pa. 546, 60 Atl. 1086; *State* v. *Byrd*, 72 S. C. 104, 51 S. E. 542; *Carson* v. *State*, 57 Tex. Crim. Rep. 394, 123 S. W. 590; *State* v. *Medley*, 66 W. Va. 216, 66 S. E. 358, 18 A. & E. Ann. Cas. 761; *Anderson* v. *State*, 133 Wis. 601, 114 N. W. 112.

§ 765. Inference from condition of weapon.—When it is alleged that a death was produced by a particular instrument, the condition of the instrument becomes a pertinent subject of inquiry. Is it a knife, for instance, with which it is alleged a homicide was committed, marked in such a way as to indicate use of the character assigned?[1] When suicide was set up as the cause of the Earl of Essex's death, in 1683, it was a strong point against this hypothesis that the razor with which the fatal wound was inflicted was notched by the act of drawing it across the neckbone, in a way very unlikely to have resulted if the deceased had himself inflicted the wound. In cases of hanging, the condition of the rope is material; and so in poisoning is that of the vessel in which the pioson was contained.[2]

Generally however, while the condition of a deadly instrument or a weapon may afford an inference, the court should not instruct the jury as to the law of presumptions, but should state the tests by which the jury may weigh the circumstantial evidence. The testimony concerning weapons and their condition, when relevant, is always admissible, not as creating a presumption, but as a circumstance from which, under the instructions of the court, the jury may infer guilt. In this view such testimony is limited only by its relevancy to the offense under trial.[3]

The following cases hold that the use of a deadly instrument raises no presumption of malice, but, at most, only justifies an inference of its existence: *Keady* v. *People,* 32 Colo. 57, 66 L.R.A. 353, 74 Pac. 892; *State* v. *Dull,* 67 Kan. 793, 74 Pac. 235; *Farris* v. *Com.* 14 Bush, 362; *Territory* v. *Hart,* 7 Mont. 489, 17 Pac. 718; *State* v. *Vaughan,* 22 Nev. 285, 39 Pac. 733; *Territory* v. *Lucero,* 8 N. M. 543, 46 Pac. 18; *Johnson* v. *State,* 8 Wyo. 494, 58 Pac. 761, 13 Am. Crim. Rep. 374; *Trumble* v. *Territory,* 3 Wyo. 280, 6 L.R.A. 384, 21 Pac. 1081.

[1] See *Papenburg's Case,* cited supra, § 762.

[2] See 3 Wharton & S. Med. Jur. 4th ed. §§ 507 et seq. Compare post, § 774.

[3] See the following cases involving weapons and their condition:

§ 766. Inference from position of weapon.—In the case of Courvoisier, who was tried for the murder of Lord William Russell, there were two facts relied upon to repel the hypothesis of suicide. One was that a napkin was placed over the face of the deceased, and the other that the instrument of death did not lie near the body.[1] To the same point is the case of Jane Norkott, who was found dead in her bed with her throat cut, while a bloody knife was found sticking in the floor some distance from the bed, and as it stuck the point was turned toward the bed and the haft from it. Yet in such case the jury must be satisfied that the body was not moved between the death and the period of observation. Thus, Mr. Taylor[2] tells us of a case of homicide in which the "weapon, a razor, was found under the left shoulder; a most unusual situation, but which, it appears, it had taken owing to the body having been carelessly turned over before it was seen by the surgeon first called."[3] That the weapon is firmly grasped in the deceased's hand strengthens the inference of suicide.[4] When it is placed in the hand after death, it is held loosely. That the instrument (*e. g.*, a razor) was closed is not conclusive against suicide.[5] It should also be kept in mind that the weapon found near the person of the deceased may not be the one with which the crime was committed.[6]

§ 767. Inference from condition of dress.—Dress, independently of the questions to be hereafter noticed, adds

State v. *Houser*, 28 Mo. 233; *People* v. *Smith*, 172 N. Y. 210, 64 N. E. 814; *Baines* v. *State*, 43 Tex. Crim. Rep. 490, 66 S. W. 847; *Jackson* v. *State*, 167 Ala. 44, 52 So. 835; *Barnett* v. *State*, 165 Ala. 59, 51 So. 299; *Ott* v. *State*, 160 Ala. 29, 49 So. 810.

[1] 3 Wharton & S. Med. Jur. 4th ed. §§ 302 et seq.

[2] Med. Jur. by Reese, 284.

[3] See 3 Wharton & S. Med. Jur. 4th ed. §§ 297 et seq.

[4] 3 Wharton & S. Med. Jur. 4th ed. §§ 297 et seq.

See Taylor, Med. Jur. by Reese, 284; post, §§ 776, 781.

[5] See 3 Wharton & S. Med. Jur. 4th ed. §§ 297 et seq.

[6] See cases, Wills, Circumstantial Ev. p. 112.

often an important element of indicatory proof.[1] Thus, in a case cited by Taylor,[2] there were two cuts in a shirt produced in evidence. These cuts were near each other, and precisely similar; leading to the inference that the knife producing them went through two folds of the shirt. From this, however, it followed that the shirt could not have been on the deceased at the time of the wounding, since, if it had been, there would have been three, not two, cuts. So, on the trial of Stokes for the murder of Fisk, in 1873, the condition of the deceased's cloak immediately after the wound was admitted to show the force and direction of the shot. The lay of bloodstains, also, may indicate the direction in which the blood flowed.[3] Nor is it necessary, it has been ruled, that the garments in question should be themselves produced.[4] There condition can be described by witnesses without such production, if their nonproduction is satisfactorily explained.[5] But if practicable they should be secured and brought into court, though, before admitting them, there should be evidence that they have not been tampered with since the commission of the crime.[6]

Generally, the condition of the body and the clothing when discovered may be shown, not only as to the manner and cause of death, but as averring an inference as to the motive and intent with which the act was committed.[7]

[1] See 3 Wharton & S. Med. Jur. 4th ed. §§ 633, 933; *People* v. *Hong Ah Duck,* 61 Cal. 387; *King* v. *State,* 13 Tex. App. 277.

[2] Taylor, Med. Jur. by Reese, p. 274.

[3] *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; post, § 778; *Leontade's Case,* post, § 776.

[4] See supra, §§ 311, et seq.

[5] *Com.* v. *Pope,* 103 Mass. 440. See supra, §§ 163–167; post, § 778.

[6] See *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 561, cited fully post, §§ 774, 777; Wills, Circumstantial Ev. 5th Am. ed. pp. 119, 120.

[7] *State* v. *Deschamps,* 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 So. 703; *Mott* v. *State,* — Tex. Crim. Rep. —, 51 S. W. 368; *Brown* v. *People,* 17 Mich. 429, 97 Am. Dec. 195; *People* v. *Majors,* 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486; *Washington* v. *State,* 46 Tex. Crim. Rep. 184, 79 S. W. 811; *People*

§ 768. Inference from ownership of weapon.—If, however, the instrument of death has been found, and homicide is suspected, the inquiry becomes important, To whom does it belong? In order to ascertain the ownership, it will be necessary to examine the weapon itself carefully for any name or other mark by which it may be identified, and to inquire who possessed such a weapon; whether anyone purchased or procured one of the kind a short time before the murder was committed;[1] whether anyone was observed preparing it for use; whether there are any marks upon it to indicate the hand, or the size of the hand, in which it was held, or the direction in which the fatal blow was given; whether the weapon is imperfect or broken, and, if so, who has been observed in possession of a fragment corresponding to the broken portion.[2]

§ 769. Inference from wound.—In ordinary cases the shape of the wound will agree with the instrument with which it has been produced.[1] This is particularly the case with wounds inflicted by a knife, a dirk, a sword, or a razor, or, in general, by any sharp weapon by which a cut or thrust may

v. *Gleason,* 127 Cal. 323, 59 Pac. 592; *Robinson* v. *State,* 114 Ga. 56, 39 S. E. 862; *Com.* v. *Holmes,* 157 Mass. 233, 34 Am. St. Rep. 270, 32 N. E. 6; *Hill* v. *State,* 146 Ala. 51, 41 So. 621; *Jacobs* v. *State,* 146 Ala. 103, 42 So. 70; *Fowler* v. *State,* 155 Ala. 21, 45 So. 913; *Bennett* v. *State,* 95 Ark. 100, 128 S. W. 851; *Welch* v. *State,* 57 Tex. Crim. Rep. 111, 122 S. W. 880; *Cole* v. *State,* 48 Tex. Crim. Rep. 439, 88 S. W. 341; *Green* v. *State,* 125 Ga. 742, 54 S. E. 724; *State* v. *Powell,* 5 Penn. (Del.) 24, 61 Atl. 966.

See *Young* v. *State,* 49 Tex. Crim. Rep. 207, 92 S. W. 841; *State* v. *Roberts,* 28 Nev. 350, 82 Pac. 100.

[1] See *Nichols* v. *Com.* 11 Bush, 575; supra, § 753; post, § 799.

[2] Wharton, Homicide, § 768; *Com.* v. *Sturtivant,* Wharton, Homicide, 742; *Maxwell* v. *State,* 129 Ala. 48, 29 So. 981; *Barnes* v. *Com.* 24 Ky. L. Rep. 1143, 70 S. W. 827; *State* v. *Green,* 115 La. 1041, 40 So. 451.

[1] See 3 Wharton & S. Med. Jur. 4th ed. 1884, §§ 265, 332, 802; *Powell* v. *State,* 13 Tex. App. 244; Watson, Homicide, 276.

be made. If, however, death has been produced by a bruise or contusion,[2] the case presents more difficulty, as it not unfrequently happens that such wounds are unaccompanied with any mark of external violence. In most cases, even of this class, however, a careful investigation will lead to the discovery whether the instrument were blunt or sharp, of wood or metal, whether the blows were repeated, and whether they were sufficient to cause death.

§ 770. Inference from powder marks on body.—If the wound has been produced by a gun or pistol, it becomes necessary to inquire whether it was received from a person near at hand, or at a distance. Marks on the body of the deceased may afford indications of the distance of the assailant at the time of the attack. If there are marks of powder on the deceased, a close attack may be inferred.[1]

§ 771. Inference from direction of wound.—The line followed by a wound may afford a basis from which the place from which it was aimed may be inferred.[1] But evidence of this kind must be received with extreme caution.[2] Thus, in an interesting case tried in Texas, in 1873,[3] the evidence was that the defendant (who was a hired servant of the deceased) was in the habit of getting up in the night to look after the horses in his care. On the night of the homicide he pretended to suspect that some interloper was prowling about the premises, and he called the deceased to go out with him to look. He had a pistol;

[2] See 3 Wharton & S. Med. Jur. 4th ed. §§ 382, 802; *Gardiner* v. *People,* 6 Park. Crim. Rep. 155; supra, § 765; *People* v. *Hong Ah Duck,* 61 Cal. 387; supra, § 412.

[1] See 3 Wharton & S. Med. Jur. § 847; Taylor, Med. Jur. 330; supra, § 769.

[1] 3 Wharton & S. Med. Jur. 4th ed. §§ 332, 802 et seq.; Watson, Homicide, 276.

[2] See *People* v. *Westlake,* 62 Cal. 303.

[3] *Saunders* v. *State,* 37 Tex. 710.

and when they were a short distance from the house, the deceased was killed by a shot from the pistol in the hands of the defendant. The defense was that the shot was accidental; that the deceased, at the time of the shooting, was walking before the defendant; that the defendant had cocked his pistol, and was trying to let the hammer down, holding the pistol in his hands, at an angle of about 45°; that the hammer slipped from under his thumb, causing an accidental discharge of the pistol, the ball penetrating, as he supposed, the deceased's back. In point of fact, however, the ball entered the head of the deceased, about the base of the occipital bone, proceeding about 2 inches in a downward range towards the chin. Experts were produced to contradict the defendant's statement by showing that it was irreconcilable with the course actually taken by the ball. The defendant was on this evidence convicted and sentenced to death; but in the supreme court the judgment was reversed, and a new trial ordered.[4] Nor can the conclusion reached by that tribunal, that the evidence was not sufficient to sustain a conviction, be disputed. No absolute rule can be laid down as to the precise course taken by a ball when entering a human body. The line it takes when resisted varies with the calibre of the ball, and the quality and quantity of the powder; and it is deflected by obstacles which seem very slight.[5] In respect to the direction of incised and punctured wounds, greater accuracy of conclusion, as is elsewhere shown, can be reached.[6]

§ 772. Inferences of skill from wound.—In incised wounds an inference may be drawn from the skill of infliction. A person acquainted with anatomy is likely, if the object be

[4] *Billings's Case*, 18 Alb. L. J. 261; *People* v. *Smith*, 4 Pacific Coast L. J. 213; 20 Alb. L. J. 423.

[5] See 3 Wharton & S. Med. Jur. 4th ed. §§ 265 et seq.; *State* v. *Morphy*, 33 Iowa, 270, 11 Am. Rep. 122; *State* v. *Porter*, 34 Iowa, 131.

[6] See 3 Wharton & S. Med. Jur. 4th ed. §§ 283 et seq.

to kill, to strike at a vital part; and hence, when a wound is skilfully directed to such a vital part as an ordinary observer would not be acquainted with, special knowledge of the subject is inferred. So, in an English case, a wound was traced to a butcher from the fact that it was inflicted in the way used by butchers in killing sheep.[1]

§ 773. Inferences from left-handedness.—Left-handedness has sometimes been resorted to for the purpose of connecting the defendant with the offense charged; and at all events, if the wound is shown to have been effected by a person who was right-handed, it is a ground of defense that the defendant was left-handed; and there may be a slight inculpatory inference, in case of a left-handed wound, drawn from the fact that the defendant was left-handed.[1]

§ 774. Adaptation of instrument to wound.—Whether a particular wound could have been produced by a particular instrument is a question as to which the opinion of experts can be asked.[1] The opinion of an expert as to which of two wounds, either of itself necessarily fatal, actually caused the death of the deceased, is competent evidence.[2] And the possession by the defendant of an instrument fitted to produce abortion is evidence against him on a trial for producing the abortion.[3]

[1] Taylor's Med. Jur. by Reese, 277.

[1] See Taylor's Med. Jur. by Reese, 279; *R.* v. *Phillips,* Woodfall's Trials, 80; Wills, Circumstantial Ev. 97; 3 Wharton & S. Med. Jur. 4th ed. §§ 297–316; *Com.* v. *Sturtivant,* 117 Mass. 139, 19 Am. Rep. 401, cited supra, § 765.

[1] Supra, § 412; *Com.* v. *Lenox,* 3 Brewst. (Pa.) 249; *Davis* v. *State,* 38 Md. 15; *State* v. *Morphy,* 33 Iowa, 270, 11 Am. Rep. 122; *State* v. *Porter,* 34 Iowa, 131. See *Wilson* v. *People,* 4 Park. Crim. Rep. 619; *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 566; Bemis's Rep. 566; *Camp* v. *Com.* 2 Met. (Ky.) 27, 74 Am. Dec. 388.

[2] *Eggler* v. *People,* 56 N. Y. 642. See *Hunt* v. *State,* 9 Tex. App. 166; supra, § 412.

[3] *Com.* v. *Blair,* 126 Mass. 40.

§ 775. Inference from number and location of wounds.—An examination of a number of reported cases of suicide leads to the conclusion that the object of the self-destroyer is to produce death by a single blow; that if he uses a cutting instrument, he selects the throat; if he stabs himself, he selects the chest, particularly the heart or belly; and if he shoots himself, he generally does it through the head.[1] It therefore becomes a subject of legitimate investigation whether or not the wounds are in a position likely to have been selected by one seeking instantaneous self-destruction, and who would be inferred to have designed to strike at what he conceived to be the most accessible vital part.[2]

§ 776. Inferences from other indications on injured party.—It is important to inquire, in cases where the defense of suicide may be started, whether there are marks upon the person other than those made by the fatal wounds; *e. g.*, whether the hands or arms have the appearance of having been forcibly held during the commission of the deed; whether the head appears to have been bruised, as if the victim were first rendered insensible by a blow upon that portion of the frame; whether the wound is in a position that could not have been reached by the deceased, which may often be ascertained by placing the weapon in the hand of the corpse, and observing whether or not the direction of its probable course corresponds with that of the wound.[1] It must be considered, also, whether there are signs of the presence of another, as in the case of a woman found dead in a room with her throat cut, and a large quantity of blood on her person, while the presence of another person in the room was plainly indicated by the print

[1] See Wharton & S. Med. Jur. 3d ed. §§ 702 et seq.; Watson, Homicide, 276.

[2] Taylor's Med. Jur. by Reese, 281; *Case of Duchess of Preslin*, reported in Ann.d' Hyg. 1847, title 2, p. 377; Wills, Circumstantial Ev. 169.

[1] See post, § 781; supra, § 766; 1 Tidy, Legal Med. Jur. (1883) 66.

of a bloody left hand on the left arm of the deceased.[2] All stains or marks of dirt on the person or dress of the deceased should be carefully scrutinized.[3] In the famous case of Leontade, where a young girl, after having been ravished, was killed, her dress was partially identified, and that of her murderer connected with it, by the fact that on both of them were found traces of evacuations which took place during the violence committed on her, which evacuations contained the seeds of figs of which she had previously copiously eaten.

The hands of the deceased should be examined for the purpose of seeing whether they exhibit any traces of attack or defense.

The mouth and throat of the deceased, if sleeping at the time of the attack, may have been compressed by the murderer to prevent an outcry; and of this the body may subsequently exhibit signs.[4]

In cases of alleged rape, proof of bruises on the person of the prosecutrix are admissible.[5]

§ 777. Inference from blood stains.—Traces of blood, in cases of homicide, near the corpse or in the way leading to or from it, or marks or spots of blood upon the person or clothes of the accused, should be carefully examined with a view to the solution of any or all of the following inquiries: 1. Were the wounds self-inflicted, or the act of another? This may in some cases be determined by the fact that blood is visible in spots or pools in places where it could not have been if death had been the result of suicide; or where there is no communication between the blood on the floor and the corpse;

[2] *Norkott's Trial,* 14 How. St. Tr. 1324.

[3] *State* v. *Kingsbury,* 58 Me. 239, cited supra, § 27.

[4] See Wharton & S. Med. Jur. 4th ed. §§ 304 et seq., §§ 847 et seq.; *State* v. *Wieners,* 66 Mo. 13; supra, §§ 311 et seq.

[5] *State* v. *McLaughlin,* 44 Iowa, 83.

as if the body had been removed by another from the spot on which the deed was committed.[1] 2. Was the deceased erect or lying down when the wounds were received? It will throw much light on this question, as will be presently again noticed, if the spots of blood on the adjoining wall, or any other erect body near the locality, be examined, as the direction from which they came may frequently be determined from the manner in which they have spattered. It is important, also to search for prints of bloody hands and impressions of bloody feet, which may give information as to the direction taken by the murderer after the commission of the act. Care should be taken, however, not to create *indicia* while searching for them.[2]

§ 777a. Human blood cannot be distinguished beyond a reasonable doubt from other blood.—Scarcely a case arises where this issue is material in which experts have not appeared ready to identify dried blood as human, and by this process, to supply a link on which a conviction of a capital offense may be made to rest.[1] It is perhaps a minor matter that in this way enormous expenses are heaped not only on the state, but on the accused. Experts are brought from a distance by the state at great cost; protracted experiments are made by them afterwards to be detailed to the jury; and testimony is adduced which the defendant must meet at the peril of his life. Controvert it he readily may, if he can procure the means, for the great weight of authority, as will presently be seen, is that such identification cannot be accurate-

[1] Post, § 778. See 3 Wharton & S. Med. Jur. 1884, 4th ed. § 304.

[2] Post, § 778. See 3 Wharton & S. Med. Jur. 4th ed. §§ 304 et seq., §§ 724 et seq.; 1 Taylor, Med. Jur. 372; *Com.* v. *Sturtevant*, Appendix to Wharton, Homicide, 742, 117 Mass. 122, 19 Am. Rep. 401.

[1] See *McLain* v. *Com.* 99 Pa. St. 86; 3 Wharton & S. Med. Jur. 5th ed. § 295; *People* v. *Gonzalez*, 35 N. Y. 49; *Com.* v. *Twitchell*, 1 Brewst. (Pa.) 561.

ly determined. But to procure this testimony may be impossible for him, unless the prosecution assume the expense, which it often is either unwilling or unable to do.[2] This amounts to a perversion of justice; but this is not the chief objection. Supposing experts are obtained so as to exhibit fully to the jury both sides of this vexed question, and the case goes to the jury on their testimony, what then? Is there not danger that the jury may regard the question as one determined, not by ascertainable physical laws, but by their own discretion or on the authority of particular experts? It would seem, in view of these dangers, and in view of the more recent explorations of scientists who have viewed the question, not as advocates retained by a particular party, but as dispassionate investigators, that the time has now arrived in which it is the duty of courts to advise juries, in all cases in which it is proposed to rest a conviction on the identification of certain blood stains as human, that, as a matter of fact, no such identification can be made beyond a reasonable doubt. That stains look like blood may be proved by expert and nonexpert;[3] that they are dried human blood can be satisfactorily proved by no one.[4]

[2] See 10 Cent. L. J. 184; supra, § 347.

[3] Post, § 778; *Thomas* v. *State,* 67 Ga. 460; Beale's Microscope in Medicine, 4th ed. London, 1878, p. 266. See Phil. Med. Times. Oct. 1878; 16 Am. L. Reg. N. S. 257; 17 Am. L. Reg. N. S. 554; 1 Tidy, Legal Med. Jur. 1883, pp. 215, 230; "Lancet" 1874, i. 210; 1875, i. 321, 700.

[4] See *State* v. *Knight,* 43 Me. 11; *Com.* v. *Alley,* Boston, 1873, Pamph.; *Lindsay* v. *People,* 63 N. Y. 143; *People* v. *Gonzalez,* 35 N. Y. 49; *Gaines* v. *Com.* 50 Pa. 319; *People* v. *Bell,* 49 Cal. 486; *Knoll* v. *State,* 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369; 3 Wharton & S. Med. Jur. 5th ed. §§ 291 et seq.

"Human blood when shed commences to clot in less than two minutes, the process of coagulation being completed in from six to twelve minutes, according to the temperature of the air. If the air is very cold coagulation may be delayed from one half to one hour.

"Taff states that it is possible to obtain a good idea of the age of blood stains on clothing by dissolving the stains in a diluted solu-

§ 778. **Collateral inferences.**—Assuming, however, that it cannot be absolutely proved that certain patches of dried blood are human, it by no means follows that evidence of such blood is inadmissible. So far from such being the case, the existence of blood, or of that which appears to be blood, either fresh or dried, at or near a place where violence has been in-

tion of acid arsenious (1/120) and noting their solubility. Acid arsenious (1/120) dissolves newly shed blood in a very few minutes; blood that has been shed from one to two days, in fifteen minutes; after ten days, in thirty minutes; after two weeks to one month, in one to two hours.

"In medico-legal examinations, the size of the red cells in blood stains has a very important bearing in deciding as to whether or not the cells under examination are human red cells.

"With the exception of the guinea pig and rabbit, human red blood cells can, in skilled hands, be differentiated from the blood cells of domesticated animals.

"The average diameter of the human red blood cell is from 1/3200 to 1/3300 inch. The red corpuscles of the monkey vary from 1/3412 to 1/3390.

"The red blood cells of fishes, reptiles, and birds are oval in shape and uncleated; those of mammals free from disease, excepting the camel, are homogenous, circular, disk-shaped, nonuncleated, and biconcave.

"It is not possible to differentiate between the red blood cells of the different races of the human family.

"Normal blood consists of colorless plasma, in which are suspended the red and white corpuscles. It coagulates when exposed to the air, forming a red clot, and a yellowish fluid known as serum. Normal human arterial blood is bright red in color, venous blood dark red. Healthy blood consists of 79 per cent water and 21 per cent solids.

"The Bordet inoculating test is of undoubted value, but it is practically impossible to obtain an absolutely specific test that will differentiate between the blood of human beings and that of animals. A. L. Bennett, M. D."

"The Hospital (London, England) reports the new serum blood test for determining the source of blood stains. Demonstrations given recently at the serological laboratories of the Royal Institute of Public Health are fully described. The claim is made that this test is specific. If a specific test has been discovered by which human blood can be differentiated from mammalian, the value of such a test in medical jurisprudence is beyond estimate. The test, as reported in The Hospital (London, England), is thus described:

" 'In testing the nature of a blood stain thought to be human, a small

flicted, is always relevant as cumulative proof.[1] And in this connection the following points must be kept in mind:

Heavy blunt instruments may produce death without immediate effusion of blood;[2] a weapon may be wiped after the fatal blow; and in all cases, the handle, casement, and joints of the weapon should be scrutinized. Often a weapon, after inflicting a rapid incised or punctured wound, is wiped by the

quantity of the dried blood stain was scraped from the cloth upon which it had been found, and transferred to a test tube containing normal saline solution. Into a second tube was put a more dilute solution than that in the first. Into other tubes were put small quantities of blood derived from a horse, pig, and an ox respectively as controls. Some anti-human serum—that is to say, serum derived from a rabbit into which human blood had been injected under the special conditions—was then put into each of the tubes, with the result that the first and second gave the specific reaction, while those containing blood derived from animals other than man gave no reaction at all. The test consists in the formation of a white cloudy ring which appears almost at once in the strong solution, but only after a minute or two in the weaker.

" 'The great point about the test is that it is specific. If a rabbit has been injected with the blood of an ox, its serum may be spoken of as "anti-ox serum," and when mixed with a solution derived from ox blood, it gives a white precipitate with this, but gives none with human blood, horse blood, pig blood. and so on; similarly, if a rabbit has been injected with dog blood under special circumstances, the serum of that rabbit may be described as "anti-dog serum," and if it is put into a series of tubes containing solutions of blood derived from various animal sources, it will give the precipitation only in that tube which contains blood derived from a dog, and so on. Sensitizing the rabbits is rather a laborious process, but it is possible to obtain a series of rabbits of which the first may for instance supply anti-human, the second anti-horse, the third anti-ox serum, the fourth anti-pig serum, and so on, so that in a case of doubt as to the exact source of a given blood stain, it may in this way be possible to determine not merely whether it is mammalian or whether it is derived from human or an animal source, but even the exact animal from which it has come. The far-reaching importance of this in cases of supposed murder is very obvious. Dr. A. L. Bennett.' "

[1] *McLain* v. *Com.* 99 Pa. 86; *Dillard* v. *State,* 58 Miss. 368.

[2] 3 Wharton & S. Med. Jur. 5th ed. §§ 203 et seq.; *O'Mara* v. *Com.* 75 Pa. 424.

edges of the wound closing before blood has reached the surface.

In stabs, the dagger or knife may inflict death without receiving any blood stains, or at the most a film, which leaves, when dried, a faint yellow-brown tinge.

The absence of blood stains on the dress of the accused affords but a slight inference of innocence, even in cases of violent homicide by cutting, since such stains may have been effaced, and since, also, there are many cases of such homicides (*e. g.*, cutting a throat from behind) in which the blood would not reach the person of the assailant.[3]

The form and direction of blood spots on walls or furniture may indicate the position of a wounded person in respect to such spots;[4] and the way in which blood stains lie on clothes may form a means of determining the place from which the blood spurted.[5]

On clothing, supposing it to be identified with the deceased, which is a prerequisite,[6] the direction of the flow of the blood must be examined. If downwards, it proves an upward blow, and indicates that the wounded person was more or less erect at the time of the wound.

Spattering may indicate an arterial wound or a continued struggle.

On shirts, blood stains may arise from flea or mosquito bites; and the shirt may have been worn on both sides. In *Alley's Case,* tried in Boston in 1873, one hypothesis presented by the defense was that the blood was caused by a menstrual discharge from the defendant's wife. But when the blood is

[3] Taylor's Med. Jur. by Reese, 290.

[4] See *Richardson* v. *State,* 7 Tex. App. 487.

[5] *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; supra, § 777.

[6] *Com.* v. *Pope,* 103 Mass. 440; supra, § 767.

dried, no satisfactory solution of this question can, as has been already seen, be reached.[7]

Blood stains, or what appear to be such, may be proved as tending to the identification of specific articles.[8]

§ 779. Inference from things adhering to weapon.— Hair adhering to a weapon is evidence connecting the weapon with the homicide, when the hair resembles that of the deceased. But hair should be carefully examined by microscope so as to determine whether or no it is human. Thus, Dr. Lyons details a case where a prima facie case of homicide was rebutted by proof that the hair was that of a brute.[1] So, in a case tried in Massachusetts in 1874, an inference that a stake traced to the defendant had been used in the homicide was drawn from the fact that the stake, besides being bloody, had on it a piece of bone, such as, in the blow given, might have been taken from the deceased.[2] But the question of identity of hair is purely one of fact for the jury. An expert may speak of similarity between particular locks of hair, and give his reasons. But he cannot be permitted to swear that the hairs, all came from the same head.[3]

The same remarks apply to fibres of clothing. In a case cited by Dr. Taylor [4] "a razor was produced in evidence, with which it was alleged the throat of the deceased had been cut. I examined the edge microscopically, and separated some small fibres from a coagulum of blood, which, under a high mag-

[7] See supra, §§ 767, 777a; *Com.* v. *Sturtevant,* Appendix to Wharton, Homicide, 742; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311; Appendix to Wharton, Homicide, 725.

[8] *Com.* v. *Tolliver,* 119 Mass. 312.

[1] Apology for the Microscope, p. 24.

[2] *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401. See post, § 804.

[3] *Knoll* v. *State,* 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369; See 3 Wharton & S. Med. Jur. 4th ed. § 681.

[4] *Reg.* v. *Harrington,* Taylor's Med. Jur. by Reese, 286.

nifying power, turned out to be cotton fibres. It was proved that the assassin, in cutting the throat of the deceased while lying asleep, had cut through one of the strings of her cotton nightcap." Other cases are cited by the same author of woolen fibres thus being mixed with blood.[5]

§ 780. Indications as to whether marks on body were after death.—We have already had occasion to advert to cases in which injuries have been inflicted, either casually, or in order to evade a probable, though unfounded, suspicion of complicity, on a body after death.[1] Other cases may occur in which wounds are inflicted in order to heap on the dead frame marks of execration; and of these we have illustrations in the cases of dismemberment of corpses after collisions inflamed by intense party or social excitement. It may also appear that a person on whom certain wounds are visible died really from poison administered by himself. In all cases a causal relation between the wound and the death must be established.[2]

[5] See *Kennedy* v. *People*, 39 N. Y. 245.

[1] Supra, § 743.

[2] Wharton, Crim. Law, 8th ed. §§ 152 et seq. See Beck, Med. Jur. 7th ed. 766; supra, § 726; Best, Ev. 8th ed. 563; *Norkott's Trial*, 14 How. St. Tr. 1324; Gericht, Med. 307 (Dr. Casper).

Dr. Casper enumerated the following conditions as throwing light upon this question:

1. The condition in life and personal surroundings of the deceased, so far as they may be likely to impel to suicide.

2. Threats or intimations on the part of the deceased, that he harbors such a purpose; he being found in a room made fast from within, etc.

3. Of far more importance, however, is an examination of the body, its position, the clothing, etc.

Where death has been produced by shooting, the following circumstances require attention:

1. The position of the body. Many authors have advanced the opinion that when the body of a person who has been killed by shooting is found resting on the back, this fact is a sure indication of suicide, while other positions of the body indicate some previous struggle. From this Dr. Casper dissents.

2. Whether the weapon used be

§ 781. Indications whether wounds were homicidal or suicidal.—We have already incidentally observed that the character of the wound, together with the position of the deceased and the condition of his clothing, are to be considered for the purpose of determining whether the death was self-

found near the dead or not is a circumstance which, according to Dr. Casper, proves nothing, since in the case of suicide the weapon may be stolen away, and in case of murder, be left lying near the body in order to mislead. When the weapon is found, however, it often adds something to the probabilities of the case. As, for instance, if the weapon be old and rusty, or in very bad repair, it is not probable that such a one would be selected by a murderer for the execution of his purposes. So, too, if the weapon has exploded from being too heavily loaded, the fact would rather point to suicide, as the overcharge was probably inserted through ignorance, or else from a desire to make sure work. The ball should, of course, be compared with the barrel of the weapon. This is often impossible, as the ball frequently passes through the body; is sometimes mutilated, and slugs and buckshot are frequently used, which are adapted, of course, to barrels of all sizes. The matter, however, is not one of much importance, as the murderer who leaves a weapon lying by the body would be most apt to leave the identical one used.

3. The hands of the dead body, in some cases, help to solve the doubt. Where the pistol is found so firmly clinched in the hand that the fingers must be sawed off in order to get it loose, this is an infallible mark of suicide. In cases, also, where the fingers are thus broken, or where the skin of the hand is thus injured, these are, generally, indications of suicide, although sometimes they may point to a previous struggle with the murderer. Where the hands are blackened by powder being burnt into them, this affords a strong probability of suicide, unless there is reason to believe that the discoloration was produced at some other time, and not by the shot which caused death. This case, however, is not to be confounded with that grayish-black color sometimes given to the hands by working in metal, which latter may be washed off, while the former remains fast. It is no negative evidence against the fact of suicide that the hands should be entirely free from this discoloration. Gloves may have been worn which have afterwards been stolen from the body; or the hands may not have been directly employed in firing the weapon; and, in fact, with percussioned firearms no such discoloration is apt to be received except where the instrument is awkwardly used. So, also, injuries to the hand are not apt to occur ex-

inflicted, or the work of another person.[1] In addition to the points already noticed,[2] the question of motive is to be considered. Was the party on whom the injuries were inflicted likely to have caused them by his own hand? 1. Would it have sheltered him from impending prosecution could he make it appear that he was robbed after a stout resistance? A bank officer, for instance, who believes himself to be a defaulter, may, to avoid discovery, concoct a plan by which all the appearances of a violent attack on his office may be exhibited, and may even inflict on himself mortal wounds.[3] 2. A family may be rescued from ruin by the falling in of a life insurance, and the party insured may for this purpose put an end to himself. 3. Wounds may be self-inflicted in order to make out a case against an alleged enemy, to whom the injury

cept through unskilful management, and hence, in the majority of cases of suicide, no such marks are found.

4. The direction followed by the ball, as we have seen, sometimes furnishes important evidence in the question of suicide. In cases, for instance, where the ball is found to penetrate from behind, or to run downwards, it may often be seen that suicide cannot have been possible. If the barrel of the pistol has been placed in the mouth and then fired, the probability is strongly in favor of suicide. In the great majority of cases, however, the question must be left doubtful so far as its answer depends upon an examination of the body. See supra, § 771. The most that the physician can say, usually, is that the probabilities are greater or less, as the case may be, in favor of suicide, or that there is nothing inconsistent with the fact of suicide.

5. Where the throat is cut in suicide, the wound runs commonly from left to right, although the opposite may sometimes occur. In many cases, it is impossible to trace the course of the wound, and, sometimes, to determine which, among many wounds, proved the mortal one. When none of the above-mentioned circumstances render the case in hand a plain one, the physician can give only an opinion as to the greater or less probability of suicide; and in many cases, he cannot safely go farther than to say that he finds nothing inconsistent with the supposition that the death is that of a suicide.

[1] See 3 Wharton & S. Med. Jur. 1905, 5th ed. 236; 1 Tidy, Legal Med. Jur. 1883, p. 65.

[2] Supra, § 776.

[3] See *Barron's Case*, cited supra, § 726.

is to be imputed. 4. To avoid military or other duty similar devices may be resorted to. 5. A person morbidly craving sympathy or desiring to produce a sensation may subject himself, in order to gratify this yearning, to great physical discomfort, to wounds, to dismemberment, and to fastings or even poisonings likely to produce death. 6. In all cases the presumption of love of life throws the burden of proof on those setting up suicide.[4]

§ 782. Inferences in hanging.—Hanging, as is noticed by Dr. Casper,[1] is most frequently resorted to by suicides, suffocation rarely, and throttling, perhaps, never. It would be very difficult to hang a person in full life and strength against his will, and in such cases the body would almost certainly show the traces of a previous struggle, while murder may easily be effected by throttling or suffocation. It must be observed in this connection, however, that certain red or reddish-yellow and brown spots upon the face, neck, breast, etc., may be nothing more than the results of a rough handling of the body subsequent to death, and are not to be mistaken for marks of a struggle during life. As regards the position in which the body is found, there is no position, whether it be that of a person suspended in the air, or with the feet touching the ground, or in a sitting or kneeling posture, or lying obliquely on the floor, etc., which precludes the supposition of suicide, since cases of undoubted suicide are quoted in which each of these positions has been observed. On the other hand, the situation of the body may sometimes clearly indicate suicide, as where it is found hanging high up in a tree.

Post-mortem examinations, according to the same high authority, can never decide the question whether strangulation

[4] Supra, § 726; Wharton, Ev. § 1247; *People* v. *Messersmith*, 61 Cal. 246.

[1] Gericht, Med. 1867 ed. p. 518; 3 Wharton & S. Med. Jur. 1905, 5th ed. §§ 354 et seq.

was the actual cause of death, except where appearances are found which belong exclusively to such cases, as erection or swelling of the penis, emission of semen, suggillations on the neck, and tearing of the muscles of the neck.

§ 783. Inferences in drowning.—Dr Casper states the points in reference to drowning as follows:[1] The question which arises first is whether death was actually produced by drowning, or whether the body was thrown into water subsequently to death. This latter often happens in the case of young infants. It may also be possible that suicide has been committed by some other means even when the body is found in water; as the party may have inflicted some mortal wound upon himself at the water's edge, or while standing in the water. In these cases an examination of the body will show that death was produced by some other means.

Injuries found upon the dead body can seldom be relied on as showing violent treatment by another person. These injuries may have been produced by the party himself in an attempt at suicide, and drowning have been afterwards resorted to. Or they may have been produced by striking against some object in the act of drowning. Or they may have been caused by the body, after death, coming in contact with floating ice, stays of a bridge, a ship's rudder, or other colliding objects. Where the process of decomposition is considerably advanced, it will be very difficult to distinguish between the appearances which result from decomposition, and suggillations produced by violence done to the living body, and here even experienced physicians may be deceived. In this, as in all other cases, some light may be thrown upon the question by the circumstances attending the particular case. As, for instance, where the body is naked, and the season a proper one

[1] Gericht, Med. p. 580. See 3 Wharton & S. Med. Jur. 1905, 5th ed. §§ 365 et seq.

for bathing, the probability will be accidental drowning; and so when the deceased was a person whose business was on the water. On the other hand, traces of blood upon the shore, torn clothing, articles of clothing belonging to another person, may indicate probable murder.

Whether the water in which the body is found is deep or shallow, a dirty pond or fresh pool, may serve to throw light upon the question; although it may sometimes happen that a drunken, feeble, or epileptic person may be drowned in shallow water or in a ditch or fetid pond.[2]

§ 783a. Physical experiments as a basis for inferences. —While testimony is always admissible as to the instrument used, its condition, its position, its ownership, and also as to the clothing, marks upon the body, the number of wounds, and other indications on the injured party, so that inferences may be drawn as to the question of what produced the effects, if the conditions and circumstances in other instances are similar to those in the concrete case, testimony obtained by experiments has consistently received the sanction of the courts as a basis for inference as to the facts that produced the results in the concrete case.

Evidence from experiments, however, should be received with the greatest caution. It is admitted without question that no two experiments of the same kind and under the same conditions will produce absolutely identical results, but the results are so substantially similar that mankind accepts the results as a basis upon which it acts in the complex affairs of life, and by which conduct is measured.

But the cautions to be observed are that, unless the experiments are shown to have been made under essentially the same conditions of the concrete case, the tendency is to confuse and

[2] See 3 Wharton & S. Med. Jur. 1905, 5th ed. § 378.

mislead the jury.[1] But, limited by this caution, the general rule is that testimony obtained by experiments under substantially the same circumstances or conditions as pertained in the concrete case are admissible as a basis for an inference to be drawn by the jury and applied to the circumstances or conditions of the offense on trial, and this is illustrated in the following rulings:[2]

IV. Inferences from Liability to Attack.

§ 784. Rapacity, old grudge, jealousy.—Liability to attack may be assigned ordinarily to one or more of the following causes, any one of which may be the object of indicatory proof:[1] 1. Rapacity, excited by the possession of money or valuable articles. 2. Special obnoxiousness to certain desperate parties. 3. An old grudge, or similar cause, such as a previous quarrel.[2] 4. Jealousy. In the first of these cases the questions arise whether the fact that the deceased was in the possession of money, particularly if the amount be consid-

[1] *Lake Erie & W. R. Co.* v. *Mugg,* 132 Ind. 168, 31 N. E. 565; *Chicago, St. L. & P. R. Co.* v. *Champion,* — Ind. —, 23 L.R.A. 861, 32 N. E. 874; *State* v. *Justus,* 11 Or. 182, 50 Am. Rep. 470, 8 Pac. 337, 6 Am. Crim. Rep. 511.

[2] *Hisler* v. *State,* 52 Fla. 30, 42 So. 692; *State* v. *Cater,* 100 Iowa, 501, 69 N. W. 880; *State* v. *Nowells.* 135 Iowa, 53, 109 N. W. 1016; *Lillie* v. *State,* 72 Neb. 228, 100 N. W. 316; *State* v. *Asbell,* 57 Kan. 398, 46 Pac. 770; *Vaughan* v. *State,* 3 Smedes & M. 555; *Dillard* v. *State,* 58 Miss. 386; *Sullivan* v. *Com.* 93 Pa. 288; *State* v. *Nagle,* 25 R. I. 105, 105 Am. St. Rep. 864, 54 Atl. 1063; *Boyd* v. *State,* 14 Lea,161; *Moore* v. *State,* 96 Tenn. 209, 33 S. W. 1046; *United States* v. *Ball,* 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192. See also the following cases: *Cowper's Trial,* 13 How. St. Tr. 1162; *Rex* v. *Webb,* 1 Moody & R. 405, 2 Lewin, C. C. 196; *R.* v. *Salmon,* Pelham's Chronicle of Crime, 1891 ed. 11, 417.

[1] Supra, §§ 23–26.

[2] *State* v. *Hannett,* 54 Vt. 83, 4 Am. Crim. Rep. 38; *Pontius* v. *People,* 82 N. Y. 339; *State* v. *Brantley,* 84 N. C. 766; *State* v. *Morris,* 84 N. C. 756; *Coxwell* v. *State,* 66 Ga. 309; *Commander* v. *State,* 60 Ala. 1; *Preston* v. *State,* 8 Tex. App. 30; *Hubby* v. *State,* 8 Tex. App. 597.

erable, was known to anyone; and if so, to whom;[3] whether money was found on the corpse or was missing; whether there is evidence that any suspected party, suddenly and from an unexplained cause, became possessed of a large sum;[4] paid long-standing and pressing debts of considerable amounts, or largely increased his expenditures. Peddlers, especially itinerant vendors of jewelry and other valuable articles, are from this cause rendered peculiarly liable to attack, and it is of importance to inquire, in cases of this description, who was last seen in company with the deceased, or having any of the articles known to have been in his possession.[5]

To show that the motive was to get rid of an importunate creditor, it is admissible to introduce evidence showing that the deceased had a pecuniary claim on the defendant.[6] That the life of the deceased was insured for the benefit of the defendant has been also received in evidence as a motive for the homicide.[7]

It is also relevant to inquire whether the party charged was on bad terms with the party injured,[8] or was inflamed by any special animosity to a cause with which the latter was identi-

[3] See *State* v. *Crowley,* 33 La. Ann. 782.

[4] See supra, §§ 23, 24, 758 et seq.; *McConkey* v. *Com.* 101 Pa. 416; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; supra, § 762.

[5] Wills, Circumstantial Ev. 237–243. See *Lindsay* v. *People,* 63 N. Y. 143.

[6] *Hamby* v. *State,* 36 Tex. 523. See *State* v. *Edwards,* 34 La. Ann. 1012; Wills, Circumstantial Ev. 5th Am. ed. pp. 43, 44; Wharton, Crim. Law, 8th ed. § 121; *Com.* v. *Sturtevant,* Appendix to Wharton, Homicide, 742; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311; s. c. appendix to Wharton, Homicide, 725; *State* v. *West,* Houst. Crim. Rep. (Del.) 371.

[7] See 3 Wharton & S. Med. Jur. 1884, 4th ed. § 920; *Reg.* v. *Heesom,* 14 Cox, C. C. 40; *Hunter* v. *State,* 40 N. J. L. 495; *State* v. *West,* Houst. Crim. Rep. (Del.) 371; *Udderzook's Case,* 76 Pa. 340, 1 Am. Crim. Rep. 311.

[8] *State* v. *Hoyt,* 46 Conn. 330; *Pontius* v. *People,* 82 N. Y. 339; *Evans* v. *State,* 62 Ala. 6; *McAdory* v. *State,* 62 Ala. 154; *Myers* v. *State,* 62 Ala. 599; *Gray* v. *State,* 63 Ala. 66; *Marler* v. *State,* 68 Ala. 580; *Marnoch* v. *State,* 7 Tex. App. 269; *Powell* v. *State,* 13 Tex. App. 244.

fied.[9] In connection with this, evidence, as we have seen, is admissible of threats and declarations of hostile purpose, as well as of quarrels and alienations.[10] But it should always be remembered that there are few persons whose lives have not been at some time threatened; and that the cases where threats have been the mere expressions of transient anger are innumerable.[11] Nor is it likely that an intelligent assassin would embarrass himself by uttering threats in advance.

Jealousy, and the facts on which it rests, may always be put in evidence as throwing light on motive.[12]

V. Distinctive Inferences in Marital Homicides.

§ 785. Inferences from marital crimes.—Among the circumstances from which malice, in a killing by a husband of his wife, may be inferred, are adultery by either husband or wife, illustrating a desire to get rid of the marital relation;[1] and bigamy by either party.[2] Thus, where A, a husband, after an absence during which he was believed to be dead, returned

[9] *Murphy* v. *People,* 63 N. Y. 590; *Coxwell* v. *State,* 66 Ga. 309; *Hinds* v. *State,* 55 Ala. 145; *State* v. *Barnwell,* 80 N. C. 466; *Dumas* v. *State,* 62 Ga. 58; Wharton, Crim. Law, 8th ed. § 477.

[10] See supra, § 756; *Hendrickson* v. *People,* 1 Park. Crim. Rep. 406..

[11] Supra, § 756.

[12] Post, § 785. See *Com.* v. *Madan,* 102 Mass. 1; *McCue* v. *Com.* 78 Pa. 185, 21 Am. Rep. 7, 1 Am. Crim. Rep. 268; *Nelbit* v. *State,* 43 Ga. 238; *Everett* v. *State,* 62 Ga. 65; *Evans* v. *State,* 62 Ala. 6; *Walker* v. *State,* 63 Ala. 105; *Marler* v. *State,* 68 Ala 580; *Templeton* v. *People,* 27 Mich. 501; *State* v. *Lawlor,* 28 Minn. 216, 9 N. W. 698. See *Com.* v. *Abbott,* 130 Mass. 472; *St. Louis* v. *State,* 8 Neb. 405, 1 N. W. 371; *Gardner* v. v. *State,* 11 Tex. App. 265.

[1] Supra, § 51; *Com* v. *Costley,* 118 Mass. 2; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Binns* v. *State,* 57 Ind. 46, 26 Am. Rep. 48; *Weyrich* v. *People,* 89 Ill. 90; *Templeton* v. *State,* 27 Mich. 501; *State* v. *Rash,* 34 N. C. (12 Ired. L.) 382, 55 Am. Dec. 420.

[2] *State* v. *Green,* 35 Conn. 205; supra, § 51. See *Billingslea* v. *State,* 68 Ala. 486.

and found his wife married to B, and B, after an altercation and partial reconciliation, shot A, the marriage, absence, and second marriage were held admissible as facts from which to infer malice.[3] So it may be shown, as supplying a motive for the crime, that the deceased had assaulted the defendant's paramour in the defendant's company.[4] And it may always be shown as a basis for an inference that there was an infatuation for, or criminal relations with, other persons.[5]

§ 786. Inference from ill-treatment of wife by husband. —Long ill-treatment by husband of wife,[1] misconduct leading to a suit against him by his wife to compel good behavior,[2]

[3] *Com.* v. *Smith,* 7 Smith's Laws (Pa.) 696, 2 Wheeler, C. C. 80. See *Binns* v. *State,* 66 Ind. 428; supra, § 51; *Com.* v. *Abbott,* 130 Mass. 472.

[4] *State* v. *Lawlor,* 28 Minn. 216, 9 N. W. 698.

[5] *Littlejohn* v. *State,* 76 Ark. 481, 89 S. W. 463; *People* v. *Cook,* 148 Cal. 334, 83 Pac. 43; *Fearson* v. *United States,* 10 App. D. C. 536; *Morrison* v. *Com.* 24 Ky. L. Rep. 2493, 67 L.R.A. 529, 74 S. W. 277; *State* v. *Reed,* 50 La. Ann. 990, 24 So. 131; *State* v. *Stukes,* 73 S. C. 386, 53 S. E. 643; *Gallegos* v. *State,* 48 Tex. Crim. Rep. 58, 85 S. W. 1150; *State* v. *Bean,* 77 Vt. 384, 60 Atl. 807; *People* v. *Botkin,* 9 Cal. App. 244, 98 Pac. 861; *State* v. *Stratford,* 149 N. C. 483, 62 S. E. 882; *Davis* v. *State,* 54 Tex. Crim. Rep. 236, 114 S. W. 366; *Van Wyk* v. *People,* 45 Colo. 1, 99 Pac. 1009; *Reyes* v. *State,* 55 Tex. Crim. Rep. 422, 117 S. W. 152; *People* v. *Le Doux,* 155 Cal. 535, 102 Pac. 517; *Copeland* v. *State,* 58 Fla. 26, 50 So. 621; *People* v. *McMahon,* 244 Ill. 45, 91 N. E. 104; *People* v. *Droste,* 160 Mich. 66, 125 N. W. 87; *People* v. *Barobuto,* 196 N. Y. 293, 89 N. E. 837; *State* v. *Jones,* 86 S. C. 17, 67 S. E. 160; *Goode* v. *State,* 57 Tex. Crim. Rep. 220, 123 S. W. 597; *Porter* v. *State,* 173 Ind. 694, 91 N. E. 340; *Com.* v. *Howard,* 205 Mass. 128, 91 N. E. 397; *Newman* v. *State,* 58 Tex. Crim. Rep. 443, 126 S. W. 578; *Pannell* v. *State,* 59 Tex. Crim. Rep. 383, 128 S. W. 133. See *Wilson* v. *State,* — Tex. Crim. Rep. —, 129 S. W. 613.

[1] *State* v. *Watkins,* 9 Conn. 49, 21 Am. Dec. 712; *State* v. *Green,* 35 Conn. 203; *McCann* v. *People,* 3 Park. Crim. Rep. 272; *Costley* v. *State,* 48 Md. 175; *Stone* v. *State,* 4 Humph. 27; *State* v. *Langford,* 44 N. C. (Busbee, L.) 436; *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95. See *Binns* v. *State,* 57 Ind. 46, 26 Am. Rep. 48.

[2] *People* v. *Williams,* 3 Park. Crim. Rep. 84.

and violent quarrels between husband and wife,[3] are relevant to prove motive in cases of marital homicide; though, as instances of such quarrels are very numerous, generally expending their force in words, such proof is entitled to little weight unless connected in some way with the fatal wound.[4]

VI. Distinctive Inferences in Poisoning.

§ 787. Exact demonstration not required.—In the examination of alleged cases of poisoning, it is peculiarly important to keep in mind the rule that, to sustain a criminal conviction, guilt should be made out beyond a reasonable doubt.[1] 1. The supposed poison may have been an innocuous drug. 2. The giving of the poison may have been accidental, or it may have been an imprudent overdose of an opiate or other powerful remedy, self-administered. 3. The disease of which the deceased died may not have been induced by poison, since there are few symptoms attendant on poisoning which are not also attendant on certain types of natural disease.[2] 4. As to post-mortem observations, it is to be observed that substances supposed to be poison may have been the accumulation of overdosing by the deceased himself, or have been surreptitiously introduced into the body, or may be after all innocuous matter; or, if deleterious, may not have been the real cause of death. As to each of these points, however, there must necessarily be more or less doubt; as it can never, in other words, be demonstrated that a substance administered to

[3] *People* v. *Kern*, 61 Cal. 244.

[4] See *State* v. *Watkins*, 9 Conn. 49, 21 Am. Dec. 712; *State* v. *Green*, 35 Conn. 203; supra, § 51; *McCann* v. *People*, 3 Park. Crim. Rep. 272; *People* v. *Williams*, 3 Park. Crim. Rep. 84; *Poindexter* v. *Com.* 33 Gratt. 766; *Sayres* v. *Com.* 88 Pa. 291; supra, § 785, note 4.

[1] See *Rex* v. *Sawyer*, Wills, Circumstantial Ev. 182.

[2] See 3 Wharton & S. Med. Jur. (1884) 4th ed. §§ 784 et seq. Compare article by Dr. Doremus in 1 Crim. L. Mag. 293 (1880).

the deceased, or found in his body, actually caused his death, or that this substance was administered to him with the intention of killing him. On the other hand, we must recollect that there are countervailing considerations which enable us to determine the guilty intent with greater certainty in poisonings than in most other cases of violent homicide.[3] Certain kinds of poison are rarely purchased except for the object of destroying life. Most poisons leave behind them traces which indicate their action. If such poisons, not in ordinary family use, and not likely to have been mistaken for other innocent drugs, have been administered, it is difficult to avoid the inference of intent. And as poisonings are rarely single, there is usually a group of cases from which, should ignorance or mistake be set up, guilty knowledge and intent can be inferred.[4]

Where poison is administered unlawfully, and without a good intention, and death ensues, the law infers or presumes that the killing was intentional and voluntary, and with malice aforethought.[5] This inference prevails where the poison was administered unlawfully, with intent to do mischief, without

[3] Quintilian, Inst. Orat. lib. 5, c. 7, vers. fin. Taylor's Med. Jur. by Reese, 159. See 3 Wharton & S. Med. Jur. 4th ed. §§ 700, 716, et seq.; 3 Guy, Forensic Medicine, 404–407; Puccinotti, 222, 253; Lancet, Aug. 4, 1860, p. 119; *Reg.* v. *Palmer,* Taylor's Med. Jur. by Reese, 101; Pamphlet by Dr. E. S. Dana, published by Linn & Co. Jersey City, 1880.

[4] *Wharton's Case,* Taylor's Med. Jur. by Reese, 25; *Pitts* v. *State,* 43 Miss. 472; Wills, Circumstantial Ev. 180; 33 Am. Jur. 1; supra. § 52. Compare observations of Buller, J., in *Donellan's Case;* of Abbott, J., of Rolf, B., and of Parke, B., cited in Wills, Circumstantial Ev. 187–191. See *Reg.* v. *Geering,* 18 L. J. Mag. Cas. N. S. 215; *Blackburn* v. *State,* 23 Ohio St. 146; Wharton, Crim. Law, 8th ed. §§ 133, 161–166, 340.

[5] *State* v. *Wells,* 61 Iowa, 629, 47 Am. Rep. 822, 17 N. W. 90; *Johnson* v. *State,* 92 Ga. 36, 17 S. E. 974; *State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *State* v. *Wagner,* 78 Mo. 644, 47 Am. Rep. 131; *Sellick's Case,* 1 N. Y. City Hall Rec. 185; *State* v. *Town,* Wright (Ohio) 75; *Rupe* v. *State,* 42 Tex. Crim. Rep. 477, 61 S. W. 929; *Bechtelheimer* v. *State,* 54 Ind. 128.

reference to whether or not there was an actual intent to kill.[6] Malice is inferred where the poison is given for the purpose of committing a felony, even if there was no intent to kill, since the intent to commit the original wrong supplies the intent as to the wrong actually committed.[7] Thus, where poison is known to be deadly, and it is given without proper medical advice, it is strong proof of malice.[8] However, the inference or presumption of malice from poisoning is not conclusive, and, to sustain a conviction under such circumstances, it must be shown that the accused knew the dangerous character of the poison that resulted in the death;[9] and the accused may rebut this inference by showing that the poison was given for an innocent purpose, or in ignorance of the fact that it possessed injurious qualities,[10] or that it was heedlessly given, without unlawful intention.[11]

§ 788. Proof of poison in remains should not be received without proof of identity of remains.—It must be remembered that the mere presence of poison in a dead body does not prove the *corpus delicti,* unless it be shown, (1) that the remains were those of the deceased; and (2) that these remains had not been tampered with by strangers, and that the examination had been conducted in such a way as to exclude the hypothesis of the poison being introduced after exhumation.[1] Hence, in a Virginia trial for homicide by poisoning, the omis-

[6] *State* v. *Wagner,* 78 Mo. 644, 47 Am. Rep. 131; *State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *Rupe* v. *State,* 42 Tex. Crim. Rep. 477, 61 S. W. 929; *Johnson* v. *State,* 92 Ga. 36, 17 S. E. 974.

[7] *Rupe* v. *State,* 42 Tex. Crim. Rep. 477, 61 S. W. 929; *State* v. *Wagner,* 78 Mo. 644, 47 Am. Rep. 131.

[8] 2 Hale, P. C. 455; *People* v. *Kesler,* 3 Wheeler, C. C. 18; *Green* v. *State,* 13 Mo. 382; *Com.* v. *Norton,* 2 Boston, L. R. 241. See *State* v. *Leak,* 61 N. C. (Phill. L.) 450.

[9] *People* v. *Stokes,* 2 N. Y. Crim. Rep. 384.

[10] *Ann* v. *State,* 11 Humph. 159.

[11] *State* v. *Wagner,* 78 Mo. 644, 47 Am. Rep. 131.

[1] See supra, § 422.

sion to prove directly that the body analyzed was that exhumed was properly held fatal to the prosecution.[2]

§ 789. Inference from possession of poison by defendant.—Poison may be possessed by the defendant either in its manufactured state, or it may be prepared by him. In the latter case we may expect to find materials from which the poison could be concocted, drugs peculiarly or exclusively suited for the purpose of adulterating food, or receptacles fitted for the preserving of such articles. It may be also relevant to show that the accused was in the habit of making materials of this class, and that he was familiar or acquainted with the criminal purposes to which they might be made subservient. Such evidence may be admissible both for the prosecution and for the defense. For the prosecution it may be admissible for the purpose of showing that the defendant had in his hands the drugs by which the crime could be effected. For the defense it may be offered for the purpose of showing that the drugs were in his hands for innocent objects; or in the ordinary course of his business; or for domestic purposes. Of the last line of cases a common illustration is the claim that the poison was bought in order to kill rats. This, however, is a defense which is open to rebuttal by showing that the poison was not so used, or, if so used, was used only as a pretext.[1]

§ 790. Inference from position of deceased.—In those cases where poison acts instantaneously, some light may be thrown on the question by the position in which the body is found. The important medico-legal question, the rapidity with which death may occur after a fatal dose of prussic or hydrocyanic acid is discussed by Dr. Taylor[1] in his Treatise on

[2] *Com.* v. *Lloyd,* Wharton, Homicide, § 732. See 1 Crim. L. Mag. 293; *Hatchett* v. *Com.* 76 Va. 1026.

[1] *R.* v. *Higgins,* 14 London Med. Gaz. 896; Wharton, Crim. Law, 8th ed. § 345.

[1] Treatise on Poisons, Philadelphia, 1873, p. 565.

Poisons. Since the action from this poison is so very rapid, it is important to know the probable length of time the individual taking it, or to whom it was administered, was conscious and able to move of his own volition. Dr. Lonsdale [2] is authority for the statement that 1 dram of Scheele's acid (equal to about 2½ drams of the dilute acid of the U. S. P.) would affect the ordinary adult in one minute or less, and three or four times this dose would exert its influence within ten to fifteen seconds. Dr. Taylor cites the importance of this question in the case of Rex v. Freeman at the Leicester spring assizes, 1829. "The medical question at the trial was: Could this quantity of poison, 4½ drams of Scheele's solution, equal to about 11 fluid drams (about 40 c. c.) of a dilute hydrocyanic acid solution of the U. S. P., have been taken, and the deceased have retained consciousness and volition for a sufficiently long period to have performed these acts herself (corking the vial and placing the leather and string, which appeared to have gone round the neck of the bottle, in the chamber vessel). Five medical witnesses were examined, and the opinions of four of these were strongly against the possibility of the acts having been performed by the deceased. This strong medical opinion was set aside by circumstances, and the prisoner was acquitted."

It seems to have been assumed in the above case that the deceased placed the articles in the position after swallowing the poison. It would be more reasonable to assume that the act of volition was performed before swallowing the poison.

Position of the body could hardly afford a basis for an inference unless all the other facts as to the kind of poison and the amount of the dose were known.

§ 791. Inferences from conduct.—As cumulative proof in such cases, it is admissible to prove that the defendant un-

[2] 8 Med. Gaz. p. 759. See Whar ton & S. Med. Jur. 5th ed. § 422.

necessarily forced himself into contact with the deceased, or out of sphere of his usual duties or habits tried to administer meat or drink to the deceased. It may, under such circumstances, be important to go far back, for the purpose of discovering who prepared the meats or had access to the dishes, and such evidence is clearly admissible. There are many cases where it may not be out of place to inquire whether any members of the deceased's family were observed unaccountably to abstain from the dish previously poisoned, particularly if it belonged to the usual meal of the family, or was a favorite of the deceased; whether there was any attempt to prevent others from partaking of it, or to dissuade the deceased from abstaining from such food; and particularly, whether there was any effort to prevent a post-mortem examination, or to hide or destroy any remaining portions of the food or drink of which the deceased partook, or any of the vessels containing them; or whether there was an effort to throw unreasonable obstacles in the way of the employment of a competent physician during the illness of the deceased.[1]

§ 792. Duration of working of poison.—It used to be held that there were certain poisons which would not operate fatally for months, or even for years after their administration. Under such circumstances, prosecutions were maintained on the Continent of Europe for poisonings in which the death did not occur till years after the alleged guilty act.[1] Under our own law it is necessary, in order to sustain a prosecution for homicide, that the death should have occurred within a year and a day from the injury inflicted.[2]

[1] Supra, § 748. See 2 Mitter. Deut. St. § 124.

[1] See Amos's Great Oyer, 347; 3 Wharton & S. Med. Jur. §§ 784 et seq.

[2] Wharton, Crim. Law, 8th ed. § 312.

§ 793. Duration of sickness as indicating poison.—If it be assumed that certain poisons have a stated time to run, it may be argued, in cases in which such poisons are alleged to have been administered, that unless the deceased's illness corresponded with such period, the inference of poisoning is negatived. But the conflict of expert testimony on this point is too great to sustain any definite conclusion; and if it should appear that the deceased was poisoned and died of poison, the length of his illness within the limitation above given is immaterial.[1]

§ 794. Inference of malice in poisoning.—Malice in poisoning cases depends upon two conditions: First, the design must be wickedly to take life or inflict bodily hurt. A physician may administer a dangerous medicine either discreetly or negligently. In the first case, where the drug is administered in order to save life, and the patient, notwithstanding that the physician exercises the diligence usual to good physicians in his circumstances, dies from the medicine, there is no criminal liability. In the second case, where the drug is administered negligently, and the patient dies of the drug, the person administering the drug is guilty of manslaughter.[1] To constitute malice, therefore, in order to convict of murder, there must be an evil intent to take life or inflict some grievous bodily harm. But this is not all. There must be a knowledge of the dangerous character of the poison, and it must be actually dangerous. A may administer a supposed enchanted, but innocent, potion to B, with intent to kill B; but this will not be administering poison. On the other hand, when the poison is known by the defendant to be deadly, his administering it

[1] *Reg.* v. *Russell*, Taylor's Med. Jur. by Reese, 99. See 2 Wharton & S. Med. Jur. 4th ed. §§ 5 et seq.; 3 Wharton & S. Med. Jur. 4th ed. §§ 784 et seq.

[1] Wharton, Crim. Law, 8th ed. §§ 362–368.

without proper medical advice is strong proof of malice. If the poison be administered negligently, the case is manslaughter.[2]

Whether other poisonings are admissible to rebut defense of accident has been already discussed.[3] In any view, after due ground laid, it is admissible to prove motive such as would prompt the guilty act.[4]

VII. Inferences from Extrinsic Indicatory Proof.

§ 795. In general.—In another work, inferences of this character, so far as concerns questions of identity, are examined at length.[1]

It should be observed that indications such as these, if relevant, go to the jury for what they are worth.[2] Thus, it has been held admissible to put in evidence a memorandum made in pencil in the pocketbook of the accused, and this without proof of handwriting.[3]

§ 796. Inferences from footprints and other marks on soil.—The character of footprints leading to the scene of murder, and their correspondence with the defendant's feet, may be put in evidence in cases when the defendant's agency is disputed.[1]

[2] Wharton, Crim. Law, 8th ed. § 345.

As to presumption of malice from killing, see note in 4 L.R.A. (N.S.) 934.

[3] Supra, § 50.

[4] *Templeton* v. *People*, 27 Mich. 501.

[1] 3 Wharton & S. Med. Jur. 4th ed. §§ 847 et seq.

[2] Supra, §§ 24, 764, et seq.; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

[3] *Whaley* v. *State*, 11 Ga. 123. But see supra, § 682.

[1] *Com.* v. *Pope*, 103 Mass. 440; *Murphy* v. *People*, 63 N. Y. 590; *State* v. *Graham*, 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182; *State* v. *England*, 78 N. C. 552; *Jones* v. *State*, 63 Ga. 395; *Campbell* v. *State*, 23 Ala. 44; *Young* v. *State* 8 Ala. 569. See 3 Wharton & S. Med. Jur. 1884, 4th ed. § 672; *State* v. *Moelchen*, 53 Iowa, 310, 5 N. W. 186; Cf. *Meyers* v. *State*,

Such evidence is not by itself of any independent strength,[2] but is admissible with other proof as tending to make out a case.[3] The measurement of the tracks may be made by a person not an expert, and without notice to the defendant, and his opinion as to their correspondence is admissible.[4]

When the question of adaptation of the foot to tracks is at issue, and where, at a preliminary hearing before a magistrate, a party under suspicion was compelled to allow his foot to be placed in the track, it was held that the results of the experiment could afterwards be detailed on trial.[5] But he cannot be compelled to place his foot in clay for experimental purposes during the final trial.[6] The defendant, also, is entitled to show that his feet do not correspond to the alleged footmarks, and that he offered to try his feet on the tracks.[7]

The following qualifications are to be kept in mind when considering indications from footprints:

1. Rapidity of movement affects the character of the print. Hurried motion slurs and breaks the edges; and the print of a person running, resting as he does mainly on the ball of the foot, is smaller and more circular than that of a person walking. The print of a person walking, also, is smaller than that of a person standing.

2. The shape of the shoe has much to do with the print. Bevelled edges produce a smaller print than edges which slope outwards. Nailed shoes, also, have a different impress from

14 Tex. App. 35; supra, §§ 315, 458, 757; *Campbell* v. *State*, 55 Ala. 80; *People* v. *Billings*, Saratoga, 1878.

[2] *Reg.* v. *Britton*, 1 Fost. & F. 354.

[3] Wells, J., *Com.* v. *Sturtevant*, Appendix to Wharton, Homicide, 742; Will's, Circumstantial Ev. p. 122.

[4] *State* v. *Reitz*, 83 N. C. 634; *State* v. *Morris*, 84 N. C. 756.

[5] *State* v. *Graham*, 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182; *Walker* v. *State*, 7 Tex. App. 246, 32 Am. Rep. 595.

[6] *Stokes* v. *State*, 5 Baxt. 619, 30 Am. Rep. 72; supra, § 312.

[7] *Bouldin* v. *State*, 8 Tex. App. 332.

stitched shoes; and a foot when clothed in a coarse shoe necessarily leaves a larger print than a foot with a shoe which is neat and close fitting. But none of these indications are of value unless sustained by proof that the shoe in question was worn by the accused at the particular time.

3. In sand, from the falling in of the edges, the print is smaller than in clay; and in moist sand the distinctive features of the print rapidly vanish.

4. Peculiarities of gait have a good deal to do with footprints. Some persons habitually drag their feet on the ground; a limping gait makes alternate prints peculiarly deep; some persons bear chiefly on the heel, others on the ball of the foot.

5. Casts are unreliable unless several can be taken.[8]

6. The measurements or casts, to be reliable, must have been taken when the prints were fresh.[9]

7. Marks on soil over which a body has been dragged may be detailed to the jury for the purpose of showing the character of the transaction.[10]

§ 797. Place of crime and jury view.—When there is an inspection of the scene of guilt, it must be shown what changes, if any, have taken place since the guilty act.[1] In most jurisdictions the jury may be taken to view the premises,[2] but the visit must be in the presence of the accused.[3] The view may be granted after the judge has summed up the case.[4] If a part of the jury are allowed to go by themselves to the view, this is error.[5]

[8] 1 Tidy, Legal Med. Jur. 1883, p. 176.

[9] *Ulrich* v. *People,* 39 Mich. 245.

[10] *McCann* v. *State,* 13 Smedes & M. 471.

[1] *State* v. *Knapp,* 45 N. H. 148.

[2] See Gen. Stat. chap. 172, § 9; *Com.* v. *Webster,* 5 Cush. 298; *Chute* v. *State,* 19 Minn. 271, Gil. 230; *Fleming* v. *State,* 11 Ind. 234; *Doud* v. *Guthrie,* 13 Ill. App. 659.

[3] *State* v. *Bertin,* 24 La. Ann. 46. See *State* v. *Ah Lee,* 8 Or. 214.

[4] *Reg.* v. *Martin,* L. R. 1 C. C. 378, 41 L. J. Mag. Cas. N. S. 113, 26 L. T. N. S. 778, 20 Week. Rep. 1016, 12 Cox, C. C. 204.

[5] *Ruloff* v. *People,* 18 N. Y. 179;

§ 798. Similar inferences in other cases.—The inferences we have just noticed are not limited to cases of homicide. Footprints are available as cumulative proof of identity in all cases where identity is to be proved. In the Tichborne Case, one of the strongest proofs against the claimant was that his foot could not in any way be made to fit the measurements used to make the shoes of Roger Tichborne. In an unreported New Jersey case of arson, elsewhere noticed, in which, while there were two tracks of horses' shoes coming from the place burned, there were no tracks going to it, it was a principal point against the accused that his horse was found, the day after the firing, with marks on his hoofs which showed that the shoes had recently been reversed, so that he could have ridden to the spot with shoes reversed, and from it with the shoes in the usual position.[1] Similar inferences may be drawn from other extrinsic facts.[2] Breaking, in burglary, for instance, may be shown by marks on the building broken into;[3] rape, by the condition of the place of offense, and of the dress of the accused;[4] abortion, by the possession of the mechanism of the crime, and by traces on the party injured of wounds from such mechanism;[5] arson, by the possession of means of ignition and by the traces of combustion, as well as from other burnings;[6] robbery, by the violence done to the property seized, as well as to the clothes and person of the prosecutor;[7] malice, in malicious mischief,

Eastwood v. *People*, 3 Park. Crim. Rep. 25. See supra, § 545; *State* v. *Jerome*, 33 Conn. 265; *Reg.* v. *Heseltine*, 12 Cox, C. C. 404.

[1] *People* v. *How*, 2 Wheeler, C. C. 412; 3 Wharton & S. Med. Jur. 4th ed. §§ 836, 857.

[2] See 3 Wharton & S. Med. Jur. 4th ed. 1884, §§ 817 et seq.

[3] Post, § 799; Wharton, Crim. Law, 8th ed. § 759.

[4] Wharton, Crim. Law, 8th ed. §§ 566, 576a.

[5] Wharton, Crim. Law, 8th ed. § 598; post, § 799.

[6] Wharton, Crim. Law, 8th ed. §§ 826–831.

[7] Wharton, Crim. Law, 8th ed. §§ 849, 850.

by marks of peculiar malignity on the thing injured;[8] larceny, by facts indicating stealth and concealment.[9] But in all cases where conviction is sought on the ground that the defendant had opportunities for committing the crime, it must be remembered that proof of this class is of value only when offered either to anticipate or to rebut the defense that the defendant had no such opportunities. That a man could have done a wrongful act is, by itself, no sufficient proof that he did it.[10]

§ 799. Inference from inculpatory instruments.—As has been already observed, it is relevant to put in evidence any instruments or tools of crime in the defendant's possession, indicating preparations on his part to commit the suspected offense.[1] Nor is proof of the possession of such instruments excluded by the fact that it implicates the defendant in independent crimes.[2]

VIII. Physical Presumptions.

§ 800. Infants presumed incapable of matrimony.—Boys under fourteen, and girls under twelve, are by the English common law presumed incapable of matrimonial consent; and this presumption is irrebuttable. The same limit is prescribed by the Roman law, and by the Council of Trent.[1]

[8] Wharton, Crim. Law, 8th ed. §§ 1071, 1082c.

[9] Wharton, Crim. Law, 8th ed. §§ 895, 908, 923, 926.

[10] Starkie, Ev. 865; Best, Ev. 572.

[1] *Com.* v. *Wilson,* 2 Cush. 590; *Com.* v. *Gallagher,* 134 Mass. 29; *Com.* v. *Kahlmeyer,* 124 Mass. 322; *Com.* v. *Blair,* 126 Mass. 40; *Com.* v. *Levy,* 126 Mass. 240; *People* v. *Larned,* 7 N. Y. 445; *Robbins* v. *People,* 95 Ill. 175; *People* v. *Winters,* 29 Cal. 658; *People* v. *Hope,* 62 Cal. 291; supra, §§ 323-9, 314; *Marnoch* v. *State,* 7 Tex. App. 269; *Com.* v. *Brown,* 121 Mass. 69; *Com.* v. *Williams,* 2 Cush. 582, 583.

[2] Supra, §§ 39 et seq.; *State* v. *Wintzingerode,* 9 Or. 153; *Ruloff* v. *People,* 45 N. Y. 213.

[1] Wharton, Confl. L. § 47.

§ 801. Infants presumed incapable of crime.—Children under seven are presumed irrebuttably to be incapable of crime;[1] between seven and fourteen the presumption is rebuttable by proof that the defendant is *capax doli,* the burden of proving capacity being on the prosecution.[2] A boy under fourteen is presumed incapable of rape, as principal in the first degree.[3] Nor can he, according to the prevalent view, be convicted of an assault with intent to ravish.[4]

As an infant under seven is not *capax doli,* an action for false imprisonment lies for the arrest of such an infant under charge of felony.[5]

[1] 1 Hale, P. C. 19, 20, 26; 4 Bl. Com. 23; *Rex* v. *Giles,* 1 Moody, C. C. 166; *Marsh* v. *Loader,* 14 C. B. N. S. 535, 11 Week. Rep. 784; *Reg.* v. *Owen,* 4 Car. & P. 236; *People* v. *Townsend,* 3 Hill, 479; *State* v. *Goin,* 9 Humph. 175; *Godfrey* v. *State,* 31 Ala. 323, 70 Am. Dec. 494; *State* v. *Fisk,* 15 N. D. 589, 108 N. W. 485, 11 A. & E. Ann. Cas. 1061; *State* v. *Tice,* 90 Mo. 112, 2 S. W. 269; *State* v. *Davis,* 104 Tenn. 501, 58 S. W. 122; *Willet* v. *Com.* 13 Bush, 230; *Heilman* v. *Com.* 84 Ky. 457, 4 Am. St. Rep. 207, 1 S. W. 731; *State* v. *Doherty,* 2 Overt. 80; *State* v. *Yeargan,* 117 N. C. 706, 36 L.R.A. 196, 23 S. E. 153; *State* v. *Aaron,* 4 N. J. L. 231, 7 Am. Dec. 502.

For note on question of presumption of criminal responsibility of children, see 36 L.R.A. 196.

[2] *Reg.* v. *Smith,* 1 Cox, C. C. 260; *Com.* v. *Mead,* 10 Allen, 398; *Reg.* v. *Reeve,* 1 Green, Crim. L. Rep. 402; *Rose* v. *State,* 82 Ind. 344; *State* v. *Adams,* 76 Mo. 355, 4 Am. Crim. Rep. 392; *State* v. *Fowler,* 52 Iowa, 103, 2 N. W. 983; *Wagoner* v. *State,* 5 Lea, 352, 40 Am. Rep. 36; *State* v. *Toney,* 15 S. C. 409; *Angelo* v. *People,* 96 Ill. 209, 36 Am. Rep. 132; *Rex* v. *Groombridge,* 7 Car. & P. 582; *Reg.* v. *Jordan,* 9 Car. & P. 118; 1 Hale, P. C. 630; *Reg.* v. *Allen,* 1 Den. C. C. 364, Temple & M. 55, 2 Car. & K. 869, 18 L. J. Mag. Cas. N. S. 72, 13 Jur. 108, 3 Cox, C. C. 270.

[3] 1 Hale, P. C. 630; *Rex* v. *Eldershaw,* 3 Car. & P. 396; *Rex* v. *Groombridge,* 7 Car. & P. 582; *Reg.* v. *Phillips,* 8 Car. & P. 736; *Reg.* v. *Jordan,* 9 Car. & P. 118; *Hiltabiddle* v. *State,* 35 Ohio St. 52, 35 Am. Rep. 592.

[4] Wharton, Crim. Law, 8th ed. § 551; *Rex* v. *Eldershaw,* 3 Car. & P. 396; *State* v. *Sam,* 60 N. C. (1 Winst. L.) 300; *State* v. *Pugh,* 52 N. C. (7 Jones, L.) 61. See *Com.* v. *Green,* 2 Pick. 380; *People* v. *Randolph,* 2 Park. Crim. Rep. 213.

[5] *Marsh* v. *Loader,* 14 C. B. N. S. 535, 11 Week. Rep. 784.

§ 802. Identity inferable from name.—Identity of name is not by itself, when the name is common, and when it is borne by several persons in the same circle of society, sufficient to sustain a conclusion of identity of person. The inference, however, rises in strength with circumstances indicating the improbability of there being two persons of the same name at the same place at the same time, and when there is no proof that there is any other person bearing the name. Names, therefore, with other circumstances, are facts from which identity can be presumed.[1] Where a father and son bear the same name, the name, if used without any addition, is presumed to indicate the father.[2]

Inference of identity from name is a rule of convenience, rather than a presumption.[3]

§ 803. Presumption of continuance of appearance and voice.—Permanence in individuality is the basis of all our inferences as to identity. In order to make these inferences we assume two things: 1. That no two individuals are precisely alike, each individual having his perceptible *differentia*.[1] 2. That these distinctive features are not capable of voluntary change; and that he who possesses these features to-day may be inferred to have possessed them yesterday, and that he who possessed them yesterday may be inferred to possess them

[1] *State* v. *Kelsoe*, 76 Mo. 505. See *State* v. *Trice*, 88 N. C. 627; *McNamee* v. *United States*, 11 Ark. 148; *People* v. *Rolfe*, 61 Cal. 540; *People* v. *Snyder*, 41 N. Y. 397.

For note on identity of name as evidence of identity of person in criminal cases, see 4 L.R.A.(N.S.) 539.

[2] See Wharton, Ev. § 1273; *Shepherd* v. *People*, 72 Ill. 480; *Richardson* v. *People*, 85 Ill. 495; *People ex rel. Bush* v. *Collins*, 7 Johns. 549; *Graves* v. *Colwell*, 90 Ill. 612; *State* v. *Vittum*, 9 N. H. 519; *Hess* v. *Stockard*, 99 Minn. 504, 109 N. W. 1113.

[3] See *People* v. *Cline*, 44 Mich. 290, 6 N. W. 671; *Shuler* v. *State*, 125 Ga. 778, 54 S. E. 689; *Ex parte Long Lock*, 173 Fed. 208; *Dow* v. *Seely*, 29 Ill. 495.

[1] Prof. Bowen in Princeton Review, May, 1880, p. 334.

to-day.[2] The first of these assumptions—that of the apparent distinctiveness of all human beings, so that no two persons are precisely alike—is one of the axioms on which society rests. It may be possible that there are adults so precisely alike as to be indistinguishable even by those who know them best; but the cases of such supposed identity are so imperfectly substantiated that it is far more probable that the witnesses testifying were mistaken than that such similitude actually existed. There are cases, also, in which mimics have been able to assume for a short time the appearance and expression of others, or to obliterate their own peculiar features; but these deceptions can be maintained but for very brief periods, and vanish when tried by close tests. We have a right to hold, in fact, that it is an absolute law that each individual should have certain features assigned to him by which he is distinguishable from all others; and that these features, while subject to gradual modification by age, should yet retain their characteristics so as to be distinguishable for months, even under the most artful disguises.[3] The whole figure may be changed by dress; the hair may be cut off or dyed; yet the eyes, the nose, the mouth, the voice remain, each of which possesses traits which cannot be defaced by any means short of destruction. "The Trimmer," says Macaulay, when narrating, in a striking passage, the arrest of Jeffreys, "was walking through Wapping, when he saw a well-known face looking out of the window of an alehouse. He could not be deceived. The eyebrows, indeed, had been shaved away. The dress was that of a common sailor from Newcastle, and black with coal dust; but there was no mistaking the savage eye and mouth of Jeffreys." But the face is not the only test. Voices are equally distinguishable, and their distinguishability

[2] Post, § 816. See 3 Wharton & S. Med. Jur. 1884, 4th ed. § 660; *Mixon* v. *State*, 55 Miss. 525.

[3] See *Brown* v. *Com.* 76 Pa. 319.

has been made the basis of convictions in criminal courts.[4] A much more difficult point arises when we take up the question of the change of appearance by time. Undoubtedly, the presumption of continuance, which is now immediately before us, extends so far as to justify us in saying that a person will continue to look to-morrow, next week, or even next month, as he looks to-day. When we take longer periods, however, the presumption fades gradually away. All persons who have reached middle life, and who have been absent for years from their school or college companions, are aware what alterative effects ten or fifteen years have on the countenance, and how, after forty or fifty years, the features which once constituted individuality have acquired such new expressions as to defy recognition. It may be said that this is because of the weakened memory of the observer. But that there is a material and sometimes decisive change in the parties observed arises from the necessary action of time on the countenance, and is illustrated by photographs taken of the same person at different stages of life. We must remember, also, that, while two persons (*i. e.,* twins) may be undistinguishable except by near relatives at an early period of life, they diverge as they grow older, and gradually assume distinct types. We must therefore hold that the presumption of continuance, when invoked in questions of identity, cannot be extended further than to imply such a continuance of appearance as is subject to the usual modifications of time.[5]

§ 804. Cautions in applying this inference to deceased persons.—After death, the presumption of continuance of

[4] *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81; *King* v. *Donahue,* 110 Mass. 155, 14 Am. Rep. 589; *Brown* v. *Com.* 76 Pa. 319; *Harrison's Trial,* 12 How. St. Tr. 850. See 3 Wharton & S. Med. Jur. 1884, 4th ed. § 634.

[5] See supra, §§ 13, 312, 378; *People* v. *Williams,* 1 N. Y. Crim. Rep. 336; 3 Wharton & S. Med. Jur. 4th

appearance rapidly weakens.[1] Even when death is sudden, there is an immediate change of countenance; and we notice instantaneously not only the loss of expressions we associated with the living person, but the starting forth of new expressions, constituting heretofore unperceived likenesses with other members of the same family. From that moment "the effacing fingers" of time work rapidly.[2] There is but little continuity of appearance, and gradually all identification by expression is impossible. The eye, also, is gone; the mouth, even if the lips remain, retains no longer those indescribable yet unmistakable peculiarities which distinguished the individual when living. We must then fall back upon the more undefaceable portions of the frame; the size of the body, the shape of the skull, the indications the skeleton offers of age. The hair and the teeth, however, form the chief means of recognition. The hair is chiefly valuable in disproving alleged identity, as where gray hair is found on a body claimed to be that of a person whose hair at death was as yet auburn or black; and cases are known, such as those of Lucrezia Borgia and of Cromwell, in which identification was claimed by comparing hair taken from a body after death, with a lock taken a short time before death from the living person.[3] But the chief mode of identification when the features of the deceased have lost their shape is by the teeth. Peculiarities as to the teeth, though by no means conclusive, since many persons may have teeth of the same kind, form admissible modes of identification. And proof of this kind is strengthened by artificial marks on teeth, produced by dentistry; and may be made still more cogent by the production of dentists' casts, and by the testimony of dentists by whom particular operations were effected.[4]

ed. §§ 620, 639, 643 et seq.; article in 10 Cent. L. J. 123.

[1] See 3 Wharton & S. Med. Jur. 1884, 4th ed. §§ 627, 682, et seq.; Burrill, Circumstantial Ev. 681.

[2] See *Gray* v. *Com.* 101 Pa. 380, 47 Am. Rep. 733, cited supra, § 633.

[3] Supra, § 779.

[4] See 2 Wharton & S. Med. Jur. §§ 321, 1022; *Reg.* v. *Cheverton*, 2

To aid the issue of identity from peculiar characteristics of the body, it is competent to show marks upon the body,[5] a similarity of wearing apparel, and articles found with, or known to have been in possession of, the deceased,[6] or from documents found on the body.[7]

§ 805. Inference as to photographs.—We have already had occasion to observe that photographs, as well as pictures, are admissible, when duly verified, in order to identify both living and dead.[1] Their weight, however, when admitted, depends largely upon extraneous circumstances. Not only must they be verified, as has just been noticed, but due allowance must be made for the fact that of some persons good photographs are rarely taken; that photographs taken of the same person in different lights or under different influences often do not

Fost. & F. 833; *Lindsay* v. *People*, 63 N. Y. 143; *Murphy* v. *People*, 63 N. Y. 590; *Foster* v. *People*, 63 N. Y. 619; *Hamby* v. *State*, 36 Tex. 523; *State* v. *Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; supra, § 326; 3 Wharton & S. Med. Jur. 1884, 4th ed. §§ 702 et seq.; *People* v. *Wilson*, 3 Park. Crim. Rep. 199; *Lowenstein's Case* (Albany, 1874, p. 332); *Goldborough's Case* (Warren's Miscellanies, Blackwood's ed. 1845, p. 93); *Com.* v. *Webster*, Bemis's Rep.; *Lindsay* v. *People*, 63 N. Y. 143. Compare 2 Wharton & S. Med. Jur. §§ 289, 1218. See supra, § 312; *Rex* v. *Clewes*, 4 Car. & P. 221; *State* v. *Williams*, 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; 3 Wharton & S. Med. Jur. 4th ed. §§ 627 et seq.

[5] *People* v. *Way*, 119 App. Div. 344, 104 N. Y. Supp. 277; *Sprouse* v. *Com.* 132 Ky. 269, 116 S. W. 344; *State* v. *Jones*, 153 Mo. 457, 55 S. W. 80; *Gray* v. *Com.* 101 Pa. 380, 47 Am. Rep. 733. See *McGill* v. *State*, 25 Tex. App. 499, 8 S. W. 661; *Lancaster* v. *State*, 91 Tenn. 267, 18 S. W. 777; *State* v. *Smith*, 9 Wash. 341, 37 Pac. 491; *Lindsay* v. *People*, 63 N. Y. 143.

[6] *Denver & R. G. R. Co.* v. *Gunning*, 33 Colo. 280, 80 Pac. 727; *Thornton* v. *State*, 113 Ala. 43, 59 Am. St. Rep. 97, 21 So. 356; *State* v. *Martin*, 47 S. C. 67, 25 S. E. 113; *State* v. *Williams*, 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; *Newell* v. *State*, 115 Ala. 54, 22 So. 572; *State* v. *Novak*, 109 Iowa, 717, 79 N. W. 465.

[7] *Bryant's Estate*, 176 Pa. 309, 35 Atl. 571; *Campbell* v. *State*, 8 Tex. App. 84.

[1] Supra, § 544. See 3 Wharton & S. Med. Jur. 1884, 4th ed. § 670.

resemble each other; and that photographs, as well as pictures, may be used as instruments of fraud. These considerations, however, go to the weight to be attached to the evidence when in. Of the admissibility of photographs of persons, supposing their fairness and relevancy to be established, and the negatives, if required, produced, there is no question.[2] Photographs of scenery, when verified, are also admissible, though dependent, even more than photographs of faces, on the standpoint from which they are taken, and the conditions of light and shade under which they were made. In the Tichborne perjury case, the defense put in evidence a photograph of a "grotto," the character of which was involved in the issue; and this photograph was so unreliable as to invoke the severe criticism of the court. But the question of accuracy is for the jury; the photograph, if proved to be fairly taken from the disputed object, is clearly admissible.[3]

Identification by picture has been already noticed.[4]

§ 806. Identification dependent upon opportunities of observation and accuracy of memory.—We have just noticed what may be called the objective conditions of identification; and of these the chief is that the object which it is sought to identify must have continued virtually the same during the time over which the witness's memory runs. We must, however, next remember, that the subjective conditions of identification—*i. e.*, those depending upon the identifying witness—

[2] Supra, § 544; *Ruloff* v. *People*, 45 N. Y. 213–225, s. c. 5 Lans. 261. See *Marcy* v. *Barnes*, 16 Gray, 161, 77 Am. Dec. 405; *Taylor Will Case*, 10 Abb. Pr. N. S. 300, 7 Alb. L. J. 50; *Schaible* v. *Washington L. Ins. Co.* 9 Phila. 136; 3 Wharton & S. Med. Jur. 670. Popular Science Monthly, April, 1875, p. 710; Morse, Famous Trials, 167; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311, Appendix to Wharton, on Homicide, 725.

[3] Morse, Famous Trials, 167.

[4] Supra, §§ 312, 544.

are to be considered before we come to a satisfactory result. These conditions are as follows:—

1. *Opportunities of observation.*[1] A witness having but a casual asquaintance with a party is entitled to comparatively little weight after a short lapse of time. On the other hand, the most intimate acquaintance in former years will not insure accuracy in face of a powerful bias. Lady Tichborne was determined to find her lost child, and this determination so swayed her as to lead her to recognize an imposter as her son.

2. *Tenacity of memory.*[2] Memory in children is more tenacious than with adults, but less discriminating, seizing often on features peculiarly evanescent. With adults a good deal depends upon natural gifts of discrimination, a good deal upon the object which we have in view in studying a face. Some men rarely forget a face they have once seen; and it used to be stated of General Scott that he recollected the faces, though not the names, of soldiers of his command with whom his acquaintance was remote and slight. And there is no question that the power of distinguishing countenances may be excited by a particular crisis. We recollect faces on which our attention has been concentrated in proportion to the vividness of the concentration. And police officers sometimes acquire the power of catching a glimpse in a moment that enables them to identify the person thus seen though afterwards skilfully disguised.[3]

3. *Capacity to make allowance for the changes of place and time.*—We do not readily recognize persons in places in which we do not expect them to be. And we must allow for the fact that when several years have passed, expressions familiar to us disappear, and unfamiliar expressions take their place.[4]

[1] Supra, § 377. See *Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

[2] Supra, § 378.

[3] See supra, §§ 373 et seq.

[4] See fully supra, §§ 13, 27, 373.

4. *Freedom from bias.*—The effect of bias, in this connection, has been already discussed.[5]

§ 807. Comparative weight of opinions.—That in question of identity we have after all to go back to opinion has been already shown. A witness says, "The person in question was A." This is opinion. A jury infers, from marks of identity or dissimilarity, that identity is proved or disproved. This, again, is opinion, but it is opinion more primary and more reliable than that of witnesses speaking from the impressions produced on themselves. And recollecting how easily opinions as to identity are affected by prejudice, we must conclude, when we rest on the opinions of witnesses as our authority, that the two great constituents of reliability are (1) familiarity with the person in controversy, and (2) freedom from personal or party prejudice.[1]

§ 808. Testing witness's memory as to identity of person.—A witness swearing to the identity of a person produced with a person whom the witness had seen on a prior occasion may be tested by presenting to him a third person, as to whose similarity with the person in controversy he may be asked. Mr. Amos[1] tells us that a woman, on a trial for burglary in which her house and person had been plundered, swore directly to the prisoner being the offender; but when

[5] Supra, § 377.

[1] *Tichborne Case* (*Reg.* v. *Orton*, special report) cited in L. R. 14 Q. B. Div. 170. See supra, §§ 13, 17; *Com.* v. *Cunningham*, 104 Mass. 545; 3 Wharton & S. Med. Jur. 4th ed. §§ 620, 643 et seq.; Amos's Great Oyer, 206; *Shields's Case*, 28 How. St. Tr. 647; Gentleman's Mag. Oct. 1772; Gentleman's Mag. Oct. 1764, p. 404; Gentleman's Mag. Oct. 1749, pp. 139, 185, 261; Spicer's Judicial Dramas, London, 1872, p. 114; 4 Chambers's Misc.; 8 London Med. Gaz.; *Muller's Case*, Pamph. New Orleans, 1846; *Aberdeen's Case*, 3 Wharton & S. Med. Jur. 4th ed. §§ 620 et seq.; *Devlin* v. *People*, 104 Ill. 504.

[1] Great Oyer, etc., 265. See supra, § 312.

the verdict of guilty was almost rendered, upon the sheriff suggesting that a man tried a day or two before had very much the same appearance, the latter was brought into court, and the prosecutrix immediately transferred her "conviction" from the one to the other. But there must be a direct presentation of such second person to the witness in presence of the court and jury. It is ordinarily inadmissible, in order to discredit proof of identity, to prove that there are other persons looking like the party in question within observation at the same time, such evidence being secondary. And it has been held in Massachusetts that, after evidence has been introduced by the defendant in a trial for murder that the person alleged to have been murdered was seen alive afterwards, the government cannot call witnesses to prove that, about the time of the alleged murder, a person so strongly resembling the person alleged to have been murdered, as to have been mistaken for him by persons well acquainted with the latter, was seen in the neighborhood where the murder was alleged to have taken place.[2]

§ 809. Presumption of death after unexplained absence of seven years.—By the English common law, as accepted generally in the United States, at the close of a continuous absence abroad of seven years, during which time nothing is heard of the absent person by those most likely to have heard of him if alive, death is presumed, as a presumption of law open to be rebutted by proof or counter presumptions.[1] But

[2] *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711.

[1] Wharton, Ev. § 1274; Wharton, Crim. Law, 8th ed. § 1691. See *Reg.* v. *Bennett,* 14 Cox, C. C. 45; *Newman* v. *Jenkins,* 10 Pick. 515; *Innis* v. *Campbell,* 1 Rawle, 373. Cf. articles in Irish Law Times, reprinted in 14 Cent. L. J. 287, 302, 345; 3 Wharton & S. Med. Jur. 1884, 4th ed. §§ 540 et seq.; *People* v. *Stokes,* 71 Cal. 263, 12 Pac. 71, 8 Am. Crim. Rep. 14; *Com.* v. *Thompson,* 6 Allen, 591, 83 Am. Dec. 653; *Scott* v. *McNeal,* 5 Wash. 309, 34 Am. St. Rep. 863, 31 Pac.

if there is no proof of unexplained absence, the mere lapse of time, even supposing that it would make the party eighty years old if living, is not by itself enough to prove death. It is otherwise when the party would have reached the limits beyond which life, according to ordinary observation, is improbable, though even when one hundred years is reached the conclusion is not absolute.[2] With other circumstances (*e. g.*, nonclaimer of rights, or exposure to peculiar sickness or other calamity,[3] with disappearance), death at a far earlier period may be inferred. The presumption in such cases is of fact, not of law.[4] And it is modified in modern times by the facility of traveling, which enables persons suddenly to escape observation by taking refuge in countries in which they may escape notice from prior acquaintances.[5]

§ 810. Presumption of continuance of life.—The presumption of continuance of life, which exists in cases where a person living a given time since is inferred to be living now, is necessarily variable, readily yielding to the presumption, already noticed, derivable from the expiration of a period beyond which the continuance of life is improbable.[1] And the presumption of innocence, as has been already noticed, may be invoked in criminal prosecutions, either to weaken or

873; *Crawford* v. *Elliott,* 1 Houst. (Del.) 465; *Adams* v. *Jones,* 39 Ga. 479; *Ryan* v. *Tudor,* 31 Kan. 366, 2 Pac. 797; *Cooper* v. *Shelton,* 97 Ky. 282, 30 S. W. 623.

As to necessity of inquiry to raise presumption of death from seven years' absence, see note in 28 L.R.A.(N.S.) 178.

[2] See *Keller* v. *Stuck,* 4 Redf. 294.

[3] *Lancaster* v. *Washington L. Ins. Co.* 62 Mo. 121.

[4] Wharton, Ev. §§ 1275, 1280; *Coye* v. *Leach,* 8 Met. 371, 41 Am. Dec. 518.

[5] See Shadwell, V. C., in *Watson* v. *England,* 14 Sim. 28, 8 Jur. 1062; *Re Corbishley,* L. R. 14 Ch. Div. 846, 49 L. J. Ch. N. S. 266, 28 Week. Rep. 536; comments in London Law Times, May 1, 1880.

[1] See *Bowden* v. *Henderson,* 2 Smale & G. 360; *Shown* v. *McMackin,* 9 Lea, 601, 42 Am. Rep. 680; supra, § 809; post, § 812.

strengthen the presumption that the life of a particular person continues.[2]

But where a party is shown to have been alive at a stated time, the presumption is that he still lives until the contrary is shown by testimony.[3]

§ 811. Inference as to date of death of absent person.—As we have just seen, if it is shown that a party who has gone abroad has not been heard from for seven years by those (if any) who, if he had been alive, would naturally have heard of him,[1] he is presumed to be dead, unless the circumstances are such as to account for his not being heard from without assuming his death.[2] But there is no presumption as to when,

[2] Supra, § 171; *Rex* v. *Twyning*, 2 Barn. & Ald. 386, 20 Revised Rep. 480; *Reg.* v. *Lumley*, L. R. 1 C. C. 196, 38 L. J. Mag. Cas. N. S. 86, 20 L. T. N. S. 454, 17 Week. Rep. 685, 11 Cox, C. C. 274. See *Reg.* v. *Jones*, 11 Cox, C. C. 358; Wharton, Crim. Law, 8th ed. §§ 1691 et seq.; *Rex* v. *Harborne*, 2 Ad. & El. 540, 4 Nev. & M. 341, 1 Hurlst. & W. 36, 4 L. J. Mag. Cas. N. S. 49; *Reg.* v. *Mansfield*, 1 Q. B. 449, 1 Gale & D. 7, 10 L. J. Mag. Cas. N. S. 97, 5 Jur. 505; *Lapsley* v. *Grierson*, 1 H. L. Cas. 498; *Kelly* v. *Drew*, 12 Allen, 107, 90 Am. Dec. 138; *Williams's Estate*, 8 W. N. C. 310; *Reg.* v. *Willshire*, 44 L. T. N. S. 222, 29 Week. Rep. 473, 14 Cox, C. C. 541, 45 J. P. 375, 50 L. J. Mag. Cas. N. S. 57, L. R. 6 Q. B. Div. 366; cited supra, § 171; *Squire* v. *State*, 46 Ind. 459; *Com.* v. *Jackson*, 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74; *Hull* v. *State*, 7 Tex. App. 593; *People* v. *Feilen*, 58 Cal. 218, 41 Am. Rep. 258; *Hyde Park* v. *Canton*, 130 Mass. 505; *Re Ackerman*, 2 Redf. 521.

[3] *Lewis* v. *People*, 87 Ill. App. 588; *Lowe* v. *Foulke*, 103 Ill. 58. See *Chicago & A. R. Co.* v. *Keegan*, 185 Ill. 70, 56 N. E. 1088; *Dworsky* v. *Arndstein*, 69 App. Div. 274, 51 N. Y. Supp. 597; *Smith* v. *Combs*, 49 N. J. Eq. 420, 24 Atl. 9.

[1] See *Wentworth* v. *Wentworth*, 71 Me. 72.

[2] Stephen, Ev. art. 99, adopted in *Davie* v. *Briggs*, 97 U. S. 628, 24 L. ed. 1086; *White* v. *Mann*, 26 Me. 361; *Eagle* v. *Emmet*, 4 Bradf. 117; *Merritt* v. *Thompson*, 1 Hilt. 550; *Clarke* v. *Canfield*, 15 N. J. Eq. 119; *Garden* v. *Garden*, 2 Houst. (Del.) 574; *Gibbs* v. *Vincent*, 11 Rich. L. 323; *Ross* v. *Glore*, 3 Dana, 189; *Puckett* v. *State*, 1 Sneed, 355; *State* v. *Henke*, 58 Iowa, 457, 12 N. W. 477. See *Burr* v. *Sim*, 4 Whart. 150, 33 Am. Dec. 50; article in 29 Alb. L. J. 347.

during the seven years, the party died;[3] and the time of death is to be collected inferentially (supposing the seven years have elapsed as above stated) from all the facts of the case.[4]

§ 812. Inference as to fact of death.—It has been incidentally observed that, aside from the general presumption of death arising from unexplained absence abroad for seven years, certain facts have been noticed by the courts as affording grounds on which inferences of death, more or less strong,

[3] *Re Phené,* L. R. 5 Ch. 150. See *Re Lewes,* L. R. 11 Eq. 236, L. R. 6 Ch. 356, 40 L. J. Ch. N. S. 602; *Lambe* v. *Orton,* 29 L. J. Ch. N. S. 286, 6 Jur. N. S. 61, 8 Week. Rep. 111; *Thomas* v. *Thomas,* 2 Drew. & S. 298, 11 L. T. N. S. 471, 13 Week. Rep. 225; *Re Benham,* 37 L. J. Ch. N. S. 265, 17 L. T. N. S. 180, 16 Week. Rep. 180, 36 L. J. Ch. N. S. 502, L. R. 4 Eq. 416, 16 L. T. N. S. 349, 15 Week. Rep. 741 (reversed); *Peck's Goods,* 29 L. J Prob. N. S. 95, 2 Swabey & T. 507; *Dunn* v. *Snowden,* 32 L. J. Ch. N. S. 104, 7 L. T. N. S. 558, 2 Drew. & S. 201, 11 Week. Rep. 160; *Doe ex dem. Knight* v. *Nepean,* 5 Barn. & Ad. 86, 2 L. J. K. B. 150, 2 Nev. & M. 219; *Nepean* v. *Doe ex dem. Knight,* 2 Mees. & W. 894, 7 L. J. Exch. 335, Murph. & H. 291, 2 Smith, Lead. Cas. 476, 492, 577.

In this case Lord Denman, in pronouncing the judgment of the court, observes: "Inconveniences may no doubt arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances." 2 Mees. & W. 913, 914. See *Hull* v. *State,* 7 Tex. App. 593.

For note as to time of death of one presumed to be dead after seven years' absence, unheard of, see 26 L.R.A.(N.S.) 294.

[4] *White* v. *Mann,* 26 Me. 370; *Smith* v. *Knowlton,* 11 N. H. 197; *Stouvenel* v. *Stephens,* 2 Daly, 319; *McCartee* v. *Camel.* 1 Barb. Ch. 456; *Whiting* v. *Nicholl,* 46 Ill. 241, 92 Am. Dec. 248; *Tisdale* v. *Connecticut Mut. L. Ins. Co.* 26 Iowa, 171, 96 Am. Dec. 136, 28 Iowa, 12; *State* v. *Moore,* 33 N. C. (11 Ired. L.) 70; *Spencer* v. *Roper,* 35 N. C. (13 Ired. L.) 333; *Hancock* v. *American L. Ins. Co.* 62 Mo. 26. See, as to survivorship, 3 Wharton & S. Med. Jur. 1884, 4th ed. §§ 721 et seq.

The return of a person presumed to have been dead, after an absence of over seven years during which he has not been heard from, avoids any acts done by his representatives without judicial authority. *Mayhugh* v. *Rosenthal,* 1 Cin. Sup. Ct. Rep. 492; supra, § 597; post, § 813.

may rest.[1] Among these facts may be noticed: Presence on board a ship known to have been lost at sea, the inference of death increasing with the length of time elapsing since the shipwreck;[2] exposure to peculiar perils to which the death may be imputed, if the party has not been subsequently heard from; ignorance, as to such person, after due inquiry, of all persons likely to know of him if he were alive; cessation in writing of letters, and of communications with relatives, in which case the presumption rises and falls with the domestic attachments of the party. Thus, death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears. It is scarcely necessary to say that evidence tending to rebut such presumption (*e. g.*, proof that the alleged deceased had been heard from by letter, or was personally warned in a litigated

[1] *Best*, Ev. 1870, § 409. See *Rex* v. *Twyning*, 2 Barn. & Ald. 386, 20 Revised Rep. 480; *Rex* v. *Harborne*, 2 Ad. & El. 540.

In the latter case Lord Denman said: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of facts, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. It may be said: Suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Proof, therefore, that the party was alive twenty-five days before the second marriage, was held to overcome the presumption of innocence; which, on the other hand, prevailed in *Rex* v. *Twyning* against proof that the decedent had been heard of alive one year previous to the marriage. To the same effect is *Lapsley* v. *Grierson*, 1 H. L. Cas. 498.

[2] See Cockburn, Ch. J., charge in *Reg.* v. *Orton*, cited in L. R. 14 Q. B. Div. 170; *Sillick* v. *Booth*, 1 Younge & C. Ch. Cas. 117, 11 L. J. Ch. N. S. 41; *Ommaney* v. *Stilwell*, 23 Beav. 328, 2 Jur. N. S. 1058; *Patterson* v. *Black*, 2 Park, Marine Ins. 919; *Gerry* v. *Post*, 13 How. Pr. 118; *Hudson* v. *Poindexter*, 42 Miss. 304. But see *Bowditch* v. *Jordan*, 131 Mass. 321.

suit) is always relevant for what it is worth. And in any view, death is a matter of inference, not of demonstration.[3]

§ 813. Letters testamentary not collaterally proof of death.—In all questions relating to the authority of the parties to whom letters testamentary or administrative are granted, such letters are prima facie proof of the death of the alleged decedent, and are conclusive in cases where there is "no plea in abatement denying the death of (the principal), and setting up the consequent invalidity of the letters of administration." Such letters, also, are conclusive as to parties and privies; but are nullities as to the alleged decedent, supposing he should turn up alive.[1] And between strangers, when the fact of death is proved, letters of administration to his estate are *res inter alios acta,* and are inadmissible.[2]

§ 814. Death without issue.—The question of death without issue is one of fact, to be determined on all the circumstances of the case.[1]

§ 815. Presumption of loss of ship from lapse of time.—The length of time after which it is to be presumed that a ship which has been unheard of is lost is to be determined by the inferences to be drawn from the concrete case. As a basis of proof, mere rumors are not sufficient; there must be reliable information. If there are any indications of foundering,—*e. g.,* a violent storm at a particular point where the ship was, her unseaworthiness, remnants of wreck,—the loss

[3] See Wharton, Ev. § 1277. See the following cases: *John Hancock Mut. L. Ins. Co.* v. *Moore,* 34 Mich. 41; *Carpenter* v. *Supreme Council L. H.* 79 Mo. App. 597; *The San Rafael,* 72 C. C. A. 388, 141 Fed. 270.

[1] Wharton, Ev. § 1278; *Lavin* v. *Emigrant Industrial Sav. Bank,* 9 Rep. 541.

[2] See supra, § 597; Wharton, Ev. § 1278; *Mayhugh* v. *Rosenthal,* 1 Cin. Sup. Ct. Rep. 492.

[1] Wharton, Ev. § 1279.

may be put earlier than would be permissible if the ship had not been heard of at all. But there must be proof of the ship having left port.[1]

IX. Presumptions of Uniformity and Continuance.

§ 816. Presumption of continuance of existing conditions.—When a particular condition of things (*e. g.*, coverture), which has the capacity of endurance, is shown to exist, the burden is on the party who seeks to prove its termination, supposing such termination be claimed to have occurred prematurely. It is sometimes said that in such cases the law presumes the continuance of the condition. Such, however, is not the case. Some conditions, such an infancy, are by their nature transient, while others, such as the possession of wealth, are subject to such vicissitudes that their continuance can be only contingently assigned. The question, as to all things liable to change, is not one of legal presumption, but of burden of proof.[1] And the conclusion is that when I once establish a juridical relation in itself not so limited as to time as to have expired before suit instituted, it is not necessary for me to prove the continuance of the relation. The burden is on my antagonist to prove that the relation has ceased to exist; though, as has just been said, there is no presumption of law against him which, when the evidence is all in, can outweigh any preponderance in such evidence in his favor.[2]

[1] See Wharton, Ev. § 815.

[1] See supra, §§ 320–326.

[2] See Heffter, App. to Weber, 280; *Scales* v. *Key*, 11 Ad. & El. 819, 3 Perry & D. 505; *Mercer* v. *Cheese*, 4 Mann. & G. 804, 5 Scott. N. R. 664, 2 Dowl. P. C. N. S. 619, 12 L. J. C. P. N. S. 56; *Price* v. *Price*, 16 Mees. & W. 232, 4 Dowl. & L. 537, 16 L. J. Exch. N. S. 99; *Lum* v. *State*, 11 Tex. App. 483.

It is in this sense that we are to understand the term "presumption," as used in the following, as well as in other, opinions: "A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to con-

We are therefore to understand that the presumption of continuance, as it is called, is simply a mode of determining on which party lies the burden of proof. In this sense we are justified in holding that the continuance of an existing condition is a presumption of fact, dependent for its intensity on the circumstances of the particular case. The burden is on the party seeking to show change, and if he fails to show it, he loses his suit.[3] But the question is one dependent on the relation of conditions to time. A state of war, for instance, existing yesterday, will in this sense be presumed to continue to-day; but it will not be presumed to continue after the lapse of ten years. I look at a block of houses in a large city, and I am justified in presuming that the same tenants that are in them to-day will be in them to-morrow. But it is otherwise when I look forward as far as twenty years. When the twenty years are past, it is not probable that a single one of these tenants will remain. Anger directed to a particular person, once roused, will be presumed to continue during hot blood, but not during the snows of many years. In fact, so far from

tinue. The fact that a man was a gambler twenty months since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So, of ownership and nonresidence." *Walrod* v. *Ball,* 9 Barb. 271; *Cooper* v. *Dedrick,* 22 Barb. 516; *Smith* v. *Smith,* 4 Paige, 432, 27 Am. Dec. 75; *McMahon* v. *Harrison,* 6 N. Y. 443; *Sleeper* v. *Van Middlesworth,* 4 Denio, 431; *Nixon* v. *Palmer,* 10 Barb. 175.

This analogy is fairly applicable to the present case, and justifies the admission of this evidence." Hunt, C., *Wilkins* v. *Earle,* 44 N. Y. 172, 4 Am. Rep. 655. See also *Reg.* v. *Lilleshall,* 7 Q. B. 158.

As to the inference of continuance of the arrangements of a "drinking saloon," see *Com.* v. *Collier,* 134 Mass. 203.

[3] See Wharton, Ev. § 1284.

"A state of things once set up must be presumed to continue unless there is evidence to displace that presumption." Coleridge. Ch. J., *Reg.* v. *Jones,* 48 L. T. N. S. 768 (a case of bigamy, when the life of the first wife was presumed to continue until the expiration of the seven years after she was last heard from. But the "evidence" referred to by Lord Coleridge, may, as the case shows, be a counter presumption, as well as an independent fact). See supra, § 810.

continuance being a legal presumption, the presumption in things dependent upon human conditions, in the long run, is the other way. Man never continueth in one stay. Of what will happen ten years hence, the only presumption that can be offered with anything like certainty is that there will be a change, at least in the actors in the drama, from what is happening to-day. The time required for the change depends upon the nature of the object. Fifty years ago the houses in one of our western cities did not exist. Ten minutes ago, the man whom I now see standing in front of one of those houses was in his countingroom, or in the cars. The presumption of wealth, which may be sought as the explanation of a murderous assault, may have obtained five years ago as to a man in good business, but cannot continue after a succession of commercial disasters. We cannot, therefore, speak of a legal presumption of continuance, when, if we are to draw any inference that would be permanently applicable, it would be that of change. And yet, for short calculations, we are justified in saying, as a means of adjusting the burden of proof, that the presumption is so far in favor of continuance that the burden is on a party who seeks to show a change from a condition which, when we last heard from it, was settled, and which, from the nature of things, would probably exist to-day unchanged. But the presumption, as it is called, even as to short calculations, is a mere inference that that which has been will be, all other things remaining the same.[4] This pre-

[4] "In a second class of cases, time will enter as a principal ground of similarity. When we hear a clock pendulum beat moment after moment, at equal intervals, and with a uniform sound, we confidently expect that the stroke will continue to be repeated uniformly. A comet having appeared several times at nearly equal intervals, we infer that it will probably appear again at the end of another like interval. A man who has returned home evening after evening for many years, and found his house standing, may, on like grounds, expect that it will be standing the next evening, and on many succeeding evenings. Even the continuous existence of an ob-

sumption extends to all established natural processes, among which that of human gestation may be specified.[5] And in the ordinary relations of life it is presumed that a certain course of conduct is followed in doing certain acts,[6] and also that acts in connection with said relations will be presumed to have occurred at the date and in the order or sequence usually followed.[7] But it is to be observed that continuousness is properly applied only to those facts, or to those relations, which are continuous in their nature.[8] Hence the rule that refers to continuousness must be stated with the qualification that the presumption is that the fact or relation once proved to exist continues as long as it is usual for facts or relations of such a nature to continue.[9] Obviously, then, the presumption would cease when the usual time for the continuance of the fact or relation has expired, and this brings a reasoning in an inverse order before such a presumption should be indulged, that is to say, there must first be evidence that a fact or relation existed, and then proof, or at least inference, from human experience, of the natural or usual length

ject in an unaltered state, or the finding again of that which we have hidden, is but a matter of inference to be decided by experience." Jevon's Principles of Science, i, 252.

[5] See 3 Wharton & S. Med. Jur. 4th ed. §§ 41 et seq.; *Baker* v. *State,* 47 Wis. 111, 2 N. W. 110; 2 Am. Crim. Rep. 606; *Cunningham* v. *State,* 65 Ind. 377; *Crawford* v. *State,* 7 Baxt. 41.

[6] *Shove* v. *Wiley,* 18 Pick. 558; *Holbrook* v. *New Jersey Zinc Co.* 57 N. Y. 616; *Stambaugh* v. *Lung,* 232 Ill. 373, 83 N. E. 922; *Richards* v. *Northwestern Coal & Min. Co.* 221 Mo. 149, 119 S. W. 953; *Shapiro* v. *Shapiro,* 125 App. Div. 608, 110 N. Y. Supp. 11; *State* v. *Truitt,* 5 Penn. (Del.) 466, 62 Atl. 790.

[7] *James River & K. Co.* v. *Littlejohn,* 18 Gratt. 53; *Graham* v. *O'Fallon,* 4 Mo. 601; *Ivy* v. *Yancey,* 129 Mo. 501, 31 S. W. 937; *Duncanson* v. *Kirby,* 90 Ill. App. 15; *Fitzgerald* v. *Barker,* 85 Mo. 13; *Hughes* v. *Debnam,* 53 N. C. (8 Jones, L.) 127.

[8] *Greenfield* v. *Camden,* 74 Me. 56. See *State ex rel. Coffey* v. *Chittenden,* 112 Wis. 569, 88 N. W. 587.

[9] See *Scott* v. *Wood,* 81 Cal. 398, 22 Pac. 871; *Toledo & W. R. Co.* v. *Smith,* 25 Ind. 288; *Martin* v. *Fishing Ins. Co.* 20 Pick. 389, 32 Am. Dec. 220.

of time incident to such relation, so that no general rule can be laid down as to the length of time, and it is therefore necessarily based upon the facts in each concrete case, at which time a working rule can be applied to determine the continuity of the presumption.

§ 817. Residence presumed to be continuous.—It has been also ruled as a presumption of fact, for the purpose, in like manner, of determining the burden of proof, that a party resides in the last place known to have been accepted by him as his residence, unless he has shown that he retains such residence no longer.[1] The same inference is applicable to the settlement of a pauper, and to domicil.[2] Yet, as we have seen, presumptions of this class are purely artificial. It is necessary to place a person who has wandered away somewhere; and we, therefore, place him in the spot where he was last heard from, though the very evidence that shows he was in it shows he has left it, because a residence in a particular place is presumed to continue until the contrary appears.[3]

§ 818. Occupancy presumed to be continuous.—Occupation and possession, for the like purpose, are inferred to be continuous; the inference varying with the person occupying, the thing occupied, and the place and period of occupation.[1] For the same purpose, also, ownership is presumed to continue until alienation.[2] It is sufficient, therefore, in

[1] *Ripley* v. *Hebron,* 60 Me. 379.

[2] Wharton, Ev. § 1285.

[3] *Daniels* v. *Hamilton,* 52 Ala. 105; *Nixon* v. *Palmer,* 10 Barb. 175; *Prather* v. *Palmer,* 4 Ark. 456; *Greenfield* v. *Camden,* 74 Me. 56; *Cover* v. *Hatten,* 136 Iowa, 63, 113 N. W. 470; *State ex rel. Phelps* v. *Jackson,* 79 Vt. 504, 8 L.R.A.(N.S.) 1245, 65 Atl. 657.

[1] *Smith* v. *Stapleton,* 2 Plowd. 426; *Winkley* v. *Kaime,* 32 N. H. 268; *Currier* v. *Gale,* 9 Allen, 522; *Rhone* v. *Gale,* 12 Minn. 54, Gil. 25.

[2] Wharton, Crim. Law, 8th ed. § 862; *Magee* v. *Scott,* 9 Cush. 148, 55 Am. Dec. 49.

cases of larceny, to prove that the goods stolen belonged a short time before the stealing to the alleged owner. The burden to prove alienation will be on the defense,[3] because the right to possession of goods or property is presumed to continue.[4]

§ 819. Habits presumed to be continuous.—Habits of individuals may come up for comparison in issues of identity, it becoming a material question whether a claimant has the characteristic traits of the person with whom he pretends to be identical. In such cases "habits are a means of identification, though with strength in proportion to their peculiarity." [1] Such admissibility rests on the fact that habits become a second nature, and that special aptitudes cannot readily be unlearned, special characteristics cannot readily be extinguished, special tricks of manner cannot readily be overcome.[2] But questions of identity [3] are an exception to the general rule, which is, that evidence of habit is inadmissible for the purpose of showing that a particular person did or did not do a particular thing. Another exception is that when a series of writings of a particular person are in evidence, a litigated writing imputed to him may be tested by comparison with the writings proved to emanate from him.[4] It has also, as we have seen,[5] been held admissible to prove habit or system in order to rebut the defense of accident, or to infer *scienter*. We have a right, again, to infer, as a presumption of fact, that mental conditions continue unchanged, unless there be reasons to infer

[3] Wharton, Crim. Law, 8th ed. § 862; *Magee* v. *Scott*, 9 Cush. 148, 55 Am. Dec. 49.

[4] *Smith* v. *Smith*, 11 N. H. 459.

[1] Agnew. Ch. J., *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311.

[2] See charge of Cockburn, Ch. J., in *Reg.* v. *Orton*, cited in L. R. 14 Q. B. Div. 170.

[3] *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311 (habits of intoxication).

[4] Supra, § 556.

[5] Supra, § 32.

the contrary. It is on this ground that we infer the continuance of sanity and of chronic insanity,[6] and of purposes once deliberately formed.[7] The habit, also, of a writer in using words in a particular sense, may be shown in certain cases of latent ambiguity.[8]

But the rule is that habits and customs once shown to exist are presumed to continue.[9]

§ 820. Marriage presumed to continue.—As between parties still living, marriage, once proved, is inferred to continue;[1] and, hence, when once established, its burdens and obligations will be regarded as existing until its dissolution be shown.[2] But such inference does not operate retrospectively, so as to lead to the conclusion that the parties who were married a year ago had been married for an indefinite period of time previously.[3]

Nor does a presumption prevail that a man or a woman was unmarried at a particular time because, at a previous time, this was his status.[4]

[6] See supra, § 730.

[7] Supra, §§ 734 et seq., 784.

[8] Wharton, Ev. § 962.

[9] *McCraw* v. *McCraw,* 171 Mass. 146, 57 N. E. 526; *Leonard* v. *Mixon,* 96 Ga. 239, 51 Am. St. Rep. 134, 23 S. E. 80.

[1] *Erskine* v. *Davis,* 25 Ill. 251; *Wilson* v. *Allen,* 108 Ga. 275, 33 S. E. 975; *Goodwin* v. *Goodwin,* 113 Iowa, 319, 85 N. W. 31; *Stoutenborough* v. *Rammel,* 123 Ill. App. 487; *Kentucky Stave Co.* v. *Page,* — Ky. —, 125 S. W. 170.

[2] Supra, § 810.

[3] *Murdock* v. *State,* 68 Ala. 567; *Johnson* v. *Johnson,* 170 Mo. 34, 59 L.R.A. 748, 70 S. W. 241; *Vought* v. *Williams,* 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; *Gibson* v. *Brown,* 214 Ill. 330, 73 N. E. 578.

See also *Killackey* v. *Killackey,* 156 Mich. 127, 120 N. W. 680.

[4] 9 Enc. Ev. p. 912; *Johnson* v. *Johnson,* 170 Mo. 34, 59 L.R.A. 748, 70 S. W. 241. Citing *Vought* v. *Williams,* 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; *Bennett* v. *State,* 103 Ga. 67, 68 Am. St. Rep. 77, 29 S. E. 919. See *Gibson* v. *Brown,* 214 Ill. 330, 73 N. E. 578.

See *Killackey* v. *Killackey,* 156 Mich. 127, 120 N. W. 680.

§ 821. Presumption as to solvency or insolvency.—Solvency [1] and insolvency, when established, are inferred to continue until the contrary is proved, or until from the lapse of time a change of condition is probable.[2] An adjudication of bankruptcy may, within a limited range of time, afford an inference of insolvency.[3]

§ 822. Presumptions as to foreign laws and foreign judgments.—States whose political origin is homogeneous are presumed to possess laws substantially the same. This presumption, however, does not extend to states whose jurisprudence springs from a different system, nor can we impute to a foreign jurisprudence idiosyncrasies we know to be peculiar to ourselves. But in any view, if we wish to prove a foreign law as distinguished from our own, we must prove such law as a fact.[1]

But in the absence of proof to the contrary, courts presume the law of another country [2] or of another state [3] to be the same as the law of the place of trial.

§ 823. Constancy of nature presumed.—What are called popularly the "laws of nature" may be inferred to be constant

[1] *Wallace* v. *Hull,* 28 Ga. 68.

[2] Wharton, Ev. § 821.

The presumption of insolvency from a return of *nulla bona* is elsewhere noticed. Supra, § 612. *Walrod* v. *Ball,* 9 Barb. 271; *Thornton-Thomas Mercantile Co.* v. *Bretherton,* 32 Mont. 80, 80 Pac. 10; *Adams* v. *State,* 87 Ind. 573; *Wachsmuth* v. *Penn Mut. L. Ins. Co.* 147 Ill. App. 510.

[3] *Safford* v. *Grout,* 120 Mass. 20; *Donahue* v. *Coleman,* 49 Conn. 464.

[1] Wharton, Ev. §§ 314 et seq. See *McKenzie* v. *Wardwell,* 61 Me. 136; *Com.* v. *Kenney,* 120 Mass. 387.

For presumption as to law of other state or country, see notes in 21 L.R.A. 471, and 67 L.R.A. 40.

[2] *Mittenthal* v. *Mascagni,* 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; *Daniel* v. *Gold Hill Min. Co.* 28 Wash. 411, 68 Pac. 884.

[3] This presumption obtains universally in all the states, in the absence of proof to the contrary.

until the contrary be proved.[1] The seasons, for instance, pursue, in the long run, a regular course, so that we may be entitled as a general rule to say that winter is cold and summer is warm; though this is open to proof that in an exceptional season the winter is comparatively mild or the summer is comparatively cool. Of this uniformity parties are supposed to have notice. It may be that a particular winter night may be so mild that a child might be exposed to it safely without shelter; but this will be no defense to a person negligently exposing a child on a winter night in such a way that it is seriously injured. It may be that a freshet may so swell a river that its shallows may be safely passed at low tide; but this will be no defense to a pilot, who without sounding runs his vessel aground on low tide, thereby negligently destroying life. It may be that an engine may, when left to itself, enter on the proper track; but this will be no defense to a switch tender who neglects his post, so that an engine is wrecked. It may be that the defendant was prevented from performing a duty incumbent on him by a storm; but if so this must be shown. Hence it is that *casus,* or the extraordinary interruption of natural laws, must be proved by the party averring such interruption.[2] In order, also, to permit inferences from certain natural conditions, these conditions must first be established.[3] But where the conditions are the same, evidence of systematic constant phenomena (*e. g.,* snow in one place to prove snow in another place in the immediate vicinity) is relevant.[4]

§ 824. Physical sequences to be presumed.—We are, therefore, to regard the ordinary sequences of nature as among the contingencies to be expected by reasonable men. Among

[1] Supra, § 37.

[2] See Wharton, Ev. 363.

[3] *Hawks* v. *Charlemont,* 110 Mass. 110. As to inferences from system, see §§ 32 et seq.; Mill's Logic, chap. 14.

[4] *Brooks* v. *Acton,* 117 Mass. 204. See supra, § 37.

these we may specify the falling of water from a higher to a lower level;[1] the spreading of fire in inflammable material;[2] the continuous movement of a railway train over the track, and the fact that the shock on meeting an obstacle is in proportion to momentum;[3] and the effect of water in extinguishing fire.[4]

§ 825. Presumptions from habits of animals.—It is also a presumption of fact that animals will act in conformity with their nature.[1] Thus, it is probable that cattle will stray;[2] that horses will take fright at extraordinary noises and sight;[3] and that dogs, proved to be ferocious, will do mischief when let loose in places where travelers pass.[4] The habits and temper

[1] *Collins* v. *Middle Level Comrs.* L. R. 4 C. P. 279, 38 L. J. C. P. N. S. 236, 20 L. T. N. S. 442, 17 Week. Rep. 929.

[2] L. 30. § 3; D. ad leg. Aquil.; *Tubervil* v. *Stamp*, 1 Salk. 13; *Filliter* v. *Phippard*, 11 Q. B. 347, 17 L. J. Q. B. N. S. 89, 12 Jur. 202; *Smith* v. *London & S. W. R. Co.* L. R. 5 C. P. 98; *Perley* v. *Eastern R. Co.* 98 Mass. 414, 96 Am. Dec. 645; *Higgins* v. *Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Calkins* v. *Barger*, 44 Barb. 424; *Gagg* v. *Vetter*, 41 Ind. 228, 13 Am. Rep. 322; *Hanlon* v. *Ingram*, 3 Iowa, 81; *Collins* v. *Groseclose*, 40 Ind. 414; *Averitt* v. *Murrell*, 49 N. C. (4 Jones, L.) 323.

[3] See *Reg.* v. *Pargeter*, 3 Cox, C. C. 191; *Caswell* v. *Boston & W. R. Corp.* 98 Mass. 194, 93 Am. Dec. 151; *Wilds* v. *Hudson River R. Co.* 29 N. Y. 315; *Jones* v. *North Carolina R. Co.* 67 N. C. 125.

[4] *Metallic Compression Casting Co.* v. *Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689.

[1] See *Carlton* v. *Hescox*, 107 Mass. 410; *Rowe* v. *Bird*, 48 Vt. 578.

[2] *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274, 42 L. J. Q. B. N. S. 147, 28 L. T. N. S. 406, 21 Week. Rep. 577.

[3] *Rex* v. *Jones*, 3 Campb. 230, 13 Revised Rep. 797; *Hill* v. *New River Co.* 18 L. T. N. S. 355; *Lake* v. *Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Jones* v. *Housatonic R. Co.* 107 Mass. 261; *Judd* v. *Fargo*, 107 Mass. 265; *People* v. *Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Congreve* v. *Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Loubz* v. *Hafner*, 12 N. C. (1 Dev. L.) 185; *Moreland* v. *Mitchell County*, 40 Iowa, 394.

[4] When the character of an animal comes into question, the general inference is that he will fol-

of animals, however, cannot be shown by proof of habits or temper of particular animals of the same species.[5]

Wild animals are presumed to be dangerous,[6] but there is no presumption that domestic animals are vicious.[7] A man is presumed to be the owner of animals kept on his premises;[8] and that a keeper knew of the vicious propensities of his dog is presumed from the fact that it was his custom to keep it chained during the day.[9]

§ 826. Inferences as to conduct of men in masses.— Taking men in bodies, and contemplating their action as a mass, there are certain incidents which may be regarded as probable, and which, under certain conditions, are presumable.[1] Thus, it is to be inferred that persons will be passing a thoroughfare in such numbers as to make it dangerous to discharge at random a gun towards such thoroughfare;[2] that a

low the natural bent of the species to which he belongs. See question discussed fully in Wharton on Negligence, §§ 923-925. But when the burden is on a party to prove a *scienter* in the owner of a mischievous animal, it is admissible to put in evidence particular facts (*Worth* v. *Gilling,* L. R. 2 C. P. 1; *Judge* v. *Cox,* 1 Starkie, 285, 18 Revised Rep. 769; *Kittredge* v. *Elliott,* 16 N. H. 77, 41 Am. Dec. 717; *Whittier* v. *Franklin,* 46 N. H. 23, 88 Am. Dec. 185; *Arnold* v. *Norton,* 25 Conn. 92; *Buckley* v. *Leonard,* 4 Denio, 500; *Cockerham* v. *Nixon,* 33 N. C. [11 Ired. L.] 269; *M'Caskill* v. *Elliot,* 5 Strobh. L. 196, 5 Am. Dec. 706) as well as general reputation (Wharton, Neg. § 924); but as to general reputation, see contra, *Heath* v. *West,* 26 N. H. 191.

[5] *Collins* v. *Dorchester,* 6 Cush. 396; *Hawks* v. *Charlemont,* 110 Mass. 110.

See, however, *Darling* v. *Westmoreland,* 52 N. H. 401, 13 Am. Rep. 55.

[6] *Scribner* v. *Kelley,* 38 Barb. 14.

[7] *Ward* v. *Danzeizen,* 111 Ill. App. 163; *Laverone* v. *Mangianti,* 41 Cal. 138, 10 Am. Rep. 269.

[8] *Bundschuh* v. *Mayer,* 81 Hun, 111, 30 N. Y. Supp. 622.

[9] *Warner* v. *Chamberlain,* 7 Houst. (Del.) 18, 30 Atl. 638; *Goode* v. *Martin,* 57 Md. 606, 40 Am. Rep. 448; *Buckley* v. *Leonard,* 4 Denio, 500.

[1] See Wharton, Neg. § 108.

[2] See *Rex* v. *Burton,* 1 Strange, 481; *People* v. *Fuller,* 2 Park. Crim. Rep. 16; *Triscoll* v. *Newark & R. Lime & Cement Co.* 37 N. Y. 637,

sudden alarm, resulting in injury, will be produced by a shock of any kind given to a crowd;[3] and that persons in fright will act instinctively and convulsively.[4] It is on this principle that persons inciting a riot are indictable for hurts which are the ordinary incidents of riots, and which follow in the particular riot such persons incite.[5]

X. Presumptions of Regularity.

§ 827. Marriage presumed to have been regular.—As we have elsewhere seen, when a man and woman have lived together as man and wife, and have been recognized as such in the community in which they lived, their marriage will be held prima facie conformable, so far as concerns its solemnities, with the practice of the *lex loci contractus*.[1] The infer-

97 Am. Dec. 761; *Sparks* v. *Com.* 3 Bush, 111, 96 Am. Dec. 196; *State* v. *Vance,* 17 Iowa, 138; *Bizzell* v. *Booker,* 16 Ark. 308.

[3] *Scott* v. *Shepherd,* 2 W. Bl. 892, 3 Wils. 403; *Guille* v. *Swan,* 19 Johns. 381, 10 Am. Dec. 234; *Fairbanks* v. *Kerr,* 70 Pa. 86, 10 Am. Rep. 664.

[4] *Reg.* v. *Pitts,* Car. & M. 284; *Adams* v. *Lancashire & Y. R. Co.* L. R. 4 C. P. 739, 38 L. J. C. P. N. S. 277, 20 L. T. N. S. 850, 17 Week. Rep. 884; *Sears* v. *Dennis,* 105 Mass. 310; *Coulter* v. *American Merchants' Union Exp. Co.* 5 Lans. 67; *Buel* v. *New York C. R. Co.* 31 N. Y. 314, 88 Am. Dec. 271; *Frink* v. *Potter,* 17 Ill. 406; *Greenleaf* v. *Illinois C. R. Co.* 29 Iowa, 47, 4 Am. Rep. 181.

[5] Wharton, Crim. Law, 8th ed. §§ 220, 1533.

[1] Supra, § 170; post, § 835; *Harrod* v. *Harrod,* 1 Kay & J. 15, 18 Jur. 853, 2 Week. Rep. 612; *Rex* v. *Brampton,* 10 East, 282, 10 Revised Rep. 289; *Raynham* v. *Canton,* 3 Pick. 293; *Redgrave* v. *Redgrave,* 38 Md. 93.

In an English prosecution for bigamy, in 1876 (*Reg.* v. *Cresswell,* 13 Cox, C. C. 126), it was alleged that the first marriage was invalid, having been contracted under these circumstances: While the parish church was under repair, divine service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of the prisoner with his wife was solemnized there. There was no evidence that the chamber at the hall was licensed for the performance of divine service or marriage. It was held that the presumption was that the place was duly licensed, and that the marriage

ence from their cohabitation, and from the admissions it involves, is that they were duly married prior to the period in which cohabitation began. This inference may be met and overcome by counter inferences. The rule raising a presumption of regularity of marriage from cohabitation and reputation is that the law presumes against wrong, and in favor of good, morals.[2] It may be shown that the cohabitation was clandestine, and the recognition only occasional, and explicable

was valid. Lush, J., said: "That fact of the marriage service having been performed by a person acting in a public capacity is prima facie evidence as to the person's legal capacity to perform the service. So the fact of its having been performed in a place by a person acting in such capacity is also prima facie evidence that the place was properly licensed for marriages. The presumption covers both the person and the place." To this effect, see Lord Lyndhurst in *Morris* v. *Davies,* 4 Clark & F. 163, 1 Jur. 911; and Lord Cottenham in *Piers* v. *Piers,* 2 H. L. Cas. 362, 13 Jur. 569.

Compare *Harrison* v. *Southhampton,* 22 L. J. Ch. N. S. 722, 4 De G. M. & G. 137, 18 Jur. 1, 1 Week. Rep. 422; *Breadalbane Case,* L R. 1 H. L. Sc. App. Cas. 182, 193; *Cunningham* v. *Cunningham,* 2 Dow P. C. 507; *Sichel* v. *Lambert,* 15 C. P. N. S. 781, 33 L. J. C. P. N. S. 137, 10 Jur. N. S. 617, 9 L. T. N. S. 687, 12 Week. Rep. 312.

In *De Thoren* v. *Atty. Gen.* L. R. 1 App. Cas. 686, it was ruled by the lord chancellor (Lord Cairns) that the presumption of marriage is much stronger than the presumption in regard to other facts. Hence, when a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration. The inference to be drawn was that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract. The onus of rebutting a marriage by habit and repute, it was said, is thrown on those who deny it. See remarks supra, §§ 170–176, 686.

For note as to presumption of validity of former marriage in prosecution for bigamy, see 9 L.R.A.(N.S.) 1036.

As to presumptions flowing from marriage ceremony generally, see notes in 14 L.R.A. 540, and 16 L.R.A.(N.S.) 98.

[2] *Waddingham* v. *Waddingham,* 21

by other hypotheses than that of marriage.[3] It may also, when the evidence is faint, be overcome by the presumption of innocence, by force of which it is necessary, in order to convict, that the ingredients of the offense should be proved beyond a reasonable doubt.[4]

§ 827a. Presumption of continuance of illicit relations. —Where the relations between a man and woman living together were illicit in their origin, they will be presumed to continue as illicit until there is proof of a change in such relations.[1] While in one case an instruction was approved

Mo. App. 609; *Cargile* v. *Wood*, 63 Mo. 501; *McKenna* v. *McKenna*, 73 Ill. App. 64; *White* v. *White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276.

[3] See *Clayton* v. *Wardell*, 5 Barb. 214, s. c. 4 N. Y. 230; *Senser* v. *Bower*, 1 Penn. & W. 450; *Jones* v. *Jones*, 45 Md. 159, s. c. 48 Md. 391, 30 Am. Rep. 466; *Williams* v. *Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98, with note in 18 Am. L. Reg. N. S. §§ 469, 629.

[4] Supra, § 171; Best, Ev. § 349.

In *Kopke* v. *People*, 43 Mich. 41, 4 N. W. 551, supra, § 533, it was held that in bigamy, where the proof was that the alleged first marriage was irregularly solemnized in another state, and there was no cohabitation, there must be independent proof of consent of the parties to such marriage.

[1] *White* v. *White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Cartwright* v. *McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Marks* v. *Marks*, 108 Ill. App. 371; *Potter* v. *Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Robinson* v. *Robinson*, 188 Ill. 371, 58 N. E. 906; *Barnes* v. *Barnes*, 90 Iowa, 282, 57 N. W. 851; *Jones* v. *Jones*, 45 Md. 144; *Van Dusan* v. *Van Dusan*, 97 Mich. 70, 56 N. W. 234; *Cargile* v. *Wood*, 63 Md. 501; *Gall* v. *Gall*, 114 N. Y. 109, 21 N. E. 106; *Bates* v. *Bates*, 7 Misc. 547, 27 N. Y. Supp. 872; *State* v. *Whaley*, 10 S. C. 500; *Williams* v. *Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Spencer* v. *Pollock*, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490; *Badger* v. *Badger*, 88 N. Y. 546, 42 Am. Rep. 263; *Drawdy* v. *Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451; *Imboden* v. *St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263; *Weidenhoft* v. *Primm*, 16 Wyo. 340, 94 Pac. 453; *Bell* v. *Clark*, 45 Misc. 272, 92 N. Y. Supp. 163.

See *Edelstein* v. *Brown*, — Tex. Civ. App. —, 95 S. W. 1126; *Klipfel* v. *Klipfel*, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26. For a

which stated as a presumption of law that the illicit relations would be presumed to continue,[2] the better rule seems to be to regard the relations as a question of fact to be proved;[3] but, while the presumption is not a conclusive one,[4] yet, if a marriage is alleged, it must be proved.[5]

§ 828. Legitimacy a presumption.—The presumption of legitimacy prevailed as a conclusive presumption, except in the case of impotency and absence, as to all persons living in civilized countries;[1] but this is modified so that the rule now is that the presumption of legitimacy obtains from the birth of a child during marriage, which may be rebutted by evidence which clearly and conclusively shows that legitimacy was impossible under the circumstances.[2]

contrary holding, see *Darling* v. *Dent*, 82 Ark. 76, 100 S. W. 747.

[2] *Cargile* v. *Wood*, 63 Mo. 501.

[3] *White* v. *White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *State* v. *Worthingham*, 23 Minn. 528; *Gall* v. *Gall*, 114 N. Y. 109, 21 N. E. 106.

[4] See *White* v. *White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276.

[5] See Wharton, Ev. § 1297; *Williams* v. *Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Norcross* v. *Norcross*, 155 Mass. 425, 29 N. E. 506; *Harbeck* v. *Harbeck*, 102 N. Y. 714, 7 N. E. 408; *Marks* v. *Marks*, 108 Ill. App. 371; *Caujolle* v. *Ferrie*, 23 N. Y. 90; *Drawdy* v. *Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451.

[1] *Bury's Case*, 5 Coke, 98b.; *Moris* v. *Davies*, 5 Clark & F. 163, 1 Jur. 911; *Banbury Peerage Case*, 1 Sim. & Stu. 153, 24 Revised Rep. 159.

[2] *Morris* v. *Davies*, 5 Clark & F. 163, 1 Jur. 911; *Stegall* v. *Stegall*, 2 Brock. 256, Fed. Cas. No. 13,351; *Bullock* v. *Knox*, 96 Ala. 195, 11 So. 339; *Robinson* v. *Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Dean* v. *State*, 29 Ind. 483; *State* v. *Romaine*, 58 Iowa, 46, 11 N. W. 721; *Herring* v. *Goodson*, 43 Miss. 392; *Cross* v. *Cross*, 3 Paige, 139, 23 Am. Dec. 778; *Mebane* v. *Capehart*, 127 N. C. 44, 37 S. E. 84; *State* v. *Rose*, 75 N. C. 239; *Page* v. *Dennison*, 1 Grant, Cas. 377; *Shuler* v. *Bull*, 15 S. C. 421; *Cannon* v. *Cannon*, 7 Humph. 410; *Pittsford* v. *Chittenden*, 58 Vt. 49, 3 Atl. 323.

See also *Hemmenway* v. *Towner*, 1 Allen, 209; *Sullivan* v. *Hugly*, 32 Ga. 316; *Re Garner*, 59 Misc. 116, 112 N. Y. Supp. 212.

A child born in wedlock, before any judicial separation of his parents, is presumed to be their legitimate child, no matter how soon the birth be after the marriage,[3] though this presumption, which is one to which the law attaches great force, may be overcome by strong proof that the husband was incapable, on ground either of impotence or absence, of being father of the child;[4] or by other evidence showing the extreme improbability of such intercourse.[5] When access is proved, it requires peculiarly strong evidence of nonintercourse to justify a judgment of illegitimacy.[6] Separation, however, by a court of competent jurisdiction, even though there be no divorce, destroys the presumption, and the children born to the woman after the separation are prima facie illegitimate.[7] But adultery

[3] Best, Ev. § 349; *Doe ex dem. Fleming* v. *Fleming,* 4 Bing. 266; *Reed* v. *Passer,* 1 Peake, N. P. Cas. 233, 1 Esp. 216, 3 Revised Rep. 696; *Sichel* v. *Lambert,* 15 C. B. N. S. 781, 787, 33 L. J. C. P. N. S. 137, 10 Jur. N. S. 617, 9 L. T. N. S. 687, 12 Week. Rep. 312; *Stegall* v. *Stegall,* 2 Brock. 256, Fed. Cas. No. 13, 351; *Caujolle* v. *Ferries,* 23 N. Y. 90; *Dannelli* v. *Dannelli,* 4 Bush, 60; *State* v. *Romaine,* 58 Iowa, 46, 11 N. W. 721; *State* v. *Worthingham,* 23 Minn. 528; *State* v. *Herman,* 35 N. C. (13 Ired. L.) 502.

[4] *Morris* v. *Davies,* 5 Clark & F. 163, 1 Jur. 911; *Reg.* v. *Mansfield,* 1 Q. B. 444, 1 Gale & D. 7, 10 L. J. Mag. Cas. N. S. 97, 5 Jur. 505; *Atchley* v. *Sprigg,* 33 L. J. Ch. N. S. 345, 10 Jur. N. S. 144, 10 L. T. N. S. 16, 12 Week. Rep. 364; *Strode* v. *Magowan,* 2 Bush, 621; *Ward* v. *Dulaney,* 23 Miss. 410; *Herring* v. *Goodson,* 43 Miss. 392.

[5] *Hawes* v. *Draeger,* 48 L. T. N. S. 518, 31 Week. Rep. 576, L. R. 23 Ch. Div. 173, 52 L. J. Ch. N. S. 449.

[6] See Wharton, Ev. § 828; supra, § 518.

Sir J. F. Stephen (Ev. art. 98) states the law to be that "declarations by either parent as to sexual intercourse are not regarded as relevant facts when the legitimacy of the woman's child is in question, whether the mother or the husband can be called as a witness or not, provided that in applications for affiliation orders, when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten."

[7] *Sidney* v. *Sidney,* 3 P. Wms. 275; *Re Parishes of St. George & St. Margaret,* 1 Salk. 123.

on the wife's part, no matter how clearly proved, will not have this effect, if the husband had access to the wife at the beginning of the period of gestation, unless there should be positive proof of nonintercourse.[8]

§ 829. Presumption as to judicial records.—All judicial proceedings in courts of general jurisdiction are presumed to be correct and regular, in the absence of proof to the contrary.[1] Hence, when a judicial record, properly authenticated, is put in evidence, the burden is on the party who assails it on account of latent imperfections of fraud.[2] It is sometimes said that the law presumes all such records to be correct. But the true view is that while the burden is on those who would assail a record on its face regular,[3] yet, when the issue is made, *e. g.*, when it is alleged that a record was fraudulently concocted, the question (unless it be on an indictment against the parties charged with the fraud) is to be decided by a preponderance of proof. But when fraud is the gravamen of the prosecution, then, to convict, it must be proved beyond a reasonable doubt.[4]

[8] *Bury* v. *Philpot,* 2 Myl. & K. 349; *Head* v. *Head,* 1 Sim. & Stu. 150; *Com.* v. *Shepherd,* 6 Binn. 283, 6 Am. Dec. 449; *Com.* v. *Stricker,* 1 Browne (Pa.) xlvii Appx.; *Com.* v. *Wentz,* 1 Ashm. (Pa.) 269; *State* v. *Pettaway,* 10 N. C. (3 Hawks.) 623.

See as to proof of illegitimacy, 3 Wharton & S. Med. Jur. 1884, 4th ed. § 666.

[1] *People* v. *Robinson,* 17 Cal. 363; *Galpin* v. *Page,* 18 Wall. 350, 21 L. ed. 959; *Voorhees* v. *Jackson,* 10 Pet. 449, 9 L. ed. 490; *American Emigrant Co.* v. *Fuller,* 83 Iowa, 599, 50 N. W. 48; *Re Eichhoff,* 101 Cal. 600, 36 Pac. 11; *United States* v. *Manthei,* 2 Alaska, 459; *State ex rel. Settle* v. *Settle,* 141 N. C. 553, 54 S. E. 445; *Johnson* v. *State,* 1 Okla. Crim. Rep. 321, 97 Pac. 1059, 18 A. & E. Ann. Cas. 300.

[2] *Mitchell* v. *State,* 58 Ala. 417; *Phillips* v. *State,* 68 Ala. 469; *Lumpkin* v. *State,* 68 Ala. 56.

[3] *State* v. *Hanna,* 84 Ind. 183; *State* v. *Nichols,* 29 Minn. 357, 13 N. W. 153; *Jones* v. *State,* 18 Fla. 889; *Territory* v. *Webb,* 2 N. M. 147.

[4] Wharton, Ev. § 1304; supra, §§ 570, 620.

See *People* v. *Gilbert,* 60 Cal. 108.

§ 830. Presumption in support of verdict.—It is otherwise when we come to the construction to be given by a court when called to decide as to the legal sufficiency of the records of other tribunals. In such cases, between two permissible constructions, that most favorable to the validity of the record will be accepted.[1] Thus, after a verdict, a court in review will assume that all facts necessary for the support of the verdict were proved, unless the contrary appear in the record duly before the court.[2] Whatever facts are necessary to the support of a record statement will be presumed to have been duly proved.[3] It will also be presumed by a court of error, when there is a general verdict in the court below on a series of counts, and a sentence on one of them, that this sentence was on the count to which the evidence applied.[4] But presumptions of this class do not extend to the supply of statements necessary to make a record complete, or which should be the subject of independent articulate averments.[5] Thus, the commission of an averment of arraignment cannot be supplied by an appellate court.[6] Jurisdiction, also, cannot be inferred, as to courts of limited jurisdiction, but must appear on the record.[7] But justices of the peace, and other judicial officers though of special and limited powers, will be presumed to have acted regularly as to a matter within their jurisdiction, unless the record shows the contrary. And a warrant of conviction, purporting to be founded on a preceding conviction,

[1] *People* v. *Bork*, 2 N. Y. Crim. Rep. 56.

[2] *Reg.* v. *Waters*, 1 Den. C. C. 356, Temple & M. 57, 2 Car. & K. 864, 18 L. J. Mag. Cas. N. S. 53, 13 Jur. 133, 3 Cox, C. C. 300; *Reg.* v. *Bowen*, 13 Q. B. 790, 19 L. J. Mag. Cas. N. S. 65, 13 Jur. 1045, 3 Cox, C. C. 483, 4 New Sess. Cas. 62; *People* v. *Petra*, 92 N. Y. 129; *Beale* v. *Com.* 25 Pa. 11; *People* v. *Sing Lum*, 61 Cal. 538; Powell, App. Jur. 158. See Wharton, Ev. § 1305.

[3] Wharton, Ev. § 1304.

[4] Wharton, Crim. Pl. & Pr. §§ 907 et seq.; *Davis* v. *State*, 6 Tex. App. 196.

[5] Wharton, Ev. § 1305.

[6] Wharton, Crim. Pl. & Pr. §§ 699, 777.

[7] Wharton, Ev. § 1308.

has been sustained in England, though it does not state that the evidence was given on oath, or in the presence of the prisoner.[3]

§ 831. Presumption of regularity as to legislative proceedings.—The legislature, whether Federal or state, when acting within its constitutional range, is presumed to act in conformity with law, whenever the contrary does not plainly and expressly appear. Hence we must prima facie hold that the respective houses, as component parts of a legislature, act within their jurisdiction, and agreeably to parliamentary usages and the rules of law and justice. It has therefore been held that a warrant issued by the speaker of a legislative house, at the instance of the house, for the arrest of a witness, need not contain any recital of the grounds on which it was founded.[1]

§ 832. Presumption as to execution of documents.—Documents on their face duly attested are presumed to have been executed in conformity with the local law of the place of execution, so as to throw the burden of proving the contrary on the assailing party. This, however, instead of a presumption, is rather in the nature of prima facie proof sufficient to let the document go to the jury.[1] Where, however, the place of execution is in a foreign country, it seems that, where proof is necessary, it must be determined by the rules of private international law.[2]

§ 833. Presumption of regularity as to appointment or and performance of duties by an officer.—In accordance with the general presumption of regularity, it is presumed, in

[3] Wharton, Ev. § 1308.

[1] Wharton, Ev. §§ 831, 1309.

[1] *Sigfried* v. *Levan*, 6 Serg. & R. 308, 9 Am. Dec. 427; *Hicks* v. *Choteau*, 12 Mo. 341; *Verzan* v. *McGregor*, 23 Cal. 339, 2 Mor. Min. Rep. 565; *Flournoy* v. *Warden*, 17 Mo. 435, 441; *Scott* v. *Delany*, 87 Ill. 146.

[2] Wharton, Ev. § 1313.

the absence of evidence to the contrary, that public officers have been regularly appointed, and have performed their duties in accordance with the law. But necessarily this cannot be applied without regard to the conditions of the concrete case, so that no particular rule can be laid down as controlling, other than the general presumption of regularity.[1] Hence, for the purpose of determining the question of the burden of proof, it is assumed that a person acting as a public officer is authorized to act as such.[2] Where a policeman, for instance, is resisted when executing a warrant, the burden of showing the illegality of his appointment (when not on its face illegal) is on the party resisting; though that the presumption is satisfied when it determines the burden is shown by the fact that when the evidence is all in, the question is to be decided on the merits. The same distinction is applicable in cases where an alleged officer is indicted for killing when attempting an arrest. If, when the killing took place, he was acting as an officer, the burden is on the prosecution to show that he was not duly commissioned. But this means only that the initiative is on the party contesting his authority; for it would be absurd to say that the law presumes that all private persons

[1] *McKinstry* v. *Collins,* 76 Vt. 221, 56 Atl. 985; *Goldie* v. *McDonald,* 78 Ill. 605; *State* v. *Lord,* 118 Mo. 1, 23 S. W. 764; *New River Mineral Co.* v. *Roanoke Coal & Coke Co.* 49 C. C. A. 78, 110 Fed. 343; *Dunlop* v. *United States,* 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. Rep. 375; *Hayes* v. *United States,* 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735; *United States* v. *Arredondo,* 6 Pet. 691, 8 L. ed. 547; *Nofire* v. *United States,* 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; *State* v. *Main,* 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; *State* v. *Scott,* 43 Fla. 396, 31 So. 244; *Dyson* v. *State,* 26 Miss. 362; *State ex rel. Wilson* v. *Mastin,* 103 Mo. 508, 15 S. W. 529; *State ex rel. Bee Bldg. Co.* v. *Savage,* 65 Neb. 714, 91 N. W. 716; *State* v. *Kean,* 10 N. H. 347, 34 Am. Dec. 162; *People ex rel. Langdon* v. *Dalton,* 46 App. Div. 264, 61 N. Y. Supp. 263; *People ex rel. Soer* v. *Crane,* 125 N. Y. 535, 26 N. E. 736; *McLean* v. *State,* 8 Heisk. 22.

[2] See Wharton, Crim. Law, 8th ed. §§ 1570, 1589, 1617, 1671; supra, § 164.

claiming to be officers are to have any vantage ground, when the case comes up on the merits, as against those whose rights they invade. In this sense we are to hold that a person acting as a public or quasi public officer is to be so far recognized as such, that his appointment is to be treated as regular until the contrary be proved.[3] The category of officers, in the sense above stated, includes justices of the peace,[4] soldiers engaged in recruiting,[5] constables and policemen,[6] attorneys,[7] and post officers and their employees.[8] Even when a party is indicted for misconduct in office, it is sufficient, prima facie, to show that he acted in the particular office in which the misconduct is supposed. In such case it is not necessary to produce, on the part of the prosecution, the record of his appointment.[9] On the trial of an ex-county treasurer, therefore, for

[3] *Rex* v. *Borrett,* 6 Car. & P. 124; *Rex* v. *Verelst,* 3 Campb. 432, 14 Revised Rep. 775; *Riley* v. *Packington,* L. R. 2 C. P. 536, 36 L. J. C. P. N. S. 204, 16 L. T. N. S. 382, 15 Week. Rep. 746; *Rex* v. *Gordon,* 1 Leach, C. L. 515; *Rex* v. *Howard,* 1 Moody & R. 188; *M'Gahey* v. *Alston,* 2 Mees. & W. 206, 2 Gale, 328, 6 L. J. Exch. N. S. 29; *Reg.* v. *Roberts,* 14 Cox, C. C. 101, 38 L. T. N. S. 690; *Bank of United States* v. *Dandridge,* 12 Wheat. 70, 6 L. ed. 554; *Sheets* v. *Selden,* 2 Wall, 177, 17 L. ed. 822; *Mechanics' & T. Bank* v. *Union Bank,* 22 Wall. 276, 22 L. ed. 871; *Cabot* v. *Given,* 45 Me. 144; *State* v. *Roberts,* 52 N. H. 492; *Briggs* v. *Taylor,* 35 Vt. 57; *Fay* v. *Richmond,* 43 Vt. 25; *Com.* v. *Fowler,* 10 Mass. 290; *Com.* v. *McCue,* 16 Gray, 226; *Nelson* v. *People,* 23 N. Y. 293; *State, Perkins Prosecutor* v. *Perkins,* 24 N. J. L. 409; *Stevenson* v. *Hoy,* 43 Pa. 191; *Conolly* v. *Riley,* 25 Md. 402; *Ex parte Strang,* 21 Ohio St. 610; *Druse* v. *Wheeler,* 22 Mich. 439; *State* v. *Maberry,* 3 Strohb. L. 144; *State* v. *Hill,* 2 Speers, L. 150; Wharton, Agency, §§ 44, 121. See supra, § 164.

[4] *Berryman* v. *Wise,* 4 T. R. 366.

[5] *Wolton* v. *Gavin,* 16 Q. B. 48, 20 L. J. Q. B. N. S. 73, 15 Jur. 329.

[6] *Berryman* v. *Wise,* 4 T. R. 366; *Butler* v. *Ford,* Car. & M. 662, 3 Tyrw. 677, 2 L. J. Mag. Cas. N. S. 109.

[7] *Pearce* v. *Whale,* 5 Barn. & C. 38. See *Reg.* v. *Newton,* 1 Car. & K. 480.

[8] *Rex* v. *Rees,* 6 Car. & P. 606.

[9] *Clay's Case,* 2 East, P. C. 580; *Rex* v. *Rees,* 6 Car. & P. 606; *Goodwin's Case,* 1 Lewin, C. C. 100; *Com.* v. *Fowler,* 10 Mass. 290; *People* v. *Cook,* 8 N. Y. 67, 59 Am. Dec. 451; *State, Perkins, Prosecu-*

embezzling money received by him officially, due execution of his official bond need not be proved by the prosecution.[10]

This presumption, however, such as it is, does not apply to special private agents,[11] though the fact that a general agent is recognized as such by his principal makes it unnecessary for the party relying on such agency to prove a formal authorization as against the principal.[12] And the presumption does not apply in cases in which the evidence shows that the alleged appointment under which the supposed officer acted was a nullity.[13]

And while the burden of proof is on the party questioning the regularity of the official act, nevertheless, if the legality of an arrest is attacked, the burden of proof is on the state to convince the jury of the legality of such arrest.[14]

§ 834. Presumption as to professional status.—When a person claiming to be a professional man is indicted for negligence as such, it is not necessary for the prosecution to prove

tor v. *Perkins,* 24 N. J. L. 409; *Com.* v. *Rupp,* 9 Watts, 114; *State* v. *Hill,* 2 Speers, L. 150.

[10] *State* v. *Mims,* 26 Minn. 183, 2 N. W. 494, 683.

[11] *Short* v. *Lee,* 2 Jac. & W. 468; Best, Ev. § 357. See *Ward* v. *Metropolitan L. Ins. Co.* 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902; *Golden* v. *Northern P. R. Co.* 39 Mont. 435, — L.R.A.(N.S.) —, 104 Pac. 549, 18 A. & E. Ann. Cas. 886.

[12] See Wharton, Ev. § 1316; *Merchants' Nat. Bank* v. *State Nat. Bank,* 10 Wall. 604, 19 L. ed. 1008; *Faneuil Hall Bank* v. *Bank of Brighton,* 16 Gray, 534; *Reed* v. *Ashburnham R. Co.* 120 Mass. 43; *Hughes* v. *New York & N. H. R. Co.* 4 Jones & S. 222.

[13] *Lambert* v. *People,* 76 N. Y. 220, 32 Am. Rep. 293.

In *Lambert* v. *People,* supra, it was held that to sustain the allegation of the official status of a notary, in an indictment for perjury, it is necessary to show that the officer was *de facto* or *de jure;* and evidence is admissible in such case to prove the incompetency of the alleged notary to hold the office.

[14] *State* v. *Hollon,* 22 Kan. 580; *State* v. *Bebee,* 13 Kan. 589, 19 Am. Rep. 93; *State* v. *Jones,* 78 N. C. 420; *State* v. *Baldwin,* 80 N. C. 390.

that he had a legal right to the professional status he assumed. Nor is it necessary when an expert is examined as a professional man, to put in evidence his diploma. In all such cases the party himself is estopped from denying that he is that which he claims to be; and if the object be to dispute his authority, the burden is on the party assailing this authority.[1]

§ 835. Presumption of regularity attaches to administrative or judicial officers.—On the same reasoning the acts of administrative or judicial officers are presumed to be regular, so far as to throw the burden of proof on the party collaterally assailing such acts on the ground of irregularity.[1] Where it is alleged, for instance, that a warrant under which a police officer makes an arrest is defective (the defect not being patent on the procedure), the burden is on the party setting up the defect. Nor in such cases is it necessary for the warrant or other authorizing record to assert specifically all antecedent steps of procedure, not in themselves essential to jurisdiction, the averment of the taking of which may be assumed to be contained in the averments actually expressed. In such case the burden is on the opposite side to show that these steps were not actually taken.[2] The presumption just given is not limited to officers of state. Thus, in a prosecu-

[1] Supra, § 833; Wharton, Ev. § 1317.

[1] See supra, § 833 and notes; *Rex* v. *Hinkley,* 12 East, 361; *Rex* v. *Catesby,* 2 Barn. & C. 814; *Gosset* v. *Howard,* 10 Q. B. 411, 16 L. J. Q. B. N. S. 345, 11 Jur. 750; *Reg.* v. *Stainforth,* 11 Q. B. 66, 3 New Sess. Cas. 53, 17 L. J. Mag. Cas. N. S. 25, 12 Jur. 95; *Reg.* v. *Broadhempston,* 1 El. & El. 154, 28 L. J. Mag. Cas. N. S. 18, 5 Jur. N. S. 267, 7 Week. Rep. 56; *United States* v. *Weed,* 5 Wall. 62, 18 L. ed. 531; *Rolland* v. *Com.* 82 Pa. 306, 22 Am. Rep. 758; Wharton, Ev. § 835; *People ex rel. Hodgkinson* v. *Stevens,* 5 Hill, 616; *People* v. *Cook,* 8 N. Y. 67, 59 Am. Dec. 451; *Hightower* v. *State,* 58 Miss. 636; *Perkins* v. *Nugent,* 45 Mich. 156, 7 N. W. 757.

[2] *Reg.* v. *Stainforth,* 11 Q. B. 66, 3 New Sess. Cas. 53, 17 L. J. Mag. Cas. N. S. 25, 12 Jur. 95; Wharton, Ev. § 835; supra, § 833.

tion for bigamy, where the marriage was proved by the witnesses present to have taken place at the parish church, and to have been solemnized by the curate of the parish, it was held unnecessary to prove either the registration of the marriage, or the fact of any license having been granted.[3]

This presumption, however, is not to be extended so as to make it cover substantive independent facts as distinguished from facts which are the mere incidents of others duly established.[4]

It must be further kept in mind, as to presumptions of this class, that to throw the burden on the objector, the conduct of the officer must be on its face regular.[5]

§ 836. Burden of proof is on party charging public officer with misconduct.—Where a public officer is prosecuted for misconduct, then, when the case goes to the jury, there is no presumption, as we have seen, of special official virtue in his favor, the only privilege that he has to claim in this respect being the privilege of all persons charged with crime, that his guilt should be proved beyond a reasonable doubt.[1]

[3] *Rex* v. *Allison* Russ. & R. C. C. 109. See supra, § 827.

[4] "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his treatise on Evidence, § 300, says: 'The true principle intended to be asserted by the rule seems to be that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.'" Strong, J., *United States* v. *Ross*, 92 U. S. 283—285, 23 L. ed. 708, 709.

[5] Wharton, Ev. § 1304; *Welsh* v. *Cochran*, 63 N. Y. 181, 20 Am. Rep. 519; *Lambert* v. *People*, 76 N. Y. 220, 32 Am. Rep. 293; supra, § 833.

[1] *Reg.* v. *Tracy*, 6 Mod. 30; *Reg.* v. *James*, Temple & M. 300, 2 Den. C. C. 1, 3 Car. & K. 167, 14 Jur.

All that is meant by the presumption, as it is called, immediately before us, is that a public officer is so far assumed prima facie to do his duty, that the burden is on the party seeking to charge him with misconduct. And this is in full harmony with the general rule above given, that on the actor lies the burden. The same reasoning applies in cases where the conduct of the officer comes collaterally in question. The burden is on those assailing such conduct; and so far, the conduct of such officer is prima facie presumed to be right.[2]

§ 836a. Authority for corporate or official act presumed.—When an official or corporate act has been executed, and when, in consequence of it, a condition of things has continued for a considerable period, which condition of things would probably not have been acquiesced in had it not been duly authorized, such authority will be presumed. Thus, the fact that a corporation has maintained a bridge and draw over a stream for fifteen years is sufficient evidence, on an indictment against a person for interference with the bridge, to show that the bridge was legally erected and maintained.[1] That it is not necessary to prove the charter of a domestic corporation has been already noticed.[2]

§ 837. Mailing letter prima facie proof of delivery.—The mailing a letter properly addressed and stamped, to a person known to be doing business in a place where there is established a regular delivery of letters, is proof of the reception of the letter by the person to whom it is addressed.[1]

940; *United States* v. *Ross*, 92 U. S. 283, 23 L. ed. 708; *People* v. *Coon*, 15 Wend. 277; *State* v. *McEntyre*, 25 N. C. (3 Ired. L.) 171. See Wharton, Crim. Law, 8th ed. § 1583; supra, §§ 833, 835.

[2] Wharton, Ev. § 1319.

[1] *Com.* v. *Chase*, 127 Mass. 7, citing *Com.* v. *Bakeman*, 105 Mass. 53.

[2] Supra, § 164a.

[1] See Wharton, Ev. § 1323; *Kimberly* v. *Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *Blu-*

Such proof, however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case.[2] In cases of registered letters the presumption may be strengthened by a receipt;[3] in cases of ordinary letters, where there is no mail delivery, there is no presumption at all,[4] and delivery must be substantively proved.[5] The rule as to letters, however, applies only to letters mailed at points other than that at which the party written resides. Notices of local transactions, to persons living in the same place as that from which the notice is issued, should, it seems, be served personally.[6] To enable the presumption, in any case, to operate, it is essential that the letters should be addressed with

thenthal v. *Atkinson*, 93 Ark. 252, 124 S. W. 510.

[2] See Wharton, Ev. § 1323; *Reidpath's Case*, 40 L. J. Ch. N. S. 39, L. R. 11 Eq. 86, 23 L. T. N. S. 834, 19 Week. Rep. 219; *United States* v. *Babcock*, 3 Dill. 571, Fed. Cas. No. 14,485; *Freeman* v. *Morey*, 45 Me. 50, 71 Am. Dec. 527; *Greenfield Bank* v. *Crafts*, 4 Allen, 447; *First Nat. Bank* v. *McManigle*, 69 Pa. 156, 8 Am. Rep. 236; *Foster* v. *Leeper*, 29 Ga. 294; *Tate* v. *Sullivan*, 30 Md. 464, 96 Am. Dec. 597; *Lyon* v. *Guild*, 5 Heisk. 175.

[3] Best, Ev. § 403.

[4] *Billgerry* v. *Branch*, 19 Gratt. 393, 100 Am. Dec. 679; *James* v. *Wade*, 21 La. Ann. 548.

[5] *First Nat. Bank* v. *McManigle*, 69 Pa. 159, 8 Am. Rep. 236.

"Upon the subject of the admissibility of letters by one person, addressed to another by name, at his known postoffice addressed, prepaid, and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow in *Com.* v. *Jeffries*, 7 Allen, 563, 83 Am. Dec. 712, that this 'is evidence tending to show that such letters reached their destination, and were received by the person to whom they were addressed.' This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. 'A fact,' says Agnew, J. (*Tanner* v. *Hughes*, 53 Pa. 290), 'in connection with other circumstances, to be referred to the jury' under appropriate instructions, as its value will depend upon all the circumstances of the particular case." Dillon, Ch. J., *United States* v. *Babcock*, 3 Dill. 573, Fed. Cas. No. 14,485.

[6] *Shelburne Falls Nat. Bank* v. *Townsley*, 102 Mass. 177, 3 Am. Rep. 445; *Ransom* v. *Mack*, 2 Hill, 587, 38 Am. Dec. 602; *Sheldon* v. *Benham*, 4 Hill, 129, 40 Am. Dec. 271.

specific correctness. Thus, it has been held that no presumption of delivery attached to a letter addressed, "Mr. Haynes, Bristol."[7] The same inference from regularity, under the same limitations, may be drawn as to the delivery of telegraphic despatches;[8] though, ordinarily, the original message should be produced.[9]

§ 838. Presumption as to time of delivery of letter.—A letter duly stamped and mailed is inferred, by a presumption of fact, to be delivered at the usual period for such delivery.[1]

§ 839. Presumption from postmark.—The postmark on a letter, if decipherable, raises a presumption that the letter was in the post at the time and place specified in such postmark, but this again is a rebuttable presumption.[1]

§ 840. Presumption from manner of delivery.—To other modes of settled and regular business delivery the same presumption applies.[1] Hence, where it was proved to be the

[7] *Walter* v. *Haynes,* Ryan & M. 149. And see, as narrowing the rule, *Allen* v. *Blunt,* 2 Woodb. & M. 121, Fed. Cas. No. 217. Cf. *Phillips* v. *Scott,* 43 Mo. 86, 97 Am. Dec. 369.

[8] *Com.* v. *Jeffries,* 7 Allen, 548, 83 Am. Dec. 712; *United States* v. *Babcock,* 3 Dill. 571, Fed. Cas. No. 14,485.

[9] *Howley* v. *Whipple,* 48 N. H. 487. See supra, § 162.

[1] See cases in Wharton, Ev. § 1324.

[1] Powell, Ev. 4th ed. 88; *Rex* v. *Johnson,* 7 East, 65; *Fletcher* v. *Braddyl,* 3 Starkie, 64, 23 Revised Rep. 758; *Arcangelo* v. *Thompson,* 2 Campb. 623, 12 Revised Rep. 758; *Shipley* v. *Todhunter,* 7 Car. & P. 680; *Stocken* v. *Collin,* 7 Mees. & W. 515, 9 Car. & P. 653, 10 L. J. Exch. N. S. 227; *Butler* v. *Mountgarrett,* 7 H. L. Cas. 633, s. c. 6 Ir. L. R. N. S. 77; *United States* v. *Noelke,* 17 Blatchf. 554, 1 Fed. 426; *New Haven County Bank* v. *Mitchell,* 15 Conn. 206; *Callan* v. *Gaylord,* 3 Watts, 321. See *Brand* v. *United States,* 18 Blatchf. 384, 4 Fed. 394.

It is doubted whether the postmark is evidence of date of forwarding in *Shelbourne Falls Nat. Bank* v. *Townsley,* 102 Mass. 177, 3 Am. Rep. 445.

[1] See supra, § 837; *New Haven County Bank* v. *Mitchell,* 15 Conn.

usage of a hotel for letters addressed to guests to be deposited in an urn at the bar, and then to be sent, about every fifteen minutes, to the rooms of the guests to whom such letters were addressed, it was held to be a presumption of fact that a letter addressed to one of the guests, and left at the bar, was received by such guest.[2] In case of a denial by the party addressed, of reception, then the case goes to the jury as a question of fact. Delivery to a servant, within the range of his duties, is also, it may be added, prima facie proof of delivery to the servant's master.[3]

§ 841. Presumption of genuineness of answer to a letter mailed.—If I should mail a letter to B, addressing him at his residence, and I should receive by mail an answer purporting to come from B, the fact that such an answer is so received makes a prima facie case in favor of the genuineness of the answer. The clerks of the postoffice are government officials, whose action is presumed to be regular; and if I can prove that B lived at the place where he was addressed, then the burden is on him to show that he did not receive the letter, and that the reply mailed in response was not genuine.[1]

§ 842. Presumption as to telegrams.—Where a telegram properly addressed is deposited in the office with the operator, and all charges of transmission prepaid, the presumption is that it reached its destination and was delivered to the sendee, in the absence of proof to the contrary.[1]

206. See *Crandall* v. *Clark*, 7 Barb. 169.

[2] *Dana* v. *Kemble*, 19 Pick. 112. See *Lawrence Bank* v. *Raney & B. Iron Co.* 77 Md. 321, 26 Atl. 119.

[3] Wharton, Ev. § 1326.

[1] See Wharton, Ev. § 1328.

[1] *Oregon S. S. Co.* v. *Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485; *Western Twine Co.* v. *Wright*, 11 S. D. 521, 44 L.R.A. 438, 78 N. W. 942. See *Com.* v. *Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; *State* v. *Gritzner*, 134 Mo. 512, 36 S. W. 39; *Perry* v. *German-American Bank*, 53 Neb.

Likewise, the response to a telephone call is presumed to come from the party called, or from his agent.[2]

§ 843. Presumption from method of mailing letter.—Testimony by a clerk that it was his invariable custom to carry certain classes of letters to the postoffice, of which class the letter in question is shown to have been one, though he had no recollection as to such letter specifically, has been held sufficient to admit a copy of the letter in evidence, after notice to the other side to produce.[1]

XI. Distinctive Inferences in Forgery.

§ 844. Genuineness of handwriting.—Genuineness of handwriting is eminently a matter of inference, the constituents of which have been already examined. Among the tests to be applied we may recur to the following:

§ 845. Opinion of writer.—Opinion of the alleged writer himself as to the genuineness of the writing.[1]

§ 846. Opinion of those who know his hand.—Opinion of those who have seen him write or who are familiar with his hand.[1]

89, 68 Am. St. Rep. 593, 73 N. W. 538; *Howley* v. *Whipple,* 48 N. H. 488.

[2] *Lenox* v. *Harrison,* 88 Mo. 496; *State ex rel. Gracy* v. *Bank of Neosho,* 120 Mo. 161, 25 S. W. 372; *Guest* v. *Hannibal & St. J. R. Co.* 77 Mo. App. 258; *Gilliland* v. *Southern R. Co.* 85 S. C. 26, 27 L.R.A.(N. S.) 1106, 127 Am, St. Rep. 861, 67 S. E. 20.

[1] See cases in Wharton, Ev. § 843; *Dunlop* v. *United States,* 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. Rep. 375; *Allen* v. *Wilbur,* 199 Mass. 366, 85 N. E. 429; *Gardam* v. *Batterson,* 198 N. Y. 175, 139 Am. St. Rep. 806, 91 N. E. 371, 19 A. & E. Ann. Cas. 649; *Cole* v. *New England Trust Co.* 200 Mass. 594, 86 N. E. 902.

[1] See supra, §§ 549, 550.

[1] Supra, § 551.

§ 847. Opinion of experts.—Opinion of experts, based on the writing by itself, or on it as compared with other writings.[1]

§ 848. Chemical and microscopic tests.—Chemical and microscopic tests should be resorted to where it is desired to restore the legibility of faded writings,[1] and where it is suspected that writing has been destroyed by chlorine or other substances which it is desirable to detect. Microscopic tests, also, are admissible to prove marks of tracing.[2]

[1] Supra, § 559. See also *Com.* v. *Nefus,* 135 Mass. 533.

On this topic the evidence of Mr. Gould in the *Webster Case* was: "In all the practice that I have ever had in writing, I have never been able to satisfy myself that I could make two letters precisely alike: so perfectly similar as to correspond throughout, if placed one upon the other. And yet, I never saw two handwritings that I could not distinguish. There is some peculiarity in everyone's writing which enables a person to identify it; and it is next to impossible to get rid of that peculiarity when the attempt is made to disguise it. Every man who undertakes to disguise his hand must do it either by carelessness or carefulness; by carelessly letting his hand play entirely loose, as in mere flourishing; or by carefully guarding every stroke which he makes, in order to prevent its being seen to be his. In this latter mode it is next to impossible for any person to continue his observation for any great length of time, or through any considerable amount of writing, without making some of those letters which are peculiar to himself, or making them in that peculiar manner which he has been accustomed to do. Frequently these will consist only of a single particle or character, but which will yet furnish a key for the detection of the real writer." Bemis's *Webster Case,* 202. As to admissibility of such testimony, see supra, § 559. As to illustrations of "disguise," see Merivale's Life of Sir P. Francis, London, 1867.

A notice of an interesting trial (*Robinson* v. *Mandell*) involving issues in the test will be found supra, § 9, note. As to identification by misspelling, see *United States* v. *Chamberlain,* 12 Blatchf. 390. Fed. Cas. No. 14,778, and cases cited post, § 851.

[1] Devergie, Med. Leg. II. p. 887; Duverger, Manual, II. p. 385.

[2] *Robinson* v. *Mandell,* supra, note to § 9. See article by Mr. R. U. Piper in Am. L. Reg. May, 1869.

§ 849. **Inferences from circumjacent tests.**—In determining the genuineness of writings alleged to be forged, it is important to inquire if there is any discrepancy between the date of a writing and the anno Domini watermark in the fabric of the paper;[1] though that this cannot always be relied upon is illustrated by an instance mentioned by Mr. Willis, of a commissioner of the insolvent debtor's court sitting at Wakefield, in 1836, who discovered that the paper he was then using, which had been issued by the government stationer, bore the watermark of 1837.[2] Extrinsic proof, also, may be adduced to show that the paper used had not, at the date in question, been manufactured.[3] When postmarks are relied on

[1] *Crisp* v. *Walpole*, 2 Hagg. Eccl. Rep. 531. See Wharton, Crim. Law, 8th ed. § 726.

[2] Wills, Circumstantial Ev. p. 114.

[3] See Report in *Dickerson's Case*, N. Y. World, Jan. 13, 1880.

Erasures may be detected by microscopic examination, under which inequalities or transparencies may be brought out. Erased portions of a paper, also, will more greedily absorb water than other parts, being in the nature of a blotter. If varnish has been placed over the erasure, this may sometimes be discovered by its change of color on treatment with a weak iodine solution. And "in the vast majority of instances where an erasure has been attempted, the application of a solution of galls will at once reveal the remains of the iron of the original writing ink; . . . if an acid has been used to remove the ink, its presence may be detected by the use of litmus, unless an alkali has been afterwards employed to neutralize it." 1 Tidy, Leg. Med. 1883, 242.

It has been recently stated that the Bank of France has almost entirely abandoned chemical tests in favor of the camera for detecting forgeries. The sensitive plate not only proclaims forthwith the doing of the eraser or penknife, but frequently shows, under the bold figures of the forger, the sum originally borne by the check. So ready is the camera to detect ink marks that a *carte de visite* inclosed in a letter may to the eye appear without blemish, while a copy of it in the camera will probably exhibit traces of writing across the face, where it has merely been in contact with the written page.

Priestman v. *Thomas*, reported in the London Spectator of December 8, 1883, was a case of forgery of the will of a man named Whalley, the principal legatee being the defendant Thomas. The will was written on white paper, and there had been a prior will written on

to prove authenticity, these may serve, also, as indications of falsification. The same may be noticed in respect to stamps,

blue paper in favor of Priestman, the plaintiff, an illegitimate son of Whalley. Thomas's mode of forgery is thus described: "He induced Whalley to dictate a pencil letter to Priestman, and then to write his name at the bottom in ink. Here, then, was the signature he wanted. He had now the most essential part of a will, and it only remained to add the incidental details relating to the distribution of the property. The pencil writing was rubbed out, and what purported to be Whalley's last will written in ink above his signature. Possibly, Thomas thought that by not imitating the signature he was protecting himself against a charge of forgery; at all events he knew that it would be the signature that would be most closely scrutinized, and if that was beyond doubt genuine, it was not likely that suspicion would go any further. Nor but for the quarrel with the witnesses—or rather with one ot the witnesses, for the other sided with Thomas—would it have gone any further. The theory that the signature to the 'white' will had originally been affixed to a letter written in pencil, and that upon this letter, as on a palimpsest, the 'white' will had been written, rested, in the first instance, on the testimony of the repentant or dissatisfied accomplice.

"When once the theory had been set up, however, confirmatory evidence was not long wanting. First, there was the will itself. Though the signature was beyond question, there were undoubtedly traces of pencilmarks underlying the ink in which the will was written, and these pencil marks bore out the explanations given by the witness. They were in Thomas's handwriting, and the words that could he deciphered seemed to have formed part of a letter addressed to Priestman. Thomas seems to have thought that these very facts might bring him safety. Why should he have left this damning record against himself, when it was in his power to destroy it? A man who is rubbing out pencil marks as a preliminary to giving himself a fortune, could hardly be so careless as to leave whole words still visible. The great difficulty in the way of this theory was the fact that the 'white' will had never passed out of Thomas's own keeping, until it had been placed in the registry of wills at Hereford; and under any circumstances, the jury would probably have refused to believe that the will had been tampered with, and the suspicious pencil traces introduced while the will was in official custody. As it turned out, however, they were not left without a perfectly adequate explanation of the facts. Mr. Holmes, the Queen's librarian, states that pencil marks are not completely erased by bread crumbs. What happens is that the fibres of the paper are raised up so as to cover them. After a time, they get smoothed down again, and

which may be shown to have been forged, or to have been fraudulently attached, by proving that such stamps were not in existence at the time of the alleged date. The condition of the paper may serve to identify it with a particular party.[4]

Forgeries, also, have been detected by the plate from which the printed part of the document was taken, proving to be

then the concealed marks come partially to light once more. Further and most complete corroboration to Priestman's case was furnished by a letter which his sister had received from Whalley, written a month after the date of the 'white' will, and telling her that he had left all his money to Priestman, and none to her. Thomas maintained that this letter was forged, but in favor of this theory he had nothing to show, except that the letter had not been produced until late in the day. This, however, was explained in its turn by the fact that the letter contained a reference to an incident only known to Whalley and his daughter, which she would naturally desire to keep concealed. The whole story was thus unravelled, and the jury had no difficulty in coming to the conclusion that the 'white' will was Thomas's composition, though the signature to it was Whalley's. It is not a pleasant story, for everyone concerned in it seems to have been quite ready to suspect everyone else of perjury and fraud, without apparently there being any antecedent improbability in the suspicion. But there is no reason to doubt that the verdict given by the jury describes with substantial accuracy what actually took place."

Questions of a similar character have arisen in *Sharon's Case,* on trial in San Francisco, in May, 1884.

[4] In April, 1880, a cadet named Whitaker, a pupil in the Military Institute at West Point, was found in his bed tied and bruised. He stated that the previous night he had been attacked and maltreated by three disguised assailants; and he exhibited an anonymous note of warning which he claimed to have received a few days before. Suspicion having been cast on his story, a court of inquiry was held in May, 1880, under circumstances which invested the case with no little political interest. In order to determine the authorship of the letter of warning, papers emanating from 300 cadets were submitted to five eminent experts in penmanship, the papers being identified and distinguished only by numbers. These experts, acting separately, concurred, with more or less certainty, in reporting that the note of warning was in the same handwriting as written exercises of which Whitaker was the unquestionable author. In addition we have the following remarkable incident, as given in the telegraphic reports in the New York papers of May 17, 1880:

"'You will no doubt be surprised,' expert Southworth stated

subsequent in origination to the date of the alleged writing; and in a case heretofore cited exposure was based on the fact that the witness to the forgery (that of a will) volunteered, in his cross-examination, the statement that the testator had placed a sixpence under his wax seal, which sixpence turned out to be subsequent in date to the will.[5]

in his report, 'when I tell you that I have a sheet which I have marked "A" in two places, out of set No. 1, from which the paper on which the anonymous note is written was torn. The fact is easily discernible to ordinary vision with the naked eye. This paper out of set No. 1 marked by me "A" twice with blue pencil, has subject-matter connected with another sheet which I have marked "B" twice in blue. The sheet "B" is torn from another sheet which I have marked "C" twice. Thus, by a fact mathematically demonstrable, the anonymous note is one of four links, three of which are papers of set 1. I have great satisfaction in discovering this point, which discovery will do much toward settling this whole affair as far as the authority of the anonymous note is concerned.

"'I have, to the best of my ability, arranged two frames of glass so as to exhibit my discovery to anyone who may properly examine it.' Mr. Southward added: 'No. 1 is the questioned note placed in juxtaposition with the part of the sheet from set 1, marked "A" in two places. We first notice the cut of the papers on top as arranged, cut at the paper mill; next the ruling, and then the ragged edges in juxtaposition where it was separated, perhaps with the paper cutter, no matter in what way, so long as the indented spot on one edge has its corresponding tooth opposite.'

"The recorder, as he read this, exhibited the two panes of glass containing the anonymous note fitted to a sheet on which Whitaker had begun to write the letter to his mother which was found in his room. The recorder read from expert Gaylor's report of an examination of these papers by microscope. Mr. Gaylor believed 'the two to be parts of the same sheet.' Expert Ames found that the same blue ruling lines were on each paper, and that the paper in each appeared to be the same when examined under a glass of high power, but Mr. Ames reported that he did not consider himself to be an expert in paper by any means. The recorder read from Mr. Southworth's evidence that that expert spent two days in a paper mill and made many experiments in cutting and tearing paper, and then observing the edges when joined before he made his discovery known."

[5] The following narrative is given by Mr. Warren in his sketch of *Lord Sterling's Case* (Warren's Miscellanies, pp. 256–258): "We have now to record as remarkable

In the controversy as to the genuineness of the letters implicating Mary Queen of Scots in the murder of Darnley, the

an incident as ever occurred in the course of a judicial inquiry. As already stated, one of the two documents pasted on the back of the map was the alleged tombstone inscription. As the map was lying on the table of the densely crowded court, owing to either the heat or some other cause, one of the corners of the paper on which the inscription was written curled up a little,—just far enough to disclose some writing underneath it, on the back of the map. On the attention of the solicitor general being directed to the circumstance, he immediately applied to the court for its permission to detach from the map the paper on which the tombstone inscription was written. Having been duly sworn, he withdrew for that purpose, and soon afterwards returned, having executed his mission very skilfully, without injury to either paper. That on which the inscription was written proved to be itself a portion of another copy of the map of Canada, and the writing which it covered was as follows, but in French: 'There has just been shown to me a letter of Fenelon, written in 1698, having reference to this grandson of Lord Stirling, who was in France during that year, and with regard to whom he expresses himself as follows: "I request that you will see this amiable and good Irishman, Mr. John Alexander, whose acquaintance I made some years ago. He is a man of real merit, and whom everyone sees with pleasure at court, and in the best circles of the capital." These were the initials, as far as they are legible, "E. Sh."' This was represented by the solicitor general as palpably an inchoate abortive forgery; and Lord Meadowbank pointed out to the jury the evident and partially successful effort which had been made to tear off that portion of the surface of the map on which the above had been written. 'That effort failing,' said he, 'the only precaution that remained to prevent its appearing was to cover it over; for which purpose the parties used the inscription. But then the apprehension of its appearing, if the map were held between the light and the eye, seems to have come across the minds of the parties engaged in the operation, and hence, with a very singular degree of foresight, expertness, and precaution, they used for their cover that by which the eye of the inquirer might be misled in his investigation; for you have seen that the lines and words of the map forming the back of the inscription were exactly such as would naturally fall in with those on the front of the map of Canada, from which the extract from the pretended letter of Fenelon had refused to be separated. Accordingly, the invention, it would appear, had proved hitherto most successful; for, though this map had been examined over and over again by persons of

issue is mainly dependent on what may be called circumjacent tests.[6]

§ 850. Inference from falsity of contents.—"The critical examination of the internal contents of written instruments," says Mr. Wills, "perhaps of all others, affords the most satisfactory means of disproving their genuineness and authenticity, especially if they profess to be the productions of an anterior age. It is scarcely possible that a forger, however artful in the execution of his design, should be able to frame a spurious composition without betraying its fraudulent origin by some statement or illusion not in harmony with the known character, opinions, and feelings of the pretended writer, or with events or circumstances which must have been known to him, or by a reference to facts or modes of thought characteristic of a later or a different age from that to which the writing relates." [1] A deed bearing date the 13th of November, in the second and third years of Philip and Mary, in which they were called "King and Queen of Spain and both Sicilies, and Dukes of Burgundy, Milan, and Brabant," was shown to be fabricated by the fact that, at the alleged date, Philip and Mary were formally styled "Princes of Spain and Sicily," and Burgundy was never put before Milan, and they did not assume the title of King and Queen of Spain and the two Sicilies, until Trinity term following.[2] A great point against the so-called forged decretals consists in the fact that they contain what are supposed to be covert allusions to events

the first skill and talent, and scrutinized with the most minute attention, the writing which was thus covered up escaped detection, till, by the extreme heat of the courthouse yesterday, or some other cause of a similar nature, a corner of this inscription separated from the map, and revealed to our observation that which was hidden below.'"

[6] See Froude's History of England, vol. 7.

[1] Wills, Circumstantial Ev. p. 111.

[2] *Ivy's Trial,* 10 How. St. Tr. 616.

subsequent to the period of their alleged publication. Bishop Hefele, in his Geschichte Concilien, applies this test with singular sagacity for the purpose of determining which degrees of the later councils are genuine, and which are not. It is difficult for a forger to prepare a paper for a use long subsequent to its alleged date, without in some way betraying the purpose. Under our recording system tests of this kind are rarely necessary, since few deeds are operative unless recorded immediately after their execution. It is otherwise, however, as to ancient histories or letters, which are without value unless emanating from the period in which they bear date. At the same time, we must keep in mind that to all truthful narratives errors of details are incident.[3]

§ 851. Proof of writing by third party.—Proof that a certain document is in the handwriting of a particular person may be met by proof that it was written by another person. In the Webster trial, a part of the case of the prosecution was that certain letters purporting to have been written by third parties were written by the defendant. Great stress, also, in the Tichborne prosecution, was laid on the fact that letters claimed by the defense to be by the lost heir were really concocted by the claimant, and exhibited his idiosyncrasies of penmanship and spelling. Lord Meadowbank, in his charge to the jury in Humphrey's Case, mentioned a remarkable instance of this nature. A tailor in Ayr, of the name of Alexander, having learned that a person of the same name had died leaving considerable property without any apparent heirs existing, obtained access to a garret in the family mansion, and it was said found there a collection of old letters about the family. These he carried off, and with their aid fabricated a mass of similar productions which, he claimed, clearly

[3] Supra, §§ 380, 381. See, as to inference in forgery, Osborn, Questioned Documents, pp. 14, 18, 199, 214, 236.

proved his connection with the family of the deceased. When the case came to be tried, it appeared that there were a number of words in the letters, purporting to be from different individuals, spelled or rather misspelled, in the same way, and some of them so very peculiar that, on examining them minutely, there was no doubt that they were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table and examined in the presence of the court. He was desired to write a dictation of the Lord Justice Clerk, and he misspelt all the words that were misspelt in the letters precisely the same way; and this and other circumstances proved that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and, according to Mr. Willis, this result was arrived at in the teeth of half a dozen engravers, all saying that they thought the letters were written by different hands.[1]

[1] Wills, Circumstantial Ev. pp. 117, 118.

CHAPTER XVI.

INTERSTATE EXTRADITION.

§ 851a. Not a matter of comity.—It has been frequently observed that too little attention has been given by courts to the strict law governing extradition, and that technical knowledge of its doctrines and governments not only tends to guard the citizen against imposition, but to prevent fatal errors in proceedings where just cause exists.

In this chapter, however, regard will only be had to evidence competent on the hearing both before the executive of the state upon whom the demand is made and the court reviewing the action of such executive upon habeas corpus.

Interstate extradition, viewed as a purely legal question, is not a matter of comity between states of the Union,[1] and

[1] *Respublica* v. *De Longchamps,* 1 Dall. 111, 1 L. ed. 59; *Re Jones,* 1 Ops. Atty. Gen. 68; *Sullivan's Case,* 1 Ops. Atty. Gen. 509; *Case of Portuguese Seamen,* 2 Ops. Atty. Gen. 559; *Re Chevalier Huygens,* 2 Ops. Atty. Gen. 452; *Dewit's Case,* 3 Ops. Atty. Gen. 661; *Wing's Case,* 6 Ops. Atty. Gen. 85; *Case of Deserter etc.* 6 Ops. Atty. Gen. 431; *Hamilton's Case,* 6 Ops. Atty. Gen. 431; *Com. ex rel. Short* v. *Deacon,* 10 Serg. & R. 125; *United States* v. *Davis,* 2 Sumn. 482, Fed. Cas. No. 14,932; *Dos Santos's Case,* 2 Brock. 493, Fed. Cas. No. 4,016; *Re Sheazle,* 1 Woodb. & M. 66, Fed. Cas. No. 12,734; *Adriance* v. *Sagrave,* 59 N. Y. 110, 17 Am. Rep. 317; *Com.* v. *Hawes,* 13 Bush, 697, 26 Am. Rep. 242, 2 Am. Crim. Rep. 201; *Re Metzger,* 5 How. 176, 12 L. ed. 104; *Holmes* v. *Jennison,* 14 Pet. 540, 10 L. ed. 579; *People ex rel. Barlow* v. *Curtis,* 50 N. Y. 321, 10 Am. Rep. 483; *Ex parte Morgan,* 20 Fed. 298; Rover, Interstate Law, 225; *Terlinden* v. *Ames,* 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

"While it is the duty of the governor to administer the laws and guard the liberties of the people of his state, yet he takes no more judicial notice of the laws of a sister state, nor has he any more interest in their enforcement, than has a private individual. He is not authorized to assume that any individual within his territorial jurisdiction has previously committed a crime within the territory of a sister state and fled therefrom. In this respect his official knowledge is limited, in the first instance, to the proof made by the requisition and its accompanying documents; and then, if a hearing is granted, to all the legitimate evidence presented. The proceedings being purely statutory the provisions of the act of Congress in relation thereto must be strictly followed. Unless this be done, an extradition warrant cannot be granted without violating the constitutional requirement that no person shall be deprived of life, liberty, or property, without due process of law.

"A mistaken idea of official ethics sometimes causes prosecuting attorneys to co-operate with those of other states in extradition proceedings. Between prosecuting attorneys of the same state there should be co-operation; for they are elected to enforce the laws, but as to those of other states no such right or reason exists. In fact there should exist that degree of antagonism which would prompt each public executor to resist any un-

it has been held that clause 2, § 2, article 4, of the United States Constitution, which reads, "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime,"—does not of itself give the right to remove the fugitive from one state to another, and that it requires the action of Congress to put the constitutional provision in operation, and that it is in no sense self-executing.[2]

lawful or unreasonable attack on the liberty of any individual whom he is elected to represent. . . .

"Frequently governors who are less versed in organic law and personal rights than in political tactics, and who regard constitutional safeguards as trifles and technicalities unworthy of their consideration, grant extradition warrants as a matter of form. . . . The excuse given is that if favors are not extended they will not be reciprocated. . . .

"A misconception of official duty often causes police officers to make complaints under oath for the arrest of an alleged fugitive, even though their only knowledge be obtained through telegrams or letters received from the police of other cities, or, after arrest is made, to exert their ingenuity to avoid or defeat writs of habeas corpus, or to hasten the removal of the prisoner beyond the state line." *Terlinden* v. *Ames,* 12 Am. Crim. Rep. 446, case note, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484.

[2] *Hyatt* v. *New York,* 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311.

The act of Congress, U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, provides: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made, before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear, if no such agent appears within six months from the time of the arrest, the

§ 851b. Special statutes and rules of governors.—Massachusetts, Ohio, Georgia, and Indiana have special statutes making provision for carrying out the general law, and the governors of the different states in conference have agreed upon the following rules, which govern in all cases of interstate extradition: [1]

person may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory."

[1] "The application for the requisition must be made by the district or prosecuting attorney for the county or district in which the offense was committed, and must be in duplicate original papers or certified copies thereof.

"The following must appear by the certificate of the district or prosecuting attorney:

"(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in capital letters; for example, JOHN DOE.

"(b) That in his opinion the ends of public justice require that the alleged criminal be brought to this state for trial at the public expense.

"(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

"(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

"(e) If there has been any former application for a requisition for the same person, growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

"(f) If the fugitive is known to be under either civil or criminal arrest in the state or territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

"(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

"(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

"(i) If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

"1. In all cases of fraud, false pretenses, embezzlement, or forgery, when made a crime by the

§ 852. What is necessary to show by the indictment or affidavit.—It must therefore appear first to the governor of the state to whom the demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an in-

common law, or any penal code or statute, the affidavit of the principal complaining witness or informant, that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason be given for the absence of such affidavit.

"2. Proof by affidavit, of facts and circumstances satisfying the executive that the alleged criminal has fled from the justice of the state, and is in the state on whose executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the state where the alleged crime was committed at the time of the commission thereof, and is found in the state upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

"3. If an indictment has been found, certified copies in duplicate must accompany the application.

"4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate (a notary public is not a magistrate within the meaning of the statutes), and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

"5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

"6. Upon the renewal of an application, for example: On the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted, new or certified copies of the papers in conformity with the above rules must be furnished.

"7. In the case of any person who has been convicted of any crime and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information,

dictment or an affidavit certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand.

The first of these prerequisites is a question of law, and is always open, upon the face of the papers, to judicial inquiry, on an application for a discharge under a writ of habeas corpus.

The second is a question of fact, which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory.[1]

record of conviction and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

"8. No requisition will be made for the extradition of any fugitive, except in compliance with these rules."

"Resolution in relation to extradition for minor offenses.

"Resolved, that it is the sense of this conference that the governors of the demanding states discourage proceedings for the extradition of persons charged with petty offenses, and that, except in special cases, under aggravating circumstances, no demand should be made in such cases."

[1] *Re Tod,* 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303; *Re Waterman,* 29 Nev. 288, 11 L.R.A. (N.S.) 424, 89 Pac. 291, 13 A. & E. Ann. Cas. 926; *Roberts* v. *Reilly,* 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Ex parte Smith,* 3 McLean, 121, Fed. Cas. No. 12,968; Clarke, Extradition, p. 31; *Salter* v. *State,* 25 L.R.A.(N.S.) 60, and case note, 2 Okla. Crim. Rep. 464, 139 Am. St. Rep. 935, 102 Pac. 719.

"The duty of the governor of the state from which the fugitive is claimed is purely ministerial. No discretion with respect to the nature or character of the crime charged is vested in him. It is his imperative duty to issue a warrant if materials sufficient in law are laid before him." *Work* v. *Corrington,* 34 Ohio St. 64, 32 Am. Rep. 345.

The lawfulness of the arrest of a person as a fugitive from another state may be inquired into upon a writ of habeas corpus issued by either a Federal or state court. *Roberts* v. *Reilly,* 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291.

But upon such inquiry the merits of the case cannot be considered. The only question for the court is whether it appears from the documents that the prisoner

§ 853. To what extent the governor's decision may be reviewed.—How far the decision of the governor may be reviewed judicially, in proceedings in habeas corpus, is a question not settled by harmonious judicial decisions, nor by any authoritative judgment. It is conceded, however, that the determination of the fact by the executive of the state in issuing his warrant of arrest upon a demand made upon that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof.[1]

has, in fact, been charged with committing an offense in the state from which he is alleged to have fled. *Kurtz* v. *State,* 22 Fla. 36, 1 Am. St. Rep. 173; *Ex parte Spears,* 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608; Clarke, Extradition, p. 31.

"The action of the governor in granting his warrant does not bind the court, which may inquire whether an offense was charged, whether the accused person was in fact a fugitive from justice, and whether the governor's warrant was actually signed and issued by him." Clarke, Extradition, p. 31; *Re Tod,* 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303. See also *State ex rel. Grass* v. *White,* 40 Wash. 563, 2 L.R.A. (N.S.) 563, 82 Pac. 907.

[1] *People ex rel. Lawrence* v. *Brady,* 56 N. Y. 182; *Ex parte Reggel,* 114 U. S. 642, 28 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; 12 Am. & Eng. Enc. Law, 2d ed. p. 601; 8 Enc. Pl. & Pr. p. 823; *Re Tod,* 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303.

"It must also be affirmatively shown that he is a fugitive from justice, and such fact should be recited in the extradition warrant. In the warrant issued in this case, the only recital upon this subject is that the 'said Grant H. Tod, alleged to be within the jurisdiction of this state, is a fugitive from the justice of the state of Nebraska.' Undoubtedly the warrant of the governor would be prima facie sufficient to prove that all the necessary prerogatives of the statute have been complied with prior to the issue by him, but this prima facie case may be overcome by competent evidence on the part of the person sought to be held upon the habeas corpus proceeding. Upon this question the Supreme Court, in *Roberts* v. *Reilly,* supra, says: "To be a fugitive from justice in the sense of the act of Congress regulating the subject under consideration, it is not necessary

§ 854. Constructive presence not sufficient.—Holding, then, that the warrant of the governor is but prima facie sufficient to hold the accused, it has been held that to be constructively present is not sufficient, for one who was not actually present cannot fly from justice, and that it is open for the accused to show by admissions, or other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the state at the time the crime was, if ever, committed.[1]

that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process, to answer for his offense, he has left its jurisdiction and is found within the territory of another." *Re Tod,* supra.

[1] *People ex rel. Lawrence* v. *Brady,* 56 N. Y. 182; *Hyatt* v. *New* York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; *Robb* v. *Connolly,* 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544.

"It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect interpretation of the statute." *Hyatt* v. *People,* 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311. See also *Ex parte Reggel,* 114 U. S. 642, 29 L. ed. 250, 5 Sup. St. Rep. 1148, 5 Am. Crim. Rep. 218; *Roberts* v. *Reilly.* 116 U. S. 81, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Cook* v. *Hart,* 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40. Contra, *Wilcox* v. *Nolze,* 34 Ohio St. 520; *Jones* v. *Leonard,* 50 Iowa, 106, 32 Am. Rep. 116; *Re Mohr,* 73 Ala. 503, 49 Am. Rep. 63; *Re Fetter,* 23 N. J. L. 311, 57 Am. Dec. 382; *Hartman* v. *Aveline,* 63 Ind. 345, 30 Am. Dec. 217; *Ex parte Knowles,* 16 Ky. L. Rep. 263; *Kingsbury's Case,* 106 Mass. 223: *State* v. *Hall,* 115 N. C. 811, 28 L.R.A. 289, 44 Am. St. Rep. 501, 20 S. E. 729, 10 Am. Crim. Rep. 297; 2 Moore, Extradition, §§ 579–581; Spear, Extradition, §§ 310 et seq.; Cooley, Const. Lim. 4th ed. 21, note, 1; 3 Crim. L. Mag. 1882, 806, et seq.; *Jones* v. *Leonard,* 50

§ 855. Good faith of prosecution always open to inquiry.—Likewise in habeas corpus where the petitioner is held on extradition warrant, the question of the good faith of the prosecution is always open to inquiry on the very proper theory that extradition laws are not created or enforced for the collection of private debts, or for the gratification of personal malice.[1]

§ 856. No power to take from prison one confined under conviction.—If it appears, also, that the alleged fugitive is confined in prison under conviction for violating the laws of the asylum state, the governor cannot upon requisition order him taken therefrom and surrendered to satisfy the justice of the demanding state upon requisition.[1]

But it would seem that if the governor desires in such case to honor the requisition he might wipe out such conviction by a pardon, or, if the alleged fugitive is held awaiting trial, that the prosecuting officer could dismiss the prosecution by the entry of an order *nolle prosequi.*

Iowa, 106, 32 Am. Rep. 116, 7 Am. & Eng. Enc. Law, p. 646, and note 1; Wharton, Crim. Pl. & Pr. 8th ed. 231; *Ex parte Smith,* 3 McLean, 121, Fed. Cas. No. 12,968; *Wilcox* v. *Nolze,* 34 Ohio St. 520; *Tennessee* v. *Jackson,* 1 L.R.A. 370, 36 Fed. 258.

[1] *People ex rel. Wegener* v. *Magerstadt,* 34 Chicago Leg. News, 194, 12 Am. Crim. Rep. 382; *Re Herres,* 33 Fed. 165; *Grin* v. *Shine,* 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366; *Ex parte Slauson,* 73 Fed. 666; *Williams* v. *Bacon,* 10 Wend. 636; *Browning* v. *Abrams,* 51 How. Pr. 172.

[1] *Ex parte Hobbs,* 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035; *Opinion of Justices,* 24 L.R.A.(N.S.) 799, and case note, 201 Mass. 609, 89 N. E. 174; *Re Troutman,* 24 N. J. L. 634; *Taylor* v. *Taintor,* 16 Wall. 366, 21 L. ed. 287; *People ex rel. Gallagher* v. *Hagan,* 34 Misc. 85, 69 N. Y. Supp. 475; *State* v. *Allen,* 2 Humph. 258.

But if arrested on civil process for alleged fraud, it is held that the interest of the private person must yield to the paramount interest of the state. *Ex parte Rosenblat,* 51 Cal. 285, 2 Am. Crim. Rep. 215.

§ 857. Whether accused is a fugitive, always open to inquiry.—The governor of the asylum state must in all cases determine for himself whether or not the accused is in fact a fugitive from justice, as a condition precedent to his surrender to the demanding state. And this must appear from competent proof, upon a proper charge, of the existence of such fact.[1] The question of the guilt or innocence of the accused is not to be inquired into, except so far as it may be necessary to determine the question whether he is or is not such fugitive from justice.[2]

§ 858. Meager evidence as to being a fugitive does not entitle prisoner to be discharged.—If the determination that the prisoner is a fugitive from justice, by the executive upon whom the demand is made, upon evidence introducted before him, is subject to judicial review upon habeas corpus, the accused, being in custody under his warrant,—which recites the requisition of the demanding state, accompanied by an authentic indictment charging him substantially in the language of her statutes with a specific crime committed within her limits,—should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice is not as full as might properly have been required, or because it is so meager as perhaps to admit of a conclusion

[1] *Ex parte Reggel,* 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; *Roberts* v. *Reilly,* 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 691; *Cook* v. *Hart,* 146 U. S. 185, 31 L. ed. 935, 13 Sup. Ct. Rep. 40.

[2] *Re Greenough,* 31 Vt. 279; *Re Roberts,* 24 Fed. 132; *Re Keller,* 36 Fed. 681; *Re White,* 45 Fed. 237; *Webb* v. *York,* 25 C. C. A. 133, 49 U. S. App. 163, 79 Fed. 616; *Ex parte Pearce,* 32 Tex. Crim. Rep. 301, 23 S. W. 15.

"But the identity of the prisoner can be inquired into, and also whether the venue of the crime charged was properly laid within the demanding state."

Harris v. *Magee,* — **Iowa,** —, 129 N. W. 742.

different from that reached by him. It is sufficient if a prima facie case is made.[1]

[1] *Ex parte Riggel,* 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218.

"But an affidavit upon information and belief does not satisfy the requirements of the law in this respect. The removal of a person from one state as a fugitive from the justice of another is a matter of the highest importance. Such removal cannot be made upon less evidence of the party's guilt and flight than would authorize a warrant and arrest in an ordinary case. It should give probable cause to believe that the person demanded had committed a particular crime against the law of the state making the demand, and that he has fled therefrom on that account." *Ex parte Smith,* 3 McLean, 121, Fed. Cas. No. 12,968; *Ex parte Thornton,* 9 Tex. 635; *Re Doo Woon,* 9 Sawy. 417, 18 Fed. 898; *Ex parte Morgan,* 20 Fed. 298; *Ex parte Lane,* 6 Fed. 34; *Rice* v. *Ames,* 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356; *Smith* v. *Luce,* 14 Wend. 237; *Re Bliss,* 7 Hill, 187; *Proctor* v. *Prout,* 17 Mich. 473; *Lippman* v. *People,* 175 Ill. 101, 51 N. E. 872; 11 Am. Crim. Rep. 356; *Ex parte Dimmig,* 74 Cal. 164, 15 Pac. 619; *State ex rel. Register* v. *McCahey,* 12 N. D. 535, 97 N. W. 865, 10 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283; *State* v. *Gleason,* 32 Kan. 245, 5 Am. Crim. Rep. 172; *Schustek's Case,* 11 Am. Crim. Rep. 372, note; *Johnston* v. *United States,* 30 C. C. A. 612, 58 U. S. App. 313, 87 Fed. 187, 11 Am. Crim. Rep. 349; *Ex parte Hart,* 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; *United States* v. *Collins,* 79 Fed. 65; *United States* v. *Sapinkow,* 90 Fed. 654; *United States* v. *Tureaud,* 20 Fed. 621; *People ex rel. Lawrence* v. *Brady,* 56 N. Y. 182; *Sheridan* v. *Briggs,* 53 Mich. 569, 19 N. W. 189.

"The principle deducible from these cases, being that an affidavit which is used as the basis of a writ which will deprive a person of his liberty, must not only set forth the facts and circumstances fully and in detail, and not conclusions or inferences from facts, but they must be facts within the personal knowledge of the deponent." *Rice* v. *Ames,* 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 365.

"Judged by another standard such affidavit, and the statements therein contained, must be made with that degree of positiveness and clearness as that, if falsely made, the affidavit would be subject to the pains and penalties of perjury." *Miller* v. *Munson,* 34 Wis. 579, 17 Am. Rep. 461; *Neal* v. *Gordon,* 60 Ga. 112; *Peers* v. *Carter,* 4 Litt. (Ky.) 269; *People ex rel. Cook* v. *Becker,* 20 N. Y. 354; *Schustek's Case,* 11 Am. Crim. Rep. 372, note; *People* v. *Heffron,* 53 Mich. 527, 19 N. W. 170; *Ex parte Dimmig,* 74 Cal. 164, 15 Pac. 619; *Ex parte Lane,* 6 Fed. 34;

§ 859. Evidence of forcible capture not admissible on a writ of habeas corpus before or upon the trial.—Evidence is never admissible on a writ of habeas corpus before or upon the trial of an alleged fugitive, that he was forcibly taken and brought into the sister state. His illegal arrest, and even abduction, are not to be inquired into.[1]

It is further the settled law that in interstate extradition the prisoner is held under the extradition process until such time only as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state; and that it necessarily follows that there is no longer a Federal question involved in his detention.[2]

§ 860. Defective process does not entitle prisoner to release.—It has likewise been held that one arrested and detained under extradition papers and capias issued on an indictment for grand larceny, and taken into the state where the offense was alleged to have been 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

Myers v. *People,* 67 Ill. 503; *Vandever* v. *State,* 1 Marv. (Del.) 209, 40 Atl. 1105, 11 Am. Crim. Rep. 355.

[1] *Ker* v. *People,* 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Crim. Rep. 211; *Ex parte Davis,* 51 Tex. Crim. Rep. 608, 12 L.R.A.(N.S.) 225, 103 S. W. 891, 14 A. & E. Ann. Cas. 522; *La Grave's Case,* 14 Abb. Pr. N. S. 333; *Re Miles,* 52 Vt. 609; *Ex parte Brown,* 28 Fed. 653; *Re Miller,* 23 Fed. 32. Contra: *Tennessee* v. *Jackson,* 1 L.R.A. 370, 36 Fed. 258.

[2] *Re Moyer,* 12 Idaho, 250, 12 L.R.A.(N.S.) 227, 118 Am. St. Rep. 214, 85 Pac. 897; *State* v. *Smith,* 1 Bail. L. 283, 19 Am. Dec. 679, 12 Am. & Eng. Enc. Law, p. 607; *Eaton* v. *West Virginia,* 34 C. C. A. 68, 61 U. S. App. 667, 91 Fed. 760; *Kingen* v. *Kelley,* 3 Wyo. 571, 15 L.R.A. 177, 28 Pac. 38; *Ex parte Barker,* 87 Ala. 4, 13 Am. St. Rep. 17, 6 So. 7, 8 Am. Crim. Rep. 236; *State* v. *Ross,* 21 Iowa, 467; *State* v. *Patterson,* 116 Mo. 505, 22 S. W. 696; *Brookin* v. *State,* 26 Tex. App. 121, 9 S. W. 737; *State* v. *Glover,* 112 N. C. 896, 17 S. E. 525; *Lascelles* v. *Georgia,* 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687, 11 Rose's Notes (U. S.) 239.

the complaint of the authorities of the state from which the prisoner was extradited.[1]

§ 861. Effect of surrender, to exonerate bail.—The surrender of a defendant, in a criminal case, by the governor, upon the requisition of the executive of another state, discharges his bail.[1]

§ 862. Sufficiency of indictment open to inquiry.—The sufficiency of the indictment upon which the demanding state

[1] *Ex parte Barker,* 87 Ala. 4, 13 Am. St. Rep. 17, 6 So. 7, 8 Am. Crim. Rep. 236.

"It nevertheless is true, that 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 into 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 kidnapping, or be held liable to respond in 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 kidnapped 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." Ibid.; Spear, Extradition, 181, 492, 554; 7 Am. & Eng. Enc. Law, p. 643; Re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; *Com. ex rel. Norton* v. *Shaw,* 6 Crim. L. Mag. 245 (1885).

[1] *State* v. *Adams,* 3 Head. 260; *State* v. *Allen,* 2 Humph. 258.

"Extradition laws have no application to the case of convicted prisoners of another state who are passing through a sister state in the custody of an officer of the state in which they have been convicted." *Re Maney,* 20 Wash. 509, 72 Am. St. Rep. 130, 55 Pac. 930.

has based its requisition may be inquired into upon an application for habeas corpus to obtain a discharge therefrom.[1]

§ 863. Evidence taken on preliminary hearing not examined on habeas corpus.—Where requisition is made upon the governor of one state by the governor of another state, for the return of an alleged fugitive from justice, and the requisition is accompanied by a copy of the complaint filed in the court to which the party whose return is demanded was held to appear by the examining magistrate, and also a copy of the evidence adduced at the preliminary hearing before the magistrate, and the party, on being arrested on the warrant issued by the governor in compliance with the request on such requisition, sues out a writ of habeas corpus in the district court or before a judge thereof, and, in order to reverse the order of the district court denying the relief prayed for, brings the case to the upper court on error,—the evidence taken on the preliminary hearing will not be examined to determine whether it sustains the charge of crime alleged in the information, nor to determine whether it supports the finding of the examining court, that there was a probable cause that the party committed the crime with which he is charged.[1]

[1] *Armstrong* v. *Van DeVanter*, 21 Wash 682, 59 Pac. 510, 12 Am. Crim. Rep. 327; *Re Cook*, 49 Fed. 833; *People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182; *Re Terrell*, 51 Fed. 213. *Ex parte Hart*, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

"It is a reasonable rule supported by obvious considerations of justice and policy, that when a surrender is sought upon proof by affidavit of a crime, the offense should be distinctly and plainly charged. Security to personal liberty demands this, and the state will meet the full measure of its obligations under the Federal Constitution if it requires this before consenting to the arrest and removal of alleged offenders. . . .

"The test is, Would the court sustain a motion to quash?" *People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182.

[1] *Re Van Sciever*, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037. Hawley, Interstate Extradition, pp. 30–33.

The court also, in the same case,

§ 864. Writ of error to review decision on habeas corpus.—The authorities uniformly hold that it is the established rule of the English courts, that a writ of error will not lie to the final order made on the hearing of a habeas corpus; and this ruling has been adhered to in a number of the states of this country, while several of them have provided by statute for reviewing such decision on a habeas corpus, by error or appeal. The general rule seems to be, that the proceedings should be instituted in the country where the alleged unlawful restraint is being exercised, and where, if it is necessary to call witnesses, the parties will not be subjected to unnecessary expense and inconvenience. The case may, then, be reviewed on error as in other cases.[1]

decides that where the requisition is accompanied by a copy of the indictment found by the grand jury, the fact that the indictment has been found is prima facie evidence that the act charged is a crime, and is so recorded in the state where the act was done; and where the practice of prosecution by information has been established by law, and it appears from the record accompanying the requisition that the party whose rendition is asked has been accorded a preliminary hearing, as a result of which he was held to appear and answer to the charge in the higher court, has been duly charged with the crime in the higher court in the information filed therein, a copy of which is attached to the papers presented for requisition to the governor,—such information is of as high a grade as a criminal pleading, as an indictment, and entitled to the same weight as evidence, and will be so considered. *Re Van Sciever,* supra.

See also to the end that the technical sufficiency of the pleading will not be examined on habeas corpus, but will be left to be disposed of by the courts of the state making the demand for the accused, *Tullis* v. *Fleming,* 69 Ind. 15; *Ex parte Pearce,* 32 Tex. Crim. Rep. 301, 23 S. W. 15; *Brown's Case,* 112 Mass. 409, 17 Am. Rep. 114; 2 Moore, Extradition, p. 1030, § 638; *State ex rel. O'Malley* v. *O'Connor,* 38 Minn. 243, 36 N. W. 462; *Re Roberts,* 24 Fed. 132; *Re Welch,* 57 Fed. 576.

[1] *Re Van Sciever,* 42 Neb. 772, 42 Am. St. Rep. 730, 60 N. W. 1037; *Re White,* 33 Neb. 812, 51 N. W. 287.

The conclusion arrived at concerning this matter of procedure, by the Nebraska court and others is, that where there is a trial in a habeas corpus case, and it is sought

§ 865. Purpose of habeas corpus proceedings.—The purpose of habeas corpus proceedings is to review the legality of the action of the governor in issuing the warrant, and not to try the question of the relator's guilt or innocence.[1] And the general rule is that a writ of habeas corpus will not issue unless the court under whose warrant the prisoner is held is without jurisdiction, and that it cannot be used to correct errors.[2] Nor will the courts of the state from which the fugitive is demanded pass on the question of the constitutionality of the statute of the demanding state.[3]

§ 866. Weight of the evidence.—The rule as to the weight of the evidence sufficient to warrant the holding and commitment of an accused person on extradition is that the same should be as strong and satisfactory as would warrant a commitment for an offense committed in the asylum state.[1]

to have reviewed any error alleged to have occurred during such trial, that the same rule applies in a habeas corpus case as in other cases, and it is necessary that a motion for a new trial should be made, embodying the errors of which the party complains, and presented to the trial court or judge, and a ruling obtained thereon. And this is believed to be the rule of practice in all states where no statute or Code provision exists for reviewing decisions on habeas corpus. *Re Van Sciever,* supra; *Ex parte Collier,* 6 Ohio St. 55; *Holmes* v. *Jennison,* 14 Pet. 540, 10 L. ed. 579; Maxwell, Pl. & Pr. 5th ed. 759; *Atwood* v. *Atwater,* 34 Neb. 402, 51 N. W. 1073; *Re White,* 33 Neb. 812, 51 N. W. 287.

In habeas corpus proceedings, exceptions to an order remanding petitioner to the custody of the agent of another state, who held him by virtue of a mandate of the governor issued in pursuance of a requisition, on the ground that the "warrant is insufficient in law, the same not being in compliance with the Constitution and laws of the United States and this state," and "because no proper requisition was made by the governor of the demanding state," are too general for review on appeal. *Ex parte Moscato,* 44 S. C. 335, 22 S. E. 308.

[1] *Harris* v. *Magee,* — Iowa, —, 129 N. W. 742; *Re White,* 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54; *Ex parte Sheldon,* 34 Ohio St. 319; Hughes, Crim. Law & Proc. § 3438.

[2] *Re Belt,* 1 Park. Crim. Rep. 169.

[3] *Ex parte Pearce,* 32 Tex. Crim. Rep. 301, 23 S. W. 15.

[1] Hughes, Crim. Law & Proc. § 3435; *Bryant* v. *United States,* 167

§ 867. "Indictment" or other accusation synonymous with "information."—While it has been held that an indictment duly certified as provided by act of Congress is prima facie evidence of guilt,[1] and that an information cannot serve as a substitute for an indictment,[2] nevertheless in some of the state courts it has been held that under § 5278 of U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 3597, requiring that a requisition shall be accompanied by a "copy of an indictment found or an affidavit made before a magistrate" of the state making the demand, the proof of the charge by an information is a sufficient compliance with the law of Congress. The intent of the law was held to be that a charge must be made in a regular course of judicial proceedings in the form of an information filed by the proper law officer, and that an "indictment or other accusation" was synonymous with "information."[3]

U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; *Benson* v. *McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; *Re Ezeta*, 62 Fed. 972; *Re McPhun*, 24 Blatchf. 254, 30 Fed. 58; Underhill, Crim. Ev. § 496.

[1] *Illinois ex rel. McNichols* v. *Pease*, 207 U. S. 100, 52 L. ed. 121, 28 Sup. Ct. Rep. 58; *Hyatt* v. *New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; *Munsey* v. *Clough*, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282; *Re Van Sciever*, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037; *Marbles* v. *Creecy*, 215 U. S. 63, 54 L. ed. 92, 30 Sup. Ct. Rep. 32; *Re Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382; 5 Enc. Ev. p. 731; *Appleyard* v. *Massachusetts*, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122, 7 A. & E. Ann. Cas. 1073.

[2] *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; *Ex parte Hart*, 28 L.R.A. 801, and note, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

[3] *Re Hooper*, 52 Wis. 699, 58 N. W. 741; 5 Enc. Ev. p. 731. See also *Cook* v. *Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Iasigi* v. *Van de Carr*, 166 U. S. 392, 41 L. ed. 1046, 17 Sup. Ct. Rep. 595.

As to scope of review on habeas corpus, see notes to *Bruce* v. *Rayner*, 62 C. C. A. 506; *Oteiza y Cor-*

§ 868. Matters in abatement and substantive defenses not considered.—On proceedings upon habeas corpus, the history of the finding of the indictment or the defense of the statute of limitations are not matters that will be considered, or evidence concerning, received. The former concerns the substantive defense of the accused, and, the latter being purely a matter of abatement, both are properly for the court into which the indictments were returned and where the case will be tried.[1] So, it has been held that all minor objections which go to the form, rather than to the substance of the indictments, are matters to be determined in the court where they were found, and are not proper for consideration upon habeas corpus proceedings.[2]

§ 869. When a notary public is a "magistrate."—While the rules adopted by the governors of the respective states, based upon U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p.

tes v. *Jacobus,* 34 L. ed. U. S. 464; *State* v. *Jackson,* 1 L.R.A. 373; *Bion's Appeal,* 11 L.R.A. 694; *Glass* v. *The Betsey,* 1 L. ed. U. S. 489; *United States* v. *Hamilton,* 1 L. ed. U. S. 490; *Re Carll, 27* L. ed. U. S. 288.

The executive of the surrendering state may act upon the requisition papers, in the absence of the accused, and without previous notice to him. *Marbles* v. *Creecy,* 54 L. ed. U. S. 92.

The mere suggestion that the alleged fugitive from the justice of another state, because of his race or color, will not receive a fair and impartial trial in the court of the demanding state, and will not be adequately protected against violence while in the custody of that state, does not require the executive of the state in which he may be found to refuse to surrender him on demand made in conformity with the Federal Constitution and laws, nor furnish a ground for his release on habeas corpus. Ibid.

[1] *Haas* v. *Henkel,* 216 U. S. 482, 54 L. ed. 578, 30 Sup. Ct. Rep. 249, 17 A. & E. Ann. Cas. 1112.

"It is enough to hold, as we do, that the indictments sufficiently charge an offense committed within the District of Columbia to require that the appellant shall be removed to that district for trial." *Benson* v. *Henkel,* 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569.

[2] *Haas* v. *Henkel,* 216 U. S. 482, 54 L. ed. 578, 30 Sup. Ct. Rep. 249, 17 A. & E. Ann. Cas. 1112; *Benson*

3597, prescribed that the affidavit must be made before a "magistrate," and that a notary public is not a magistrate within the meaning of such statute, yet, under Georgia Code 1895, vol. 2, pp. 93, 982, where a notary public is *ex officio* a justice of the peace, such affidavit must be regarded as satisfying the requirements of the provisions of U. S. Rev. Stat. § 5278, that such affidavit must be made before "a magistrate." [1]

§ 870. Complaint filed before a committing magistrate is a "charge of crime."—So a person against whom a complaint for a felony has been filed before a committing magistrate, who can only charge or hold for trial before another tribunal, is "charged" with the crime, within the meaning of U. S. Const. art. 4, § 2, sub. 2, and of U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, providing for the extradition of persons charged with treason, felony, or other crime.[1]

v. *Henkel,* 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569.

[1] *Compton* v. *Alabama,* 214 U. S. 1, 53 L. ed. 885, 29 Sup. Ct. Rep. 605, 16 A. & E. Ann. Cas. 1098.

As to what papers are necessary to obtain the surrender of a fugitive from another state, see note to *Ex parte Hart,* 28 L.R.A. 801.

An indictment, whether good or bad, as a pleading which unmistakably describes every element of the crime of false swearing, as defined by Tex. Penal Code, art. 209, is "a charge of crime" within the meaning of the U. S. Const., Art. 4, § 2, ¶ 2, regulating interstate extradition. *Pierce* v. *Crecey,* 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714.

[1] *Re Strauss,* 197 U. S. 325, 49 L. ed. 774, 25 Sup. Ct. Rep. 535.

CHAPTER XVII.

CIRCUMSTANTIAL EVIDENCE.

I. Circumstantial Evidence.

§ 871. Definition.—Circumstantial evidence is more clearly defined from its results than by a definition of the phrase itself. It is that evidence that tends to prove the facts in issue by proving other facts or circumstances that, according to the common experience of mankind, usually attend the facts in issue, affording a basis for a reasonable inference by the court or the jury that the facts in issue actually occurred.[1]

[1] *State* v. *Avery,* 113 Mo. 475, 21 S. W. 193; *State* v. *Dickson,* 78 Mo. 438; *State* v. *Tate,* 156 Mo. 119, 56 S. W. 1099; *Baird* v. *New York,* 96 N. Y. 567, 593; *State* v. *Kornstett,* 62 Kan. 221, 61 Pac. 805; *Howard* v. *State,* 34 Ark. 433; *State* v. *Evans,* 1 Marv. (Del.) 477, 41 Atl. 136; *Horn* v. *Territory,* 8 Okla. 52, 56 Pac. 846; *Buel* v. *State,* 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; Ga. Code, 1895, § 5143; Will, Circumstantial Ev. 15; Wigmore, Ev. § 25.

Evidence is either direct or indirect. Direct evidence is that which authenticates the ultimate fact, that is, the very fact in issue; as where, on a murder trial, a witness testifies that he saw defendant stab the deceased, who immediately died. Indirect evidence is that which authenticates not the ultimate fact, but evidentiary facts, that is, facts from which an inference may be drawn of the existence of the ultimate fact; as

§ 872. Illustrations of.—In the endeavor to give to the jury a clear comprehension of what is meant by circumstantial

if, in the illustration just given, the witness should testify not that he saw defendant stab the deceased, but that he saw him draw a knife from deceased's side, fling it into a river near by, and hurry away, the knife afterwards being found and identified as defendant's. Direct evidence appeals only to the belief of the jury. Indirect evidence, on the other hand, appeals, first, to the belief of the jury, and, second and characteristically, to their reason. If direct evidence is believed, the jury can but find that the fact in issue exists. Their belief in the truth of indirect evidence does not thus dispose of the matter; in spite of that belief, they may decline to infer the existence of the ultimate fact.

Evidential presumptions are a development of indirect evidence. In the mass of cases that come before the courts for trial, it is inevitable that certain evidentiary facts should often recur. The effect of these as evidence of the ultimate fact in issue was originally, in all cases, a matter of inference,—a question of fact to be determined by the jury under appropriate instructions from the court; but when case after case had presented itself with like evidentiary facts, it was only natural that the courts should begin to advise the jury as to the inference which they might draw from those facts. At first, no more was done than to inform the jury that they "might" draw a particular inference from the facts in evidence. Later it was told them that that inference "ought" to be drawn. And it finally came about that the jury were instructed that that inference "must" be drawn. Now, when this stage was reached, as it was reached in many cases, what had theretofore been an inference—the result of the exercise of the rational faculty—became a conclusion of law, dependent in no wise upon the jury's view of its propriety; in other words, what was originally an inference became a presumption,—an assumption or a taking for granted under the sanction of the law. In this manner, evidential presumptions came into being. Hammon, Ev. § 16a.

"Matter, logically evidential, [thus becomes] the subject of a rule which directly, although only prima facie, annexes to it legal consequences belonging to the facts of which it is evidence; and this rule takes its place in the substantive law as a subsidiary proposition, alongside of the main and fundamental one, as an aid in the application of it. The law . . . is always growing in this way, through judicial determinations, for the application of the ultimate rule of the substantive law has to be made by reasoning; and this process is forever discovering the identity, for legal and practical purposes, of one state of things with

evidence, courts have used two illustrations: First, that each of the incidental facts surrounding a main fact in issue is a link in a chain, and that the chain is not stronger than its weakest link. This illustration is generally rejected as an inaccurate metaphor and liable to misconstruction.[1] Second, that such incidental facts surrounding the main fact in issue are compared to the strands in a rope, where no one of them may be sufficient in itself, but all taken together may be strong enough to establish the guilt of the accused beyond a reasonable doubt.[2]

§ 873. Certain and uncertain.—Circumstantial evidence is generally spoken of as being of two classes: First, certain or that from which the conclusion to be reached must necessarily follow; second, uncertain, or that from which the conclusion to be reached does not necessarily follow, but is rendered probable only, and the ultimate fact is dependent upon the inference that is drawn.[1]

some other. Many facts and groups of facts often recur; and when a body of men, with a continuous tradition, has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them." Thayer, Ev. 326.

[1] *Clare* v. *People,* 9 Colo. 122, 10 Pac. 799; *Graves* v. *People,* 18 Colo. 170, 32 Pac. 63; *State* v. *Shines,* 125 N. C. 730, 34 S. E. 552; *Tompkins* v. *State,* 32 Ala. 569.

See *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356; *Carroll* v. *Com.* 84 Pa. 107, 2 Am. Crim. Rep. 290; *Bressler* v. *People,* 117 Ill. 422, 8 N. E. 62.

[2] *State* v. *Austin,* 129 N. C. 534, 40 S. E. 4, 15 Am. Crim. Rep. 53; *United States* v. *Searcey,* 26 Fed. 435.

[1] *People* v. *Morrow,* 60 Cal. 142; *Gannon* v. *People,* 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525.

See *Beason* v. *State,* 43 Tex. Crim. Rep. 442, 69 L.R.A. 193, 67 S. W. 96; Hughes, Crim. Law, 3204; 1 Greenl. Ev. 14th ed. 13a; Hammon, Ev. p. 57.

§ 874. Value of.—Circumstances are but minor facts, although the words, facts, and circumstances are used interchangeably in the phrase, "circumstantial evidence." When we speak of a circumstance, we have in mind a minor fact that relates to or is connected with the main fact. When these minor facts point unerringly to a conclusion, then they are said to be certain. Thus, in the case of Mendum v. Com.,[1] the accused was indicted for murder, and at the trial many of the minor facts or circumstances were inconclusive. But the state proved by a physician that the wound inflicted had the appearance of having been made by a dirk or dagger; another witness supplemented this by testifying that a short time before the murder he had borrowed from the accused a dirk with a metallic handle, having either "J. C." or "J. H." engraved upon the handle, but could not positively identify the dirk produced at the trial. The state farther proved that the dirk when found had no cap, but later a cap was found that fitted the dirk, which was engraved with the letters "J. H." The state farther proved that about sixteen years before, a half brother of the accused had such a dirk purchased for him by the witness testifying; that the half brother died without issue; that the accused said that the dirk was the only property he had ever received from his brother's estate. A conviction was sustained. While these minor facts were inconclusive in themselves, yet when all were established there could be but one reasonable conclusion drawn, and that of guilt, and the conclusion was so certain as to leave no reasonable doubt of the guilt of the accused.

But the worthlessness of an abundance of apparently well-connected circumstances is well illustrated in the Tichborne Case.[2] The mother of Sir Roger recognized the claimant as

[1] 6 Rand. (Va.) 704.
See *How's Case*, 2 Wheeler, C. C. 410; *Cook* v. *State*, — Miss. —, 28 So. 833; *United State* v. *Isla de Cuba*, 2 Cliff. 295, Fed. Cas. No. 15,447.

[2] *R.* v. *Orton* (Pamphlet).
See also *R.* v. *Wood*, 28 St. Tr.

her son; he was so recognized by one of the family solicitors; an officer who had served in the Army with him testified to his identity with Sir Roger; these circumstances led to an overwhelming number of soldiers making positive identification of the claimant as Sir Roger. None of them believed he could be mistaken.

The reasonable explanation of this is that the soldiers were persuaded that since the mother and family solicitor and the officer identified the claimant as the heir, there must be some defect in their own memory, if they could not so identify him; and they at once persuaded themselves that they, too, positively recognized Sir Roger in the claimant. The claim was only defeated by the unshaken doubts of another family solicitor, who knew of a circumstance that only he and the real Sir Roger could know, a note written to a lady with whom Sir Roger hoped to arrange a marriage on his return, left with the solicitor, and when the claimant attempted to state its contents, the falsity of his well-established pretenses at once appeared.

Hence, where circumstantial evidence consists in reasoning from the minor fact to establish the main fact, the process is fatally vicious if the circumstances from which we seek to deduce the conclusions depend themselves upon conjecture.[3] In a case depending upon circumstantial evidence, the finding of one fact inconsistent with the guilt of the accused is sufficient to create a reasonable doubt of his guilt.[4]

819; *Com.* v. *Harman,* 4 Pa. 269; *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65.

[3] *People* v. *Kennedy,* 32 N. Y. 141; Starkie, Ev. § 572; *Algheri* v. *State,* 25 Miss. 584; *State* v. *Moxley,* 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *People* v. *Cunningham,* 6 Park. Crim. Rep. 398; *People* v. *Strong,* 30 Cal. 151; *Harrison* v. *State,* 6 Tex. App. 42.

[4] Burrill, Circumstantial Ev. § 136; *Walker* v. *State,* 153 Ala. 31, 45 So. 640; *Simmons* v. *State,* 158 Ala. 8, 48 So. 606; *People* v. *Dole,* 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581, *Howard* v. *State,* 108 Ala. 571, 18 So. 813; *Hodges's*

In both direct and circumstantial evidence, the facts may be undisputed, but in circumstantial evidence the relation to the main issue may be only apparent, and even when the connection is established, the deduction and inference may be erroneous.

Assuming that three factors are essential to establish a main proposition, these factors, which we may denominate A, B, and C, must each be established. It is not sufficient to establish A and B, by multiplying each of these a number of times, because such multiplication will not supply the place of C. Thus, in the Tichborne Case, there was a multiplication of one factor, that is, identification by a great number, as to the services of the claimant in the Army. This was not sufficient to overcome the necessity for identity on other points involved. In the Mendum Case, the essential factors were established without multiplication of any one of the factors.

Hence, where circumstantial evidence merely tends to augment one essential factor, and endeavors by such augmentation to substitute it for another, the proof thus sought to be adduced is valueless. But where it goes to the establishment of each of essential factors of the main proposition, it becomes convincing, and as certain as human affairs can be established.[5]

Case, 2 Lewin, C. C. 227; Starkie, Ev. 4th ed. 839.

[5] Will, Circumstantial Ev. chap. 3.

The danger to be guarded against in circumstantial evidence is that tendency of the mind to adapt circumstances to each other, and to see in isolated circumstances a connection that points to a conclusion. We have already referred to the *Trailor's Case* (supra, § 635), but the following letter written by Mr. Lincoln from the standpoint of one of the attorneys for the defense sets forth the matter so vividly, and shows the danger of circumstantial evidence so completely, particularly where there is no proof of the *corpus delicti,* that the letter is appended in full in the note.

Springfield, June 19, 1841.

Dear Speed:—

We have had the highest state of excitement here for a week past that our community has ever wit-

§ 875. Comments of court upon relative merits of direct and circumstantial evidence.—No human testimony is con-

nessed; and although the public feeling is somewhat allayed, the curious affair which aroused it is far from being over yet, cleared of mystery. It would take a quire of paper to give you anything like a full account of it, and I therefore only propose a brief outline.

The chief personages in the drama are Archibald Fisher, supposed to be murdered, and Archibald Trailor, Henry Trailor, and William Trailor, supposed to have murdered him. The three Trailors are brothers. The first, Archibald, as you know, lives in town; the second, Henry, in Clary's Grove; and the third, William, in Warren county; and Fisher, the supposed murdered, being without a family, had made his home with William. On Saturday evening, being the 29th of May, Fisher and William came to Henry's in a one-horse dearborn, and there stayed over Sunday; and on Monday all three came to Springfield (Henry on horseback), and joined Archibald at Myer's, the Dutch carpenter. That evening at supper Fisher was missing, and so next morning some ineffectual search was made for him; on Tuesday, at 1 o'clock P. M. William and Henry started home without him. In a day or two Henry and one or two of his Clary Grove neighbors came back for him again, and advertised his disappearance in the papers.

The knowledge of the matter thus far had not been general, and here it dropped entirely till about the 10th inst., when Keys received a letter from the postmaster in Warren county, that William had arrived at home, and was telling a very mysterious and improbable story about the disappearance of Fisher, which induced the community there to suppose he had been disposed of unfairly. Keys made this letter public, which immediately set the whole town and adjoining county agog. And so it has continued until yesterday.

The mass of the people commenced a systematic search for the dead body, while Wickersham was dispatched to arrest Henry Trailor at the Grove, and Jim Maxcy to Warren to arrest William. On Monday last, Henry was brought in, and showed an evident inclination to insinuate that he knew Fisher to be dead, and that Archibald and William had killed him. He said he guessed the body could be found in Spring creek, between the Beardstown road and Hickox's mill. Away the people swept like a herd of buffalo, and cut down Hickox's milldam *nolens volens*, to draw the water out of the pond, and then went up and down, and down and up the creek, fishing and raking, and raking and ducking, and diving for two days; and, after all, no dead body found. In the meantime a sort of a scuffling ground had been found in the brush in the angle, or point, where

clusive as superior to every doubt. Even in direct testimony where the integrity of the witness is unquestioned, he may

the road leading into the woods past the brewery, and the one leading in past the brick grove, meet. From the scuffle ground was the sign of something about the size of a man having been dragged to the edge of the thicket, where joined the track of some small wheeled carriage drawn by one horse, as shown by the road track. The carriage track led off towards Spring creek. Near this drag trail, Dr. Merryman found two hairs, which, after a long scientific examination, he pronounced to be human hair, which term, he says, includes within it the whiskers, the hair growing under the arms, and on other parts of the body; and he judged that these two were of the whiskers, because the ends were cut, showing that they had flourished in the neighborhood of the razor's operations.

On Thursday last Jim Maxcy brought in William Trailor from Warren. On the same day Arch. was arrested, and put in jail. Yesterday (Friday) William was put upon his examining trial before May and Lavely; Archibald and Henry were both present. Lamborn prosecuted, and Logan, Baker, and your humble servant defended. A great many witnesses were introduced and examined, but I shall only mention those whose testimony seemed most important. The first of these was Capt. Ransdell. He swore that, when William and Henry left Springfield for home on Tuesday before mentioned, they did not take the direct route,—which, you know, leads by the butcher shop; but that they followed the street north until they got opposite, or nearly opposite, May's new house, after which he could not see them from where he stood; and it was afterwards proved that, in about an hour after they started, they came into the street by the butcher's shop from towards the brickyard. Dr. Merryman and others swore to what is stated about the scuffle ground, drag trail, whiskers, and carriage tracks.

Henry was then introduced by the prosecution. He swore that, when they started for home, they went out north, as Ransdell stated, and turned down west by the brickyard into the woods, and there met Archibald; that they proceeded a small distance further, when he was placed as a sentinel to watch for and announce the approach of anyone that might happen that way; that William and Arch. took the dearborn out of the road a small distance to the edge of the thicket, where they stopped, and he saw them lift the body of a man into it; that they moved off with the carriage in the direction of Hickox's mill, and he loitered about for something like an hour, when William returned with the carriage, but without Arch., and said they had put him in a safe place; that they

err in his observations or in narration. Such testimony comes to the jury through the remove of one medium, that is, the

went somehow, he did not know exactly how, into the road close to the brewery, and proceeded on to Clary's Grove. He also stated that some time during the day William told him that he and Arch. had killed Fisher the evening before; that the way they did it was by him (William) knocking him down with a club, and Archibald then choking him to death.

An old man from Warren, called Dr. Gilmore, was then introduced on the part of the defense. He swore that he had known Fisher for several years; that Fisher had resided at his house a long time at each of two different spells; once while he built a barn for him, and once while he was doctored for some chronic disease; that two or three years ago Fisher had a serious hurt in his head by the bursting of a gun, since which he had been subject to continued bad health and occasional aberration of mind. He also stated that on last Tuesday, being the same day that Maxcy arrested William Trailor, he (the doctor) was from home in the early part of the day, and on his return, about 11 o'clock, found Fisher at his house in bed, and apparently very unwell; that he asked him how he had come from Springfield; that Fisher said he had come by Peoria, and also told of several other places he had been at, more in the direction of Peoria, which showed that he, at the time of speaking, did not know where he had been wandering about in a state of derangement. He further stated that in about two hours he received a note from one of Trailor's friends, advising him of his arrest, and requesting him to go on to Springfield as a witness, to testify as to the state of Fisher's health in former times; that he immediately set off, calling up two of his neighbors as company, and, riding all evening and all night, overtook Maxcy and William at Lewiston, in Fulton county. That Maxcy refusing to discharge Trailor upon his statement, his two neighbors returned, and he came on to Springfield. Some question being made as to whether the doctor's story was not a fabrication, several acquaintances of his (among whom was the same postmaster who wrote to Keys, as before mentioned) were introduced as sort of compurgators, who swore that they knew the doctor to be of good character for truth and veracity, and generally of good character in every way.

Here the testimony ended, and the Trailors were discharged; Archibald and William expressing, both in word and manner, their entire confidence that Fisher would be found alive at the doctor's by Galloway, Mallory, and Myers, who a day before had been despatched for that purpose; while Henry still protested that no

jury must rely upon the witness who testifies to the fact. In circumstantial testimony, the facts also come to the jury through the remove of one medium, so the difference between direct and circumstantial testimony is a difference of degree rather than a difference of kind.

Hence, where courts, in their instructions to the jury attempt to make a comparison as to the relative merits of circumstantial evidence and direct evidence, the result is apt to be confusing and misleading. Where the jury were told that circumstantial evidence "is to be regarded as direct and positive evidence of eyewitnesses" it is error.[1] The statement that "circumstantial evidence, in law, is as good as any other kind

power on earth could ever show Fisher alive. Thus stands this curious affair.

When the doctor's story was first made public, it was amusing to scan and contemplate the countenances, and hear the remarks of those who had been actively engaged in the search for the dead body; some looked quizzical, some melancholy, and some furiously angry. Porter, who had been very active, swore he always knew the man was not dead, and that he had not stirred an inch to hunt for him. Langford, who had taken the lead in cutting down Hickox's milldam, and wanted to hang Hickox for objecting, looked most awfully woebegone; he seemed the "wictim of hunrequited affection," as represented in the comic almanacs we used to laugh over. And Hart, the little drayman that hauled Molly home once, said: "It was too damned bad to have so much trouble, and no hanging after all."

I commenced this letter yesterday, since which I received yours of the 13th. I stick to my promise to come to Louisville. Nothing new here, except what I have written. I have not seen . . . since my last trip; and I am going out there as soon as I mail this letter

Yours forever,
Lincoln.

On page 62 of 15 Am. Crim. Rep. appears the following: "On the next Monday, Myers arrived in Springfield, bringing with him the now famed Fisher, in full life and proper person."—J. F. G. *Stanley* v. *State,* 82 Miss. 498, 34 So. 360, 15 Am. Crim. Rep. 57.

[1] *State* v. *Thompson,* 127 Iowa, 440, 103 N. W. 377.

But see *West* v. *State,* 76 Ala. 98.

of evidence" is held to be a fatal error as constituting a fundamental misconception and probably misleading the jury.[2]

It is equally improper to instruct that direct evidence is superior to circumstantial evidence.[3] It is not the law that circumstantial evidence is inferior to direct and positive evidence,[4] and it is correct to instruct the jury that there is nothing in the nature of circumstantial evidence that renders it less reliable then other classes of evidence.[5] Circumstantial evidence should not be disparaged nor called a species of evidence.[6]

§ 876. Necessity for; limitations on.—Circumstantial evidence is an instrument in the administration of justice quite as legitimate as direct evidence.[1] When minor facts are established by evidence that logically points to the ultimate fact in issue, and when established, as they must be, with the same degree of certainty as the ultimate fact must be established, such evidence does not fall below direct evidence in probative force.[2] Excepting, generally, cases where crime is committed from an overmastering passion or through necessity, real or apparent, crimes are committed in secret and under the conditions where concealment is probable. Therefore to require

[2] *Haywood* v. *State*, 90 Miss. 461, 43 So. 614.

But see *State* v. *Moelchen*, 53 Iowa, 310, 5 N. W. 186.

See *Blandy's Trial*, 18 How. St. Tr. 1187.

[3] *People* v. *Johnson*, 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377.

[4] *Cook* v. *State*, — Miss. —, 28 So. 833.

[5] *People* v. *Urquidas*, 96 Cal. 239, 31 Pac. 52.

See *Gordon* v. *State*, 147 Ala. 42, 41 So. 847.

[6] *State* v. *Foster*, 14 N. D. 561, 105 N. W. 938.

See *Com.* v. *Kovovic*, 209 Pa. 465, 58 Atl. 857; *State* v. *Tedder*, 83 S. C. 437, 65 S. E. 449.

[1] *Spick* v. *State*, 140 Wis. 104, 121 N. W. 664.

See supra, § 10; *Thorn's Case*, 6 Law. Rep. 49, 54; *Com.* v. *Harman*, 4 Pa. 269.

[2] *Schwantes* v. *State*, 127 Wis. 160, 177, 106 N. W. 237, 243.

See *People* v. *Kennedy*, 32 N. Y. 141; *People* v. *Harris*, 136 N. Y. 423, 33 N. E. 65.

direct testimony in all cases of crimes would result in freeing criminals and deny proper protection to society, so that a resort to circumstantial evidence is, in the very nature of things, a necessity.[3]

However, circumstantial evidence is limited by, or rather should be tested by, the following rules, which, while they may be differently phrased, are fundamental rules in all jurisdictions: First, it should be acted upon with caution;[4] second, all the essential facts must be consistent with the hypothesis of guilt, as that is to be compared with all the facts proved;[5] third, the facts must exclude every other theory but that of guilt;[6] fourth, the facts must establish such a certainty of

[3] *United States* v. *Jones*, 2 Wheeler, C. C. 451, note; *United States* v. *Gibert*, 2 Sumn. 19, Fed. Cas. No. 15,204; *People* v. *Morrow*, 60 Cal. 142; *Schoolcraft* v. *People*, 117 Ill. 271, 7 N. E. 649; *Com.* v. *Webster*, 5 Cush. 295, 52 Am. Dec. 711; *People* v. *Harris*, 136 N. Y. 423, 33 N. E. 65; *People* v. *Kerr*, 6 N. Y. Crim. Rep. 406, 6 N. Y. Supp. 674; *Com.* v. *Cullen*, 36 Phila. Leg. Int. 252; *Hickman* v. *Trout*, 83 Va. 478, 3 S. E. 131; *Dean* v. *Com.* 32 Gratt. 912; *Com.* v. *Twitchell*, 1 Brewst. (Pa.) 551; *Hickory* v. *United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334.

[4] *Cook* v. *State*, — Miss. —, 28 So. 833; 4 Bl. Com. 359; 1 Roscoe, Crim. Ev. 24.

[5] *People* v. *Aikin*, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821; 7 Am. Crim. Rep. 363; Wills, Circumstantial Ev. 3d ed. 17; supra, § 18; Burrill, Circumstantial Ev. 736; 3 Greenl. Ev. Redf. ed. § 137; 1 Roscoe, Crim. Ev. 8th ed. 25; *People* v. *Bennett*, 49 N. Y. 139; 1 McClain, Crim. Law, § 409; *Schusler* v. *State*, 29 Ind. 394; Gillett, Indirect & Collateral Ev. § 53; 1 Greenl. Ev. Redf. ed. § 34; *People* v. *Davis*, 64 Cal. 440, 1 Pac. 889, 4 Am. Crim. Rep. 515; *Smith* v. *State*, 35 Tex. Crim. Rep. 618, 33 S. W. 339, 34 S. W. 960; *Carlton* v. *People*, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; *State* v. *David*, 131 Mo. 380, 33 S. W. 28; *Lancaster* v. *State*, 91 Tenn. 267, 18 S. W. 777; *State* v. *Asbell*, 57 Kan. 398, 46 Pac. 770; *People* v. *Foley*, 64 Mich. 148, 31 N. W. 94; *Howard* v. *State*, 108 Ala. 571, 18 So. 813; Underhill, Crim. Ev. § 6.

[6] *Purdy* v. *People*, 140 Ill. 48, 29 N. E. 700; *Marzen* v. *People*, 173 Ill. 62, 50 N. E. 249; *People* v. *Kennedy*, 32 N. Y. 141; *People* v. *Strong*, 30 Cal. 151; *Coleman* v. *State*, 26 Fla. 61, 7 So. 367; *Com.* v. *Webster*, 5 Cush. 313, 52 Am. Dec. 711; *Crow* v. *State*, 33 Tex.

guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.[7]

In applying these rules, courts should allow a very great latitude in the reception of testimony, so that the jury can see, if possible, all of the surrounding facts and circumstances, and for this reason their judgment is likely to be the more correct.

App. 264, 26 S. W. 209; Thomp. Trials, § 2505; *Dreessen* v. *State,* 38 Neb. 375, 56 N. W. 1024; Starkie, Ev. 577; Burrill, Circumstantial Ev. 728–738; *People* v. *Cunningham,* 6 Park. Crim. Rep. 608.

[7] *Dunn* v. *People,* 158 Ill. 593, 42 N. E. 47; *Carlton* v. *People,* 150 Ill. 187, 41 Am. St. Rep. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; *Stephens* v. *People,* 4 Park. Crim. Rep. 396; *People* v. *Harris,* 136 N. Y. 423, 49 N. Y. S. R. 751, 33 N. E. 65; *People* v. *Kelly,* 11 App. Div. 495, 42 N. Y. Supp. 756; *People* v. *Fitzgerald,* 156 N. Y. 253, 50 N. E. 846, 11 Am. Crim. Rep. 700, 20 App. Div. 139, 46 N. Y. Supp. 1020.

"There are two great rules by which circumstantial evidence is to be weighed, appreciated, and applied by the jury. They are these: First, that the jury shall be satisfied that they conduct as a necessary result and conclusion, to the inference of guilt. It is a rule that may be called a golden rule in the examination and application of this kind of evidence which we call circumstantial, that should it so turn out that every fact and circumstance alleged and proved to exist is consistent, on the one hand, with hypothesis of guilt, and, on the other hand, consistent reasonably and fairly with the hypothesis of innocence, then those circumstances prove nothing at all. Unless they go so far as to establish as a necessary conclusion this guilt which they are offered with a view to establish, they are utterly worthless and ineffectual for the investigation of truth. This doctrine is every day applied, everywhere recognized as primary in the appreciation of this kind of evidence. It is not enough that the circumstances relied upon are plainly and certainly proved. It is not enough to show that they are consistent with the hypothesis of guilt. They must also render the hypothesis of innocence inadmissible and impossible, unreasonable and absurd, or they have proved nothing at all." Rufus Choate, in Dalton Divorce Case.

"In order to justify the inference of guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reason-

§ 877. Relevancy of circumstantial evidence.—As has been stated in this work[1] relevancy is to be determined upon principles of logic. There is no test or standard of relevancy from which a rule can be deduced, applicable to all cases, as to what evidence is relevant or irrelevant. The test can be made only in the concrete case.

The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry.[2] In circumstantial evidence, we have to deal almost exclusively with inference and deduction, hence, the greater the number of consistent facts, the more certain and complete the deduction.

While the rule that the evidence must be relevant to the hypothesis must always be rigidly applied in criminal cases,[3] nevertheless, there should be an enlarged admission of all circumstances that will aid the court and the jury in determining the facts in issue beyond a reasonable doubt.[4]

able hypothesis than that of his guilt." Judge Porter, in Babcock Conspiracy Case, St. Louis, Mo., Feb. 1876.

[1] Supra, § 24.

[2] *Simms* v. *State,* 10 Tex. App. 132; supra, § 24; *Green* v. *State,* 12 Tex. App. 51.

[3] *Austin* v. *State,* 14 Ark. 555; *Dyson* v. *State,* 26 Miss. 362; *Hudson* v. *State,* 3 Coldw. 355; *Pharr* v. *State,* 9 Tex. App. 129.

[4] *Johnson* v. *State,* 14 Ga. 55; *Com.* v. *Smith,* 163 Mass. 411, 40 N. E. 189; *McCann* v. *State,* 13 Smedes & M. 471; *State* v. *Rhodes,* 111 N. C. 647, 15 S. E. 1038; *Com.* v. *Spink,* 137 Pa. 255, 20 Atl. 680; *Hart* v. *State,* 15 Tex. App. 202, 49 Am. Rep. 188; *Moore* v. *State,* 2 Ohio St. 500; *State* v. *Evans,* 1 Marv. (Del.) 477, 41 Atl. 136; *State* v. *Armstrong,* 167 Mo. 257, 66 S. W. 961; *McCoy* v. *State,* — Tex. Crim. Rep. —, 73 S. W. 1057; *Com.* v. *Chance,* 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *United States* v. *Greene,* 146 Fed. 803; *People* v. *Feinberg,* 237 Ill. 348, 86 N. E. 584; *State* v. *Lambert,* 104 Me. 394, 71 Atl. 1092, 15 A. & E. Ann. Cas. 1055; *Holder* v. *State,* 119 Tenn. 178, 104 S. W. 225. Testimony is relevant concerning the most trivial circumstances, where they may become important in connection with other circumstances. Thus, that a train was due at a certain place at a certain hour is some evidence that it reached that point at that time. *People* v. *Wong Chuey,* 117 Cal. 624, 49 Pac. 833.

Testimony is relevant to show

II. Motive.

§ 877a. Motive generally.—Mr. Wills says:[1] "It is always a satisfactory circumstance of corroboration when, in connection with convincing facts of conduct, an apparent motive can be assigned." He says, farther:[2] "Actions, as the objects or results of motives, are the only legitimately cognizable subjects of human law." An analytical discussion of the exact meaning of motive is not within the purview of this chapter, because we are here concerned only with the results of motives, or actions themselves. Motive as here used, then, is more correctly defined as, "the whole of that which *moves*, excites, or invites the mind to volition, whether that be one thing singly or many things conjunctively."[3]

§ 878. Motive not a necessity.—The presence or absence of motive in cases depending wholly on circumstantial evidence is not a factor that determines either the guilt or the innocence of the accused. Proof of motive does not establish guilt, nor want of it establish innocence;[1] but while such

that the reasons given by the accused for being in town where the crime was committed, on the day of the crime, was false. *People* v. *Cuff*, 122 Cal. 589, 55 Pac. 407. See *Stone* v. *State* 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630.

[1] Wills, Circumstantial Ev. 5th Eng. ed. 49.

[2] Wills, Circumstantial Ev. 5th Eng. ed. 51.

[3] Johnathan Edwards's Definition of "Motive." See Webster's New Int. Dict. "Motive."

[1] *Cupps* v. *State*, 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546; *Keady* v. *People*, 32 Colo. 57, 66 L.R.A. 353, 74 Pac. 892; *Reynolds* v. *State*, 147 Ind. 3, 46 N. E. 31; *Hinshaw* v. *State*, 147 Ind. 334, 47 N. E. 157; *Clifton* v. *State*, 73 Ala. 473; *Com.* v. *Harley*, 7 Met. 462; *Preston* v. *State*, 8 Tex. App. 30; *Marcum* v. *Com.* 8 Ky. L. Rep. 418, 1 S. W. 727; *People* v. *Feigenbaum*, 148 N. Y. 636, 43 N. E. 78; *Com.* v. *Kirkpatrick*, 15 Phila. Leg. Int. 268; *State* v. *Bobbitt*, 215 Mo. 10, 114 S. W. 511; *House* v. *State*, 94 Miss. 107, 21 L.R.A. (N.S.) 840, 48 So. 3; *People* v. *Durrant*, 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; *State* v. *Rathbun*, 74 Conn. 524, 51 Atl.

proof is not a necessity, it is of great importance, and the absence of motive is a factor for the consideration of the jury, but only as bearing on the question whether or not the crime was committed by the accused.[2]

§ 878a. Absence of apparent motive.—The absence of apparent motive to commit the offense charged would, upon principles of logic, create a presumption in favor of the innocence of the accused, since, in terms of logic, an action without a motive would be an effect without a cause.[1]

Mr. Greenleaf says: "This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence to the benefit of which the party is entitled." [2] Notwithstanding such high authority, the statement that a presumption is to be regarded as evidence is not logical.[3] The presumption of innocence calls for evidence from the state to rebut the presumption, but it is not in itself evidence in favor of the accused.[4] The absence of apparent motive, while not ground

540; *People* v. *Owens,* 132 Cal. 469, 64 Pac. 770; *People* v. *Minisci,* 12 N. Y. S. R. 719; *Thurman* v. *State,* 32 Neb. 224, 49 N. W. 338; *People* v. *Robinson,* 1 Park. Crim. Rep. 649; *Salm* v. *State,* 89 Ala. 56, 8 So. 66.

[2] *State* v. *Hembree,* 54 Or. 463, 103 Pac. 1008; *Schmidt* v. *United States,* 66 C. C. A. 389, 133 Fed. 257.

[1] Wigmore in 30 Am. L. Rev. 29.

[2] Greenl. Ev. 16th ed. § 34. See *Coffin* v. *United States,* 156 U. S. 432, 460, 39 L. ed. 481, 493, 15 Sup. Ct. Rep. 394.

[3] *Agnew* v. *United States,* 165 U. S. 36, 51, 41 L. ed. 624, 630, 17 Sup. Ct. Rep. 235; *State* v. *Smith,* 65 Conn. 283, 31 Atl. 206; Thayer, Ev. 551; Wigmore, Ev. § 119.

[4] *State* v. *Smith,* 65 Conn. 283, 31 Atl. 206.

In the case of *Agnew* v. *United States,* the following instruction was asked and refused:

"Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy." In commenting on this instruction the Supreme Court says: "The court is not bound to ac-

for an instruction on the part of the court, that such absence might be considered as favorable to the defendant,[5] still the jury should always take into consideration its absence as a circumstance in determining the question of whether or not the accused himself committed the offense.[6] It is also a sound principle of interpretation that where no apparent motive appears, that the offense charged shall be referred to the operation of the least guilty motive.[7] Again, from the absence of any apparent motive, the presumption in favor of innocence is rendered much stronger where the counteracting motive not to commit a crime is shown to exist. Thus, where an accused was indicted for arson with intent to defraud the insurance company, and it is shown that he had property on the

cept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language. *Ayers* v. *Watson,* 137 U. S. 584, 34 L. ed. 803, 11 Sup. St. Rep. 201; *Grand Trunk R. Co.* v. *Ives,* 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Coffin* v. *United States,* 162 U. S. 672, 40 L. ed. 1112, 16 Sup. Ct. Rep. 943. The instruction given was quite correct, and substantially covered the instruction refused, and as to the latter the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead. In *Coffin* v. *United States,* 156 U. S. 432, 460, 39 L. ed. 481, 493, 15 Sup. Ct. Rep. 394, this court, in discussing the distinction between the presumption of innocence and reasonable doubt, said; 'The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a *presumptio juris,* demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.' But in that case the charge of the court was thought to have given due effect to the presumption of innocence, which there was no failure in this case to state, and the giving of the instruction asked would have tended to obscure what had already been made plain."

[5] *Moore* v. *State,* 64 Ga. 449.

[6] *Schmidt* v. *United States,* 66 C. C. A. 389, 133 Fed. 257; *People* v. *Pavlik,* 7 N. Y. Crim. Rep. 30, 3 N. Y. Supp. 232; *Salem* v. *State,* 89 Ala. 56, 8 So. 66.

[7] *Stone* v. *State,* 105 Ala. 60, 17 So. 114; *Elizabeth* v. *State,* 27 Tex. 329; *Reg.* v. *McClarens,* 3 Cox, C. C. 425; *Reg.* v. *Boober,* 4 Cox, C. C. 272.

premises worth more than his insurance, it would greatly strengthen the presumption of his innocence.[8] Hence, under the weight of authority, absence of apparent motive calls for evidence to rebut the presumption of innocence. The act must be referred to the least guilty motive, and the presumption is strengthened by counter-acting motives, which elements are to be considered by the jury, not as evidence, but as circumstances, in determining the question of whether or not the accused committed the offense charged against him.

§ 879. Proof of motive.—The observation that there is no rule by which relevancy is to be determined applies with equal force to the proof of motive. Motives are as various as the innumerable ramifications of human conduct. Any fact which supplies a motive for an act or shows preparation for it; any subsequent conduct apparently influenced by the doing of the act, and any act done in consequence of it by, or by the authority of, the accused,—are relevant.[1] Motive cannot always be shown directly, but is to be inferred from facts in evidence,[2] although the person who did the act may testify to his motive,[3] and the facts supplying a motive may be adduced in connection with other evidence in the case,[4] and the admission

[8] *R.* v. *Bingham,* Horsham Spr. As. 1811.

[1] Stephen's Dig. Ev. art. 7.

[2] *John* v. *Bridgman,* 27 Ohio St. 43.

[3] *Ohio Coal Co.* v. *Davenport,* 37 Ohio St. 194; *Mitchell* v. *Ryan,* 3 Ohio St. 377. See supra, § 476.

[4] *State* v. *Palmer,* 65 N. H. 216, 20 Atl. 6, 8 Am. Crim. Rep. 196; *State* v. *Watkins,* 9 Conn. 52, 54, 21 Am. Dec. 712; *Com.* v. *McCarthy,* 119 Mass. 354; *Com.* v. *Choate,* 105 Mass. 451; *Com.* v. *Bradford,* 126 Mass. 42; *Com.* v. *Abbott,* 130 Mass. 472; *Com.* v. *Hudson,* 97 Mass. 565; *Com.* v. *Vaughan,* 9 Cush. 594; *Scott* v. *People,* 141 Ill. 195, 30 N. E. 329; *Benson* v. *State,* 119 Ind. 488, 21 N. E. 1109; *State* v. *Glahn,* 97 Mo. 679, 11 S. W. 260; *Moore* v. *United States,* 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; *Alexander* v. *United States,* 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350.

by the accused that one adequate motive existed does not prevent the state from proving another motive.[5]

But proof of motive cannot be made until it is first shown that the accused had knowledge of the fact from which the motive is to be inferred, as otherwise it could not have been the motive of the accused.[6]

§ 880. Motive in crimes through which money is secured.—The evidentiary value of circumstances establishing a motive that applies to an entire class or to a community is much less than where it affects the accused only. Thus, the fact that an accused charged with larceny desired to become rich would be of little weight in establishing his guilt of an offense, because a desire for wealth is universal and common to all persons.[1] But circumstances showing the financial straits of the accused, or that he desired to secure moneys from specific sources, are relevant in offenses through which money may be secured. Need of money may be shown on the trial of the accused for killing his mother.[2] On a question of forgery, it may be shown that at about the date charged accused tried to borrow money.[3] On a charge of arson, it is relevant to show that the accused insured the building and that he was insolvent;[4] or that the securing of the insurance money was his motive for burning certain buildings.[5]

[5] *Com.* v. *Spink,* 137 Pa. 255, 20 Atl. 680.

[6] *State* v. *Shelton,* 64 Iowa, 333, 20 N. W. 459; *Son* v. *Territory,* 5 Okla, 526, 49 Pac. 923; *Stokes* v. *People,* 53 N. Y. 164, 13 Am. Rep. 492.

[1] *Com.* v. *Hudson,* 97 Mass. 565.

[2] *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 551.

[3] *Stevenson* v. *Stewart,* 11 Pa. 307.

[4] *People* v. *Fitzgerald,* 20 App. Div. 139, 46 N. Y. Supp. 1020.

[5] *Knights* v. *State,* 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *State* v. *Ward,* 61 Vt. 153, 17 Atl. 483, 8 Am. Crim. Rep. 207; *People* v. *Levine,* 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *People* v. *O'Neill,* 112 N. Y. 355, 19 N. E. 796; *Com* v. *Bradford,* 126 Mass. 42; *State* v. *Watson,* 63 Me. 128; *Freund* v. *People,* 5 Park. Crim. Rep. 198;

Evidence is relevant to show that the securing of moneys from life insurance was the motive for murder,[6] or that a plan was to make the policies payable to the accused by killing another,[7] or that the deceased was insured in favor of the accused,[8] or that a scheme had been devised to procure insurance upon the life of a person, and then to kill that person.[9]

As supplying a motive for homicide, it is relevant to show that the accused knew that the deceased had money;[10] it is relevant to show that the accused was in need of money, and paid debts about the time of the homicide;[11] or that the accused knew that deceased was reputed to have money and that she distrusted banks.[12]

§ 881. Motive in marital crimes.—In marital crimes, it is relevant to show as a motive that improper relations existed between the accused and the wife of the deceased, or between the deceased and the wife of the accused, or any other circumstance showing that disturbing marital relations were known to the accused.[1]

Where the charge is wife murder, it is relevant to show

Stitz v. *State,* 104 Ind. 359, 4 N. E. 145, 5 Am. Crim. Rep. 48; *People* v. *Scott,* 10 Utah, 217, 37 Pac. 335; *State* v. *Cohn,* 9 Nev. 179; *Com.* v. *Hudson,* 97 Mass. 565.

[6] *Com.* v. *Clemmer,* 190 Pa. 202, 42 Atl. 675.

[7] *Com.* v. *Robinson,* 146 Mass. 571, 16 N. E. 452. See *Shaffner* v. *Com.* 72 Pa. 60, 13 Am. Rep. 649.

[8] *State* v. *Rainsbarger,* 74 Iowa, 196, 37 N. W. 153.

[9] *Brandt* v. *Com.* 94 Pa. 290.

[10] *Byers* v. *State,* 105 Ala. 31, 16 So. 716; *Stafford* v. *State,* 55 Ga. 591; *State* v. *Jackson,* 95 Mo. 623, 8 S. W. 749; *Kennedy* v. *People,* 39 N. Y. 245; *Howser* v. *Com.* 51 Pa. 332; *Marable* v. *State,* 89 Ga. 425, 15 S. E. 453.

[11] *People* v. *Wolf,* 95 Mich. 625, 55 N. W. 357; *Clough* v. *State,* 7 Neb. 320; *State* v. *Wintzingerode,* 9 Or. 153; *State* v. *Rice,* 7 Idaho, 762, 66 Pac. 87.

[12] *Musser* v. *State,* 157 Ind. 423, 61 N. E. 1.

[1] *Com.* v. *Ferrigan,* 44 Pa. 386; *Johnson* v. *State,* 24 Fla. 162, 4 So. 535; *State* v. *Reed,* 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *Templeton* v. *People,* 27 Mich. 501; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Com.* v. *Fry,* 198 Pa. 379, 48 Atl. 257; *Ouidas* v. *State,* 78 Miss. 622, 29 So. 525; *State* v. *Chase,* 68

that the accused had beaten and abused his wife;[2] or that she had made a will leaving her property to the accused;[3] or that she had applied for divorce;[4] or that the accused had been disappointed in the will of his wife's father;[5] or that she had refused to live with him;[6] or that she had had him arrested for nonsupport;[7] or that accused was incensed over fear of the announcement of a secret marriage with deceased, which would interrupt his relations with another woman;[8] or that accused desired to marry another woman;[9] or that accused maintained improper relations with other women;[10] or malignant indifference concerning the fact of his wife's

Vt. 405, 35 Atl. 336; *Weaver* v. *State,* 43 Tex. Crim. Rep. 340, 65 S. W. 534; *Miller* v. *State,* 68 Miss. 221, 8 So. 273; *Traverse* v. *State,* 61 Wis. 144, 20 N. W. 724; *State* v. *Abbatto,* 64 N. J. L. 658, 47 Atl. 10; *Nicholas* v. *Com.* 91 Va. 741, 21 S. E. 364; *Pierson* v. *People,* 79 N. Y. 424, 35 Am. Rep. 524; *Stokes* v. *State,* 71 Ark. 112, 71 S. W. 248.

[2] *Phillips* v. *State,* 62 Ark. 119, 34 S. W. 539; *Hall* v. *State,* 31 Tex. Crim. Rep. 565, 21 S. W. 368; *Stone* v. *State,* 4 Humph. 27; *Thiede* v. *People,* 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62; *State* v. *O'Neil,* 51 Kan. 651, 24 L.R.A. 555, 33 Pac. 287; *Com.* v. *Holmes,* 157 Mass. 233, 34 Am. St. Rep. 270, 32 N. E. 6.

[3] *People* v. *Buchanan,* 145 N. Y. 1, 39 N. E. 46.

[4] *Pinckord* v. *State,* 13 Tex. App. 468.

[5] *Hendrickson* v. *People,* 10 N. Y. 13, 61 Am. Dec. 721.

[6] *State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238; *Sayres* v. *Com.* 88 Pa. 291.

[7] *People* v. *Otto,* 4 N. Y. Crim. Rep. 149, 101 N. Y. 690, 5 N. E. 788; *McCann* v. *People,* 3 Park. Crim. Rep. 272.

[8] *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471. See *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65.

[9] *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95; *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471; *Duncan* v. *State,* 88 Ala. 31, 7 So. 104; *Pettit* v. *State,* 135 Ind. 393, 34 N. E. 1118; *People* v. *Wilson,* 109 N. Y. 345, 16 N. E. 540; *Shaw* v. *State,* 102 Ga. 660, 29 S. E. 477; *Caddell* v. *State,* 129 Ala. 59, 30 So. 76; *McUin* v. *United States,* 17 App. D. C. 323; *Hunter* v. *State,* 43 Ga. 483; *McCue* v. *Com.* 17 Pa. 185, 21 Am. Rep. 7, 1 Am. Crim. Rep. 268; *People* v. *Cook,* 148 Cal. 334, 83 Pac. 43; *State* v. *Stratford,* 149 N. C. 483, 62 S. E. 882; *Gallegos* v. *State,* 48 Tex. Crim. Rep. 58, 85 S. W. 1150.

[10] *State* v. *Hinkle,* 6 Iowa, 380; *Givens* v. *State,* 103 Tenn. 648, 55 S. W. 1107; *Stricklin* v. *Com.* 83 Ky. 566; *People* v. *Nileman,* 8 N. Y. S. R. 300; *Mack* v. *State,* 48 Wis. 271, 4 N. W. 449.

death;[11] or that accused, on trial for poisoning his wife, had poisoned his mother-in-law, from whom his wife would inherit certain property;[12] or that bad feeling existed between the accused and his wife.[13]

But on a charge of wife murder, it seems that the accused enters upon his trial not alone with the ordinary presumptions of innocence in his favor, but with an added and favorable presumption that arises out of the marital relations existing between the parties.[14]

§ 882. Showing motive through threats.—To show motive, it is relevant to introduce evidence of threats that the accused had in mind the commission of crime. Threats to do the act may always be shown;[1] evidence of such threats is relevant even though they are general in their nature, and no specific mention is made of any one person against whom they

[11] *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *People* v. *Hamilton,* 137 N. Y. 531, 32 N. E. 1071.

[12] *Goersen* v. *Com.* 99 Pa. 388, 106 Pa. 477, 51 Am. Rep. 534.

[13] *Shaw* v. *State,* 60 Ga. 246; *Painter* v. *People,* 147 Ill. 444, 35 N. E. 64; *Phillips* v. *State,* 62 Ark. 119, 34 S. W. 539; *People* v. *Simpson,* 48 Mich. 474, 12 N. W. 662.

[14] *State* v. *Leabo,* 84 Mo. 168, 54 Am. Rep. 91; *State* v. *Moxley,* 102 Mo. 374, 392, 14 S. W. 969, 15 S. W. 556.

[1] *Porter* v. *State,* 135 Ala. 51, 33 So. 694; *Drake* v. *State,* 110 Ala. 9, 20 So. 450; *Horn* v. *State,* 98 Ala. 23, 13 So. 329; *Pulliam* v. *State,* 88 Ala. 1, 6 So. 839; *People* v. *Fitzgerald,* 138 Cal. 39, 70 Pac. 1014; *State* v. *Tucker,* 75 Conn. 201, 52 Atl. 741; *People* v. *Powell,* 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481; *State* v. *Hoyt,* 47 Conn. 518, 36 Am. Rep. 89; *Heron* v. *State,* 22 Fla. 86; *Barnes* v. *Com.* 24 Ky. L. Rep. 1143, 70 S. W. 827; *Nichols* v. *Com.* 11 Bush, 575; *State* v. *Edwards,* 34 La. Ann. 1012; *State* v. *Ridgely,* 2 Harr. & M'H. 120, 1 Am. Dec. 372; *Com.* v. *Corrigan,* 1 Pittsb. 292; *State* v. *Vance,* 29 Wash. 435, 70 Pac. 34; *State* v. *Prater,* 52 W. Va. 132, 43 S. E. 230; *Spraggins* v. *State,* 139 Ala. 93, 35 So. 1000; *Parham* v. *State,* 147 Ala. 57, 42 So. 1; *Mazzotte* v. *Territory,* 8 Ariz. 270, 71 Pac. 911, 13 Am. Crim. Rep. 182; *State* v. *Samuels,* 6 Penn. (Del.) 36, 67 Atl. 164; *Rawlins* v. *State,* 124 Ga. 31, 52 S. E. 1; *State* v. *Thompson,* 127 Iowa, 440, 103 N. W. 377; *State* v. *Quen,* 48 Or. 347, 86 Pac. 791.

are directed.[2] Thus, it is relevant to show that the accused threatened to kill somebody before night;[3] or that he would kill a man before sundown;[4] or that he was going to "get even" with somebody;[5] and, also, where accused had no part in the crime, he may be shown to have been an accessory to it by previous threats;[6] and threats are always relevant as showing the disposition of the accused.[7]

Threats against a class of people are relevant, as where the accused said he would kill any policeman who tried to arrest him;[8] and even a threat to shoot another officer than the one making the arrest was relevant where the accused was charged with shooting the officer who did arrest him.[9]

Threats of a different crime are relevant. Thus, a threat to rob the deceased was admissible on a trial for murder;[10] or

[2] *Jordan* v. *State,* 79 Ala. 9; *State* v. *Windahl,* 95 Iowa, 470, 64 N. W. 420; *Hopkins* v. *Com.* 50 Pa. 9, 88 Am. Dec. 518; *State* v. *Hymer,* 15 Nev. 49; *Snodgrass* v. *Com.* 89 Va. 679, 17 S. E. 238; *Stewart's Trial,* 19 How. St. Tr. 100; *Harrison* v. *State,* 79 Ala. 29; *Redd* v. *State,* 68 Ala. 492; *State* v. *Pierce,* 90 Iowa, 506, 58 N. W. 891; *State* v. *Hayward,* 62 Minn. 474, 65 N. W. 63; *State* v. *Grant,* 79 Mo. 113, 49 Am. Rep. 218; *State* v. *Ellis,* 101 N. C. 765, 9 Am. St. Rep. 49, 7 S. E. 704; *Johnson* v. *State,* 18 Tex. App. 385; *Perovich* v. *United States,* 205 U. S. 86, 51 L. ed. 722, 27 Sup. Ct. Rep. 456; *State* v. *Rosa,* 72 N. J. L. 462, 62 Atl. 695.

[3] *State* v. *Vance,* 29 Wash. 435, 70 Pac. 34.

[4] *Hodge* v. *State,* 26 Fla. 11, 7 So. 593.

[5] *State* v. *Harlan,* 130 Mo. 381, 32 S. W. 997; *Hopkins* v. *Com.* 50 Pa. 9, 88 Am. Dec. 518.

[6] *State* v. *Prater,* 52 W. Va. 132, 43 S. E. 230.

[7] *State* v. *Sullivan,* 51 Iowa, 142, 50 N. W. 572; *Babcock* v. *People,* 13 Colo. 515, 22 Pac. 817; *State* v. *Stackhouse,* 24 Kan. 445; *State* v. *Agnew,* 10 N. J. L. J. 165; *Stewart* v. *State,* 1 Ohio St. 66.

[8] *State* v. *Grant,* 79 Mo. 113, 49 Am. Rep. 218. See *Carroll* v. *Com.* 84 Pa. 107, 2 Am. Crim. Rep. 290; *State* v. *Davis,* 6 Idaho, 159, 53 Pac. 678; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Hester* v. *Com.* 85 Pa. 139; *McManus* v. *Com.* 91 Pa. 57.

[9] *Palmer* v. *People,* 138, Ill. 356, 32 Am. St. Rep. 146, 28 N. E. 130; *State* v. *Partlow,* 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14.

[10] *Com.* v. *Farrell,* 187 Pa. 408, 41 Atl. 382, 11 Am. Crim. Rep. 468.

where threats were made to commit the crime through different means, as where the accused was charged with homicide by poison, it is relevant to show that he had threatened the deceased with a sling shot.[11] The possession of a gun, with threats to kill the deceased, is relevant;[12] or where the accused killed the deceased, believing him to be another person, threats by the accused against that other person are relevant.[13] Uncommunicated threats of deceased are always relevant as tending to show his motive and intention and giving rise to an inference that in the fatal encounter he was the aggressor.[14]

The length of time elapsing between the threat and the act does not affect the relevancy of the testimony,[15] but merely its weight, which is always a question for the jury.[16] But where the threat had been made thirteen years before, the jury ought to give it very little weight, because of its remoteness,[17] and threats made four or five years previous have been held too remote;[18] but threats by the accused to kill A are not relevant on his trial for killing B,[19] and the disconnected threats are not relevant.[20] Within the limitations just named, the relevancy

[11] *Labeau* v. *People,* 34 N. Y. 223.

[12] *People* v. *Fitzgerald,* 138 Cal. 39, 70 Pac. 1014. See *Benedict* v. *State,* 14 Wis. 424; *Burgess* v. *State,* 93 Ga. 304, 20 S. E. 331; *Palmer* v. *People,* 138 Ill. 356, 32 Am. St. Rep. 146, 28 N. E. 130; *Whittaker* v. *Com.* 13 Ky. L. Rep. 504, 17 S. W. 358; *People* v. *Palmer,* 96 Mich. 580, 55 N. W. 994.

[13] *Clarke* v. *State,* 78 Ala. 474, 56 Am. Rep. 45, 6 Am. Crim. Rep. 525.

[14] *Com.* v. *Keller,* 191 Pa. 122, 43 Atl. 198.

[15] *Rains* v. *State,* 88 Ala. 91, 7 So. 315; *Pate* v. *State,* 94 Ala. 14, 10 So. 665; *United States* v. *Neverson,* 1 Mackey, 152; *Keener* v. *State,* 18 Ga. 194, 63 Am. Dec. 269; *Goodwin* v. *State,* 96 Ind. 550; *State* v. *Ford,* 3 Strobh. L. 517, note; *State* v. *Bradley,* 64 Vt. 466, 24 Atl. 1053; *Macmasters* v. *State,* 81 Miss. 374, 33 So. 2.

[16] *Turner's Trial,* 32 How. St. Tr. 1132; *Babcock* v. *People,* 13 Colo. 515, 22 Pac. 817; *State* v. *Hoyt,* 46 Conn. 330; *Goodwin* v. *State,* 96 Ind. 550; *Territory* v. *Roberts,* 9 Mont. 12, 22 Pac. 132; *Jefferds* v. *People,* 5 Park. Crim. Rep. 522.

[17] *Goodwin* v. *State,* 96 Ind. 550; *Redd* v. *State,* 68 Ala. 492.

[18] *Macmasters* v. *State,* 81 Miss. 374, 33 So. 2.

[19] *Abernethy* v. *Com.* 101 Pa. 322.

[20] *Daniel* v. *State,* 103 Ga. 202, 29 S. E. 767; *Horton* v. *State,* 110 Ga. 739, 35 S. E. 659.

of threats as showing a motive for the commission of crime is practically unrestricted.

§ 883. Showing motive through previous quarrels and ill feeling.—Evidence of previous quarrels and ill feeling is always relevant to show motive, with the limitation that a connection be shown to exist between the difficulty and the crime charged.[1] Thus, dissatisfaction with a previous settlement of wages between the parties may be shown;[2] or that the deceased had challenged the vote of the accused at an election;[3] that the testimony given by accused, at a previous trial, was impeached by the deceased;[4] that accused and the deceased belonged to factions of two different parties involved in a continuous feud; that there had been previous fights between other members of the two factions;[5] and evidence of a previous quarrel is relevant, even though it is remote, the remoteness going only to its weight, and not its relevancy;[6] but the details of the previous difficulty are not admissible,[7] unless such details tend to show ill feeling.[8]

[1] *Flint* v. *Com.* 81 Ky. 186; *Pound* v. *State,* 43 Ga. 88; *Hudson* v. *Com.* 24 Ky. L. Rep. 785, 69 S. W. 1079; *Finch* v. *State,* 81 Ala. 41, 1 So. 565; *White* v. *State,* 30 Tex. Crim. Rep. 652, 18 S. W. 462; *State* v. *Ackles,* 8 Wash. 462, 36 Pac. 597; *Brown* v. *State,* 51 Ga. 502; *Rone* v. *Com.* 24 Ky. L. Rep. 1174, 70 S. W. 1042; *State* v. *Cole,* 63 Iowa, 695, 17 N. W. 183; *Holmes* v. *State,* 100 Ala. 80, 14 So. 864; *State* v. *De Angelo,* 9 La. Ann. 46; *Aycock* v. *State,* 2 Tex. App. 381.

[2] *Hudson* v. *State,* 44 Tex. Crim. Rep. 251, 70 S. W. 764; *State* v. *Gooch,* 94 N. C. 987.

[3] *Thompson* v. *State,* 55 Ga. 47.

[4] *Rea* v. *State,* 8 Lea, 356.

[5] *McGinnis* v. *State,* 31 Ga. 236. See *Coxwell* v. *State,* 66 Ga. 309.

[6] *People* v. *Brown,* 76 Cal. 573, 18 Pac. 678. But see *Horton* v. *State,* 110 Ga. 739, 35 S. E. 659; *Woodward* v. *State,* 42 Tex. Crim. Rep. 188, 58 S. W. 135.

[7] *Tarver* v. *State,* 43 Ala. 354; *McAnally* v. *State,* 74 Ala. 9; *Stewart* v. *State,* 78 Ala. 436. See *Com.* v. *Silk,* 111 Mass. 431; *People* v. *Thompson,* 92 Cal. 506, 28 Pac. 589.

[8] *State* v. *Anderson,* 45 La. Ann. 651, 12 So. 737.

§ 884. Showing motive through other crimes.—As we have already seen, other offenses are inadmissible when offered for the purpose of proving the crime charged,[1] or to show that the defendant would be likely to commit the crime with which he is charged.[2] But the evidence of other crimes is admissible to show motive,[3] and, where relevant for this purpose, the admissibility is not affected by the fact that such evidence may prove other crimes.[4]

[1] Supra, § 30 and notes.

[2] *Clark* v. *State,* 47 N. J. L. 556, 4 Atl. 327; *Ryan* v. *State,* 60 N. J. L. 552, 38 Atl. 672; *State* v. *Sprague,* 64 N. J. L. 419, 45 Atl. 788; *Bullock* v. *State,* 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62.

[3] *Goersen* v. *Com.* 99 Pa. 388, 106 Pa. 477, 51 Am. Rep. 534; *McConkey* v. *Com.* 101 Pa. 416; *Kramer* v. *Com.* 87 Pa. 299; *Com.* v. *Major,* 198 Pa. 290, 82 Am. St. Rep. 803, 47 Atl. 741; *Com.* v. *Biddle,* 200 Pa. 647, 50 Atl. 264; *Rex* v. *Cleewes,* 4 Car. & P. 221; *Gassenheimer* v. *State,* 52 Ala. 313; *People* v. *Walters,* 98 Cal. 138, 32 Pac. 864; *People* v. *Pool,* 27 Cal. 572; *Jones* v. *State,* 63 Ga. 395; *State* v. *Reed,* 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *Maden* v. *Com.* 4 Ky. L. Rep. 45; *Com.* v. *Choate,* 105 Mass. 451; *State* v. *Williamson,* 106 Mo. 162, 17 S. W. 172; *Smith* v. *State,* 17 Neb. 358, 22 N. W. 780, 5 Am. Crim. Rep. 363; *State* v. *Palmer,* 65 N. H. 216, 20 Atl. 6, 8 Am. Crim. Rep. 196; *Territory* v. *McGinnis,* 10 N. M. 269, 61 Pac. 208; *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65; *Pontius* v. *People,* 21 Hun, 328; *State* v. *Kent* (*State* v. *Pancoast*), 5 N. D. 516, 35 L.R.A. 513, 67 N. W. 1052; *Brown* v. *State,* 26 Ohio St. 176; *Blackwell* v. *State,* 29 Tex. App. 194, 15 S. W. 597; *Hart* v. *State,* 15 Tex. App. 202, 49 Am. Rep. 188; *Halleck* v. *State,* 65 Wis. 147, 26 N. W. 572; *Shaw* v. *State,* 102 Ga. 660, 29 S. E. 477; *Sanderson* v. *State,* 169 Ind. 301, 82 N. E. 525; *Whitney* v. *Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257, 12 Am. Crim. Rep. 170; *State* v. *Spaugh,* 200 Mo. 571, 594, 98 S. W. 55; *State* v. *Coleman,* 17 S. D. 594, 98 N. W. 175; *Cortez* v. *State,* 47 Tex. Crim. Rep. 10, 83 S. W. 812, 43 Tex. Crim. Rep. 384, 66 S. W. 453.

[4] *Brown* v. *State,* 26 Ohio St. 176; *Williams* v. *People,* 166 Ill. 132, 46 N. E. 749; *Gray* v. *State,* 63 Ala. 66; *People* v. *Walters,* 98 Cal. 138, 32 Pac. 864; *People* v. *Wilson,* 117 Cal. 688, 49 Pac. 1054; *People* v. *Gleason,* 127 Cal. 323, 59 Pac. 592; *State* v. *Watkins,* 9 Conn. 47, 21 Am. Dec. 712; *State* v. *Green,* 35 Conn. 203; *West* v. *State,* 42 Fla. 244, 28 So. 430; *State* v. *McGann,* 8 Idaho, 40, 66 Pac. 823; *Cross* v. *State,* 138 Ind. 254, 37 N. E. 790; *State* v. *Dooley,* 89 Iowa, 584, 57 N. W. 414; *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471; *Templeton* v. *People,* 27 Mich. 501; *Pontius* v.

§ 885. Showing motive through other crimes, continued. —The test of the inadmissibility of circumstantial evidence to show motive is where such evidence proves distinct and different offenses, unconnected with and unrelated to the particular act in question. But, inasmuch as motive is a condition of the mind impelling it to action, such conditions cannot be made know by direct evidence, and can only be inferred from what has been done or said, and from the circumstances surrounding the offense charged; and from necessity we are compelled to resort to proof of those circumstances from which motive may be reasonably inferred. Hence, such circumstances are relevant to show the character of the act, the state of mind with which it was done, and to show knowledge, system, or plan, and to rebut defenses, such as mistake or accident. On the other hand, such testimony is equally relevant when offered by the accused as explanatory of his motive in doing the act charged, or in showing that he did not commit the offense.

People, 82 N. Y. 339; *State* v. *Kent* (*State* v. *Pancoast*), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *Kramer* v. *Com.* 87 Pa. 299; *Com.* v. *Ferrigan,* 44 Pa. 386; *Barkman* v. *State,* 41 Tex. Crim. Rep. 105, 52 S. W. 73; *Miller* v. *State,* 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836, 21 S. W. 925; *State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238; *Keffer* v. *State,* 12 Wyo. 49, 73 Pac. 556; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Doolittle* v. *State,* 93 Ind. 272; *Thomas* v. *United States,* 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897; *People* v. *Argentos,* 156 Cal. 720, 106 Pac. 65; *Jaynes* v. *People,* 44 Colo. 535, 99 Pac. 325; *Sanderson* v. *State,* 169 Ind. 301, 82 N. E. 525; *State* v. *O'Connell,* 144 Iowa, 559, 123 N. W. 201; *Greenwell* v. *Com.* 30 Ky. L. Rep. 1282, 100 S. W. 852; *Com.* v. *Howard,* 205 Mass. 128, 91 N. E. 397; *State* v. *Spaugh,* 200 Mo. 571, 98 S. W. 55; *State* v. *Blumenthal,* 141 Mo. App. 502, 125 S. W. 1188; *People* v. *Barobuto,* 196 N. Y. 293, 89 N. E. 837; *State* v. *Dickerson,* 77 Ohio St. 34, 13 L.R.A.(N.S.) 341, 122 Am. St. Rep. 479, 82 N. E. 969, 11 A. & E. Ann. Cas. 1181; *Smith* v. *State,* 3 Okla. Crim. Rep. 629, 108 Pac. 418; *State* v. *La Rose,* 54 Or. 555, 104 Pac. 299; *Com.* v. *Levinson,* 34 Pa. Super. Ct. 286; *Jenkins* v. *State,* — Tex. Crim. Rep. —, 128 S. W. 1113; *State* v. *Sargood,* 80 Vt. 415, 130 Am. St. Rep. 995, 68 Atl. 49, 13 A. & E. Ann. Cas. 367.

Evidence of similar acts.

Evidence of similar acts affords the surest basis for inference that the crime charged was committed by the accused.[1]

[1] *Reg.* v. *Stephens,* 16 Cox, C. C. 387; *Reg.* v. *Dossett,* 2 Car. & K. 306, 2 Cox, C. C. 243; *State* v. *Adams,* 138 N. C. 688, 50 S. E. 765; *Stanley* v. *State,* 88 Atl. 154, 7 So. 273; *Ross* v. *State,* 62 Ala. 224, *State* v. *McGann,* 8 Idaho, 40, 66 Pac. 823; *Higgins* v. *State,* 157 Ind. 57, 60 N. E. 685; *State* v. *Jamison,* 74 Iowa, 613, 38 N. W. 509; *State* v. *Porter,* 45 La. Ann. 661, 12 So. 832; *Com.* v. *McCarthy,* 119 Mass. 354; *Com.* v. *Shepard,* 1 Allen, 575; *People* v. *Thacker,* 108 Mich. 652, 66 N. W. 562; *Meister* v. *People,* 31 Mich. 99, 1 Am. Crim. Rep. 91; *State* v. *Phillips,* 160 Mo. 503, 60 S. W. 1050; *State* v. *Franke,* 159 Mo. 535, 60 S. W. 1053; *State* v. *Lapage,* 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; *People* v. *Dimick,* 107 N. Y. 13, 14 N. E. 178; *People* v. *Lyon,* 1 N. Y. Crim. Rep. 400; *State* v. *Murphy,* 84 N. C. 742; *State* v. *Hahn,* 8 Ohio N. P. 101, 11 Ohio S. & C. P. Dec. 311; *Com.* v. *Birriolo,* 197 Pa. 371, 47 Atl. 355; *State* v. *Phelps,* 5 S. D. 480, 59 N. W. 471; *Wiley* v. *State,* 3 Coldw. 362; *Cortez* v. *State,* 4 Tex. Crim. Rep. 375, 66 S. W. 453; *Goodwyn* v. *State,* — Tex. Crim. Rep. —, 64 S. W. 251; *Brown* v. *State,* — Tex. Crim. Rep. —, 59 S. W. 1118; *Street* v. *State,* 7 Tex. App. 5; *O'Boyle* v. *Com.* 100 Va. 785, 40 S. E. 121; *State* v. *Place,* 5 Wash. 773, 32 Pac. 736; *Cox* v. *State,* 162 Ala. 66, 50 So. 398; *Butler* v. *State,* 162 Ala. 71, 50 So. 400; *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927; *Jaynes* v. *People,* 44 Colo. 535, 99 Pac. 325, 16 A. & E. Ann. Cas. 787; *State* v. *Sebastian,* 81 Conn. 1, 69 Atl. 1054; *Ryan* v. *United States,* 26 App. D. C. 74, 6 A. & E. Ann. Cas. 633; *Webb* v. *State,* 7 Ga. App. 35, 66 S. E. 27; *Miller* v. *State,* — Ind. —, 91 N. E. 930; *State* v. *Yates,* 145 Iowa, 332, 124 N. W. 174; *Watson* v. *Com.* 132 Ky. 46, 116 S. W. 287; *Raymond* v. *Com.* 123 Ky. 368, 96 S. W. 515; *State* v. *Riggio,* 124 La. 614, 50 So. 600; *Com.* v. *Parsons,* 195 Mass. 560, 81 N. E. 291; *People* v. *Klise,* 156 Mich. 373, 120 N. W. 989; *State* v. *Fournier,* 108 Minn. 402, 122 N. W. 329; *State* v. *Missouri P. R. Co.* 219 Mo. 156, 117 S. W. 1173; *State* v. *McNamara,* 212 Mo. 150, 110 S. W. 1067; *State* v. *Radmilovich,* 40 Mont. 93, 105 Pac. 91; *People* v. *Geyer,* 196 N. Y. 364, 90 N. E. 48; *State* v. *Hazlet,* 16 N. D. 426, 113 N. W. 374; *State* v. *Kent* (*State* v. *Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *Rea* v. *State,* 3 Okla. Crim. Rep. 269, 105 Pac. 381; *Com.* v. *House,* 223 Pa. 487, 72 Atl. 804; *United States* v. *Tanjuanco,* 1 Philippine 116; *Windham* v. *State,* — Tex. Crim. Rep. —, 128 S. W. 1130; *Roberts* v. *State,* 51 Tex. Crim. Rep. 27, 100 S. W. 150; *Lightfoot* v. *State,* — Tex. Crim. Rep. —, 106 S. W. 345; *Smith* v. *State,* 51 Tex. Crim. Rep. 427, 102 S. W. 406; *Hinson* v. *State,* 51 Tex. Crim. Rep. 102, 100 S. W. 939; *State*

Thus, it is proper to give evidence of other thefts to show knowledge of ownership and intent to steal.[2]

Receiving stolen goods.

A very great latitude is allowed in the reception of evidence relating to the possession of stolen goods. Thus, evidence that there were other instances of the reception by the defendant of stolen goods is relevant;[3] that the accused had received such goods from the same person;[4] that he bought them at an inadequate price;[5] that he received them at unusual hours of the night;[6] and other unusual or suspicious circumstances attending the possession.[7]

v. *Williams,* 36 Utah, 273, 103 Pac. 250; *State* v. *Sanderson,* 83 Vt. 351, 75 Atl. 961; *Davis* v. *State,* 134 Wis. 632, 115 N. W. 150. See *People* v. *Minney,* 155 Mich. 534, 119 N. W. 918; *Dillard* v. *State,* 152 Ala. 86, 44 So. 537; *Abrams* v. *State,* 155 Ala. 105, 46 So. 464; *Morse* v. *Com.* 129 Ky. 294, 111 S. W. 714; *People* v. *Hill,* 198 N. Y. 64, 91 N. E. 272; *Sorenson* v. *United States,* 94 C. C. A. 181, 168 Fed. 785; *Smothers* v. *State,* 81 Neb. 426, 116 N. W. 152; *State* v. *Routzahn,* 81 Neb. 133, 129 Am. St. Rep. 675, 115 N. W. 759; *Skidmore* v. *State,* 57 Tex. Crim. Rep. 497, 26 L.R.A.(N.S.) 466, 123 S. W. 1129.

[2] *People* v. *Machen,* 101 Mich. 401, 59 N. W. 664; *Housh* v. *People,* 24 Colo. 262, 50 Pac. 1036; *Williams* v. *People,* 166 Ill. 132, 46 N. E. 749.

[3] *Com.* v. *Charles,* 21 Pittsb. L. J. 11; *Com.* v. *Moorby,* 8 Phila. 616; *Com.* v. *Johnson,* 133 Pa. 293, 19 Atl. 402; *Kilrow* v. *Com.* 89 Pa. 480.

[4] *State* v. *Ward,* 49 Conn. 440; *Shriedley* v. *State,* 23 Ohio St. 130; *People* v. *Grossman,* 168 N. Y. 47, 60 N. E. 1050; *People* v. *Doty,* 175 N. Y. 164, 67 N. E. 303; *Devoto* v. *Com.* 3 Met. (Ky.) 417; *State* v. *Crawford,* 39 S. E. 345, 17 S. E. 799; *Copperman* v. *People,* 56 N. Y. 591.

[5] *Cohen* v. *State,* 50 Ala. 108; *People* v. *Hertz,* 105 Cal. 660, 39 Pac. 32; *State* v. *Houston,* 29 S. C. 108, 6 S. E. 943. But see *Sartorious* v. *State,* 24 Miss. 602; *Minor* v. *State,* 65 Fla. 90, 45 So. 818; *State* v. *Levich,* 128 Iowa, 372, 104 N. W. 334; *State* v. *Pirkey,* 22 S. D. 550, 118 N. W. 1042, 18 A. & E. Ann. Cas. 192.

[6] *Friedberg* v. *People,* 102 Ill. 160. See *State* v. *Gordon,* 105 Minn. 217, 117 N. W. 483, 15 A. & E. Ann. Cas. 897.

[7] *People* v. *Clausen,* 120 Cal. 381, 52 Pac. 658; *People* v. *Schooley,* 149 N. Y. 99, 43 N. E. 536; *Adams* v. *State,* 52 Ala. 379; *Cobb* v. *State,* 76 Ga. 664; *Delahoyde* v. *People,* 212 Ill. 554, 72 N. E. 732; *Durant* v.

Connected crimes and previous attempts.

Circumstances showing the commission of other crimes than the crime charged are relevant where they are so connected that evidence of one cannot be given without it proves the other;[8] and such circumstances are also relevant whether the crime incidentially shown is of the same or a different character from the one on trial;[9] and circumstances showing that

People, 13 Mich. 351; *People* v. *Rando*, 3 Park. Crim. Rep. 335; *Goldstein* v. *People*, 82 N. Y. 231; *Harwell* v. *State*, 22 Tex. App. 251, 2 S. W. 606; *State* v. *Miller*, 159 Mo. 113, 60 S. W. 67; *People* v. *Zimmerman*, 11 Cal. App. 115, 104 Pac. 590; *State* v. *Winter*, 83 S. C. 251, 65 S. E. 243; *Koerner* v. *State*, 98 Ind. 7; *State* v. *Feuerhaken*, 96 Iowa, 299, 65 N. W. 299; *State* v. *Habib*, 18 R. I. 558, 30 Atl. 462; *Goldsberry* v. *State*, 66 Neb. 312, 92 N. W. 906; *Morgan* v. *State*, 31 Tex. App. 1, 18 S. W. 647; *Sapir* v. *United States*, 98 C. C. A. 227, 174 Fed. 219; *Piano* v. *State*, 161 Ala. 88, 49 So. 803; *Woodward* v. *State*, 84 Ark. 119, 104 S. W. 1109; *Lipsey* v. *People*, 227 Ill. 364, 81 N. E. 348; *Jeffries* v. *United States*, 7 Ind. Terr. 47, 103 S. W. 761; *Hanks* v. *State*, 55 Tex. Crim. Rep. 451, 117 S. W. 150.

[8] *Mason* v. *State*, 42 Ala. 532; *People* v. *Smith*, 106 Cal. 73, 39 Pac. 40; *People* v. *Teixeira*, 123 Cal. 297, 55 Pac. 988; *People* v. *Jones*, 123 Cal. 65, 55 Pac. 698; *Piela* v. *People*, 6 Colo. 343; *Killins* v. *State*, 28 Fla. 313, 9 So. 711; *Hickam* v. *People*, 137 Ill. 75, 27 N. E. 83; *Parkinson* v. *People*, — Ill. —, 24 N. E. 772; *Starr* v. *State*, 160 Ind. 661, 67 N. E. 527; *State* v. *Porter*, 45 La. Ann. 661, 12 So. 832; *People* v. *Saunders*, 25 Mich. 119; *People* v. *Marble*, 38 Mich. 117; *People* v. *Foley*, 64 Mich. 148, 31 N. W. 94; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *State* v. *Perry*, 136 Mo. 126, 37 S. W. 804; *Brown* v. *Com.* 76 Pa. 319; *State* v. *Halpin*, 16 S. D. 170, 91 N. W. 605; *Wilkerson* v. *State*, 31 Tex. Crim. Rep. 86, 19 S. W. 903; *Crews* v. *State*, 34 Tex. Crim. Rep. 533, 31 S. W. 373; *McMahon* v. *State*, 16 Tex. App. 357; *Hamilton* v. *State*, 41 Tex. Crim. Rep. 644, 56 S. W. 926; *Conley* v. *State*, 21 Tex. App. 495, 1 S. W. 454; *Robinson* v. *State*, — Tex. Crim. Rep. —, 48 S. W. 176; *People* v. *Coughlin*, 13 Utah, 58, 44 Pac. 94; *Heath* v. *Com.* 1 Rob. (Va.) 736; *State* v. *Craemer*, 12 Wash. 217, 40 Pac. 944; *State* v. *Vines*, 34 La. Ann. 1079, 4 Am. Crim. Rep. 296; *People* v. *McClure*, 148 N. Y. 95, 42 N. E. 523; *Renfroe* v. *State*, 84 Ark. 16, 104 S. W. 542; *People* v. *Smith*, 9 Cal. App. 644, 99 Pac. 1111; *Bennett* v. *Com.* 133 Ky. 452, 118 S. W. 332; *State* v. *Blount*, 124 La. 202, 50 So. 12; *Doyle* v. *State*, — Tex. Crim. Rep. —, 126 S. W. 1131.

[9] *Seams* v. *State*, 84 Ala. 410, 4

the accused attempted to commit at another time the crime with which he is charged are relevant.[10]

§ 886. **Showing motive through fraud.**—As we have already seen,[1] when the question at issue is fraud, there is a peculiar latitude in the reception of all the circumstances. But latitude must not be permitted to dispense with the rules of evidence. Thus, the admission of circumstances tending to establish a motive in fraud, or the proof of the existence of an intent to commit a fraud, does not raise a presumption that the fraud was actually committed. The proof of the motive is not proof of the fact of the crime.[2] This is always the limitation in a civil suit where fraud is the issue, and it is much more rigorously enforced where fraud is the subject of a criminal prosecution, where, to convict, the fact must be established beyond a reasonable doubt. Within these limitations the number and variety of circumstances that may become relevant is so great as to prevent classification. A large field of circumstantial evidence is the admission of similar acts or trans-

So. 521; *Oakley* v. *State,* 135 Ala. 15, 33 So. 23; *Doghead Glory* v. *State,* 13 Ark. 236; *State* v. *Phillips,* 118 Iowa, 660, 92 N. W. 876; *People* v. *Ascher,* 126 Mich. 637, 86 N. W. 140; *State* v. *Taylor,* 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; *People* v. *Pallister,* 138 N. Y. 601, 33 N. E. 741; *Brown* v. *Com.* 76 Pa. 319; *English* v. *State,* 34 Tex. Crim. Rep. 190, 30 S. W. 233; *State* v. *Burton,* 27 Wash. 528, 67 Pac. 1097; *Hayes* v. *State,* 36 Tex. Crim. Rep. 146, 35 S. W. 983; *People* v. *Courtright,* 10 Cal. App. 522, 102 Pac. 542; *Hall* v. *State,* 7 Ga. App. 115, 66 S. E. 390; *Parrish* v. *Com.* 136 Ky. 77, 123 S. W. 339; *State* v. *Anderson,* 120 La. 331, 45 So. 267; *State* v. *Sylvester,* 40 Mont. 79, 105 Pac. 86; *People* v. *Morse,* 196 N. Y. 306, 89 N. E. 816; *Hines* v. *State,* 57 Tex. Crim. Rep. 216, 123 S. W. 411; *Nelson* v. *State,* 51 Tex. Crim. Rep. 349, 101 S. W. 1012; *Schoette* v. *Drake,* 139 Wis. 18, 120 N. W. 393. See *Gardner* v. *State,* 55 Tex. Crim Rep. 400, 117 S. W. 148.

[10] *State* v. *Ward,* 61 Vt. 153, 17 Atl. 483, 8 Am. Crim. Rep. 207.

[1] Supra § 24.

[2] *Moore* v. *Parker,* 25 Iowa, 355; *Seward* v. *Seward,* 59 Kan. 387, 53 Pac. 653. See *Water Comrs.* v. *Robbins,* 82 Conn. 623, 74 Atl. 938.

actions. Thus, proof of similar fraudulent acts is generally relevant to show the intent or motive to cheat and defraud.[3]

In *forgery,* it is relevant to show possession, by the accused, of other forged instruments;[4] or to introduce copies evidently made through practice; and on the issue of raising the amount of a note, it is relevant to show practice work in altering figures.[5]

In *counterfeiting,* it is relevant to show frequent passing of counterfeit money,[6] and also possession of other counterfeit money, to prove intent and knowledge.[7]

[3] *Bloomer* v. *State,* 48 Md. 521, 3 Am. Crim. Rep. 37; *State* v. *Wilson,* 72 Minn. 522, 75 N. W. 715; *State* v. *Jackson,* 112 Mo. 585, 20 S. W. 674; *Com.* v. *Lubinsky,* 182 Mass. 142, 64 N. E. 966; *Bottomley* v. *United States,* 1 Story, 135, Fed. Cas. No. 1,688; *Reg.* v. *Francis,* L. R. 2 C. C. 128, 43 L. J. Mag. Cas. N. S. 97, 30 L. T. N. S. 503, 22 Week. Rep. 663, 12 Cox, C. C. 612; *Reg.* v. *Cooper,* L. R. 1 Q. B. Div. 19, 45 L. J. Mag. Cas. N. S. 15, 33 L. T. N. S. 754, 24 Week. Rep. 279, 13 Cox, C. C. 123. See *Blum* v. *State,* 94 Md. 375, 56 L.R.A. 322, 51 Atl. 26.

[4] *Bell* v. *State,* 57 Md. 108; *Bishop* v. *State,* 55 Md. 138; *People* v. *Frank,* 28 Cal. 507; *Com.* v. *Miller,* 3 Cush. 243; *State* v. *Prins,* 113 Iowa, 72, 84 N. W. 980; *Anson* v. *People,* 148 Ill. 494, 35 N. E. 145.

[5] *Pennsylvania Co.* v. *Philadelphia, G. & N. R. Co.* 153 Pa. 160, 25 Atl. 1043; *Wheeler* v. *Ahlers,* 189 Pa. 138, 42 Atl. 40.

[6] *Reg.* v. *Forster,* Dears. C. C. 456, 3 C. L. R. 681, 24 L. J. Mag. Cas. N. S. 134, 1 Jur. N. S. 407, 3 Week. Rep. 411, 6 Cox, C. C. 521; *Reg.* v. *Weeks,* Leigh & C. C. C. 18, 30 L. J. Mag. Cas. N. S. 141, 7 Jur. N. S. 472, 4 L. T. N. S. 373, 9 Week. Rep. 553, 8 Cox, C. C. 455; *People* v. *Sharp,* 107 N. Y. 467, 1 Am. St. Rep. 851, 14 N. E. 319; *Stalker* v. *State,* 9 Conn. 341; *Com.* v. *Bigelow,* 8 Met. 235; *Com.* v. *Jackson,* 132 Mass. 18, 44 Am. Rep. 299 note; *State* v. *McAllister,* 24 Me. 139; *Griffin* v. *State,* 14 Ohio St. 55.

[7] *Hess* v. *State,* 5 Ohio, 9, 22 Am. Dec. 767; *Com.* v. *Hall,* 4 Allen, 306; *Tharp* v. *State,* 15 Ala. 749; *Wright* v. *State,* 138 Ala. 69, 34 So 1009; *People* v. *Farrell,* 30 Cal. 316; *State* v. *Smith,* 5 Day, 175, 5 Am. Dec. 132; *State* v. *McAllister,* 24 Me. 139; *Com.* v. *Price,* 10 Gray, 473, 71 Am. Dec. 668; *Com.* v. *Edgerly,* 10 Allen, 184; *Com.* v. *White,* 145 Mass. 394, 14 N. E. 611, 7 Am. Crim. Rep. 192; *State* v. *Mix,* 15 Mo. 153; *State* v. *Wolff,* 15 Mo. 173; *State* v. *Van Houten,* 3 N. J. L. 672, 4 Am. Dec. 407; *State* v. *Robinson,* 16 N. J. L. 507; *Peek* v. *State,* 2 Humph. 78.

See *United States* v. *Roudenbush,*

In *embezzlement,* circumstantial evidence is relevant where other acts have been done under conditions so similar to the one on charge as to negative the idea of mistake or accident on the part of the accused,—not with a view of proving guilt, but of proving the motive or intent with which the act charged was done.[8]

In *false pretenses,* it is relevant to show the repetition of similar acts, in order to show the motive of the accused. But each case must depend on its own circumstances, and, ordinarily, the limit of admission rests in the discretion of the trial court.[9]

Baldw. 514, Fed. Cas. No. 16,198; *United States* v. *Burns,* 5 McLean, 23, Fed. Cas. No. 14,691; *Finn* v. *Com.* 5 Rand. (Va.) 701; *Bryan* v. *United States,* 66 C. C. A. 369, 133 Fed. 495.

[8] Roscoe, Crim. Ev. § 143; *Reg.* v. *Richardson,* 2 Fost. & F. 343, 8 Cox, C. C. 448; *Reg.* v. *Stephens,* 16 Cox, C. C. 387; *People* v. *Gray,* 66 Cal. 271, 5 Pac. 240; *People* v. *Bidleman,* 104 Cal. 609, 38 Pac. 502; *Thalheim* v. *State,* 38 Fla. 169, 20 So. 938.

See *Shipp* v. *Com.* 101 Ky. 518, 41 S. W. 856; *Com.* v. *Tuckerman,* 10 Gray, 173, 197; *Com.* v. *Shepard,* 1 Allen, 575; *Perkins* v. *Spaulding,* 182 Mass. 218, 65 N. E. 72; *American Surety Co.* v. *Pauly,* 18 C. C. C. 644, 38 U. S. App. 254, 72 Fed. 470; *Wolfson* v. *United States,* 41 C. C. A. 422, 101 Fed. 430; *Eatman* v. *State,* 48 Fla. 21, 37 So. 576.

[9] *People* v. *Shulman,* 80 N. Y. 373, note; *Mayer* v. *People,* 80 N. Y. 364.

See the following cases as illustrating the principle of relevancy: *Hathaway's Trials,* 14 How. St. Tr. 664; *Irving* v. *Motly,* 7 Bing. 543, 5 Moore & P. 380, 9 L. J. C. P. 161; *Reg.* v. *Roebuck,* Dears & B. C. C. 24, 25 L. J. Mag. Cas. 101, 2 Jur. N. S. 597, 4 Week. Rep. 514, 7 Cox, C. C. 126; *Reg.* v. *Stenson,* 12 Cox, C. C. 111, 25 L. T. N. S. 666; *Reg.* v. *Francis,* L. R. 2 C. C. 128, 43 L. J. Mag. Cas. N. S. 97, 30 L. T. N. S. 503, 22 Week. Rep. 663, 12 Cox, C. C. 612; *Reg.* v. *Saunders,* L. R. 1 Q. B. Div. 15, 45 L. J. Mag. Cas. N. S. 11, 33 L. T. N. S. 677, 24 Week. Rep. 348, 13 Cox, C. C. 116, 3 Am. Crim. Rep. 436; *Gardner* v. *Preston,* 2 Day, 205, 2 Am. Dec. 91; *Elwell* v. *Russell,* 71 Conn. 462, 42 Atl. 862; *Allin* v. *Millison,* 72 Ill. 201; *Dubois* v. *People,* 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658; *Crum* v. *State,* 148 Ind. 401, 47 N. E. 833; *State* v. *Rivers,* 58 Iowa, 102, 43 Am. Rep. 112, 12 N. W. 117; *State* v. *Dexter,* 115 Iowa, 678, 87 N. W. 417; *State* v. *Soper,* 118 Iowa, 1, 91 N. W. 774; *McKenney* v. *Dingley,* 4 Me. 172; *Carnell* v. *State,* 85 Md.

In *perjury,* it is relevant to show that the accused testified falsely in immaterial matters as well, to show intention and negative the idea of mistake;[10] and in *subornation of perjury,* it is relevant to show preparations on the part of the accused to coach the false witnesses.[11]

In *bribery,* similar transactions are relevant to show motive and intent; thus, on the charge of soliciting a bribe to influence the passage of an ordinance, solicitation by the accused, about the same time, of a bribe relative to an ordinance then pending, is relevant.[12] As bribery transactions are generally entered

1, 36 Atl. 117; *Com.* v. *Stone,* 4 Met. 43; *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596. But see *Jordan* v. *Osgood,* 109 Mass. 457, 12 Am. Rep. 731; *Com.* v. *Blood,* 141 Mass. 575, 6 N. E. 769; *Shipman* v. *Seymour,* 40 Mich. 274; *People* v. *Henssler,* 48 Mich. 49, 11 N. W. 804; *Ross* v. *Miner,* 67 Mich. 410, 35 N. W. 60; *State* v. *Wilson,* 72 Minn. 522, 75 N. W. 715; *State* v. *Southall,* 77 Minn. 296, 79 N. W. 1007; *State* v. *Jackson,* 112 Mo. 585, 20 S. W. 674; *State* v. *Turley,* 142 Mo. 403, 44 S. W. 267; *State* v. *Wilson,* 143 Mo. 334, 44 S. W. 722; *Swinney* v. *Patterson,* 25 Nev. 411, 62 Pac. 1; *Angier* v. *Ash,* 26 N. H. 109; *Hovey* v. *Grant,* 52 N. H. 569; *Cary* v. *Hotailing,* 1 Hill, 311, 37 Am. Dec. 323. See *Hall* v. *Naylor,* 18 N. Y. 588, 75 Am. Dec. 269; *Hathorne* v. *Hodges,* 28 N. Y. 486; *Bielschofsky* v. *People,* 60 N. Y. 616; *Weyman* v. *People,* 62 N. Y. 623; *Shipply* v. *People,* 86 N. Y. 376, 40 Am. Rep. 551; *State* v. *Durham,* 121 N. C. 546, 28 S. E. 22; *Schofield* v. *Shiffer,* 156 Pa. 65, 27 Atl. 69; *Defrese* v. *State,* 3 Heisk. 53, 8 Am. Rep. 1; *Rafferty* v. *State,* 91 Tenn. 665, 16 S. W. 728; *United States* v. *Snyder,* 4 McCrary, 618, 14 Fed. 554; *Mudsill Min. Co.* v. *Watrous,* 9 C. C. A. 415, 22 U. S. App. 12, 61 Fed. 163, 18 Mor. Min. Rep. 1; *Spurr* v. *United States,* 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701; *Trogdon* v. *Com.* 31 Gratt. 862; *Johnson* v. *State,* 75 Ark. 427, 88 S. W. 905; *Com.* v. *Clancy,* 187 Mass. 191, 72 N. E. 842.

[10] *Dodge* v. *State,* 24 N. J. L. 456; *State* v. *Raymond,* 20 Iowa, 582.

[11] *Stone* v. *State,* 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630; *People* v. *Van Tassel,* 156 N. Y. 561, 51 N. E. 274. See *People* v. *Doody,* 172 N. Y. 165, 64 N. E. 807, 15 Am. Crim. Rep. 576.

[12] *Higgins* v. *State,* 157 Ind. 57, 60 N. E. 685; *State* v. *Durnam,* 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179. See *State* v. *Ames,* 90 Minn. 183, 96 N. W. 330; *State* v. *Schnettler,* 181 Mo. 173, 79 S. W. 1123; *State* v. *Williams,* 136 Mo. 293, 38 S. W. 75 (embracery).

into in secret, and with none present except the parties to the offense, the proof must frequently rest on circumstantial evidence, which is therefore relevant, and may be sufficient to sustain a conviction.[13]

In the *illegal sales of intoxicating liquors,* inasmuch as these offenses are always statutory controlled, the particular statute should be referred to as to matters of evidence. Such statutes generally provide that the drinking of liquors on the premises shall be evidence of sale with intent;[14] that the possession of intoxicating liquors, except in a man's house, by one who has no license to sell, shall be evidence of intent to sell in violation of law;[15] and that the delivery of liquors from any place other than the dwelling house shall constitute evidence of sale;[16] and such statutes are upheld upon constitutional principles as a proper exercise of police power. In such cases the question of intent is always involved; hence it is relevant on the question of intent to show previous illegal sales.[17]

[13] *People* v. *Sharp,* 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *People* v. *Kerr,* 6 N. Y. Crim. Rep. 406, 6 N. Y. Supp. 674. See *Epps* v. *Smith,* 121 N. C. 157, 28 S. E. 359; *People* v. *Fong Ching,* 78 Cal. 169, 20 Pac. 396; *Guthrie* v. *State,* 16 Neb. 667, 21 N. W. 455, 4 Am. Crim. Rep. 78; *Tinkle* v. *Wallace,* 167 Ind. 382, 79 N. E. 355; *People* v. *McGarry,* 136 Mich. 316, 99 N. W. 147; *Vernon* v. *United States,* 76 C. C. A. 547, 146 Fed. 121.

[14] *Board of Excise* v. *Merchant,* 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484.

[15] *Gillespie* v. *State,* 96 Miss. 856, 51 So. 811, 926; *Yeoman* v. *State,* 81 Neb. 272, 117 N. W. 997; *Steinkuhler* v. *State,* 77 Neb. 331, 109 N. W. 395; *State* v. *Barrett,* 138 N. C. 630, 1 L.R.A.(N.S.) 626, 50 S. E. 506; *Parsons* v. *State,* 61 Neb. 244, 85 N. W. 65; *State* v. *Sheppard,* 64 Kan. 451, 67 Pac. 870; *Durfee* v. *State,* 53 Neb. 214, 73 N. W. 676.

[16] *State* v. *Hurley,* 54 Me. 562; *Com.* v. *Williams,* 6 Gray, 1; *Coy* v. *State,* — Tex. Crim. Rep. —, 123 S. W. 414; *State* v. *Raymond,* 24 Conn. 206; *State* v. *Plunkett,* 64 Me. 534.

[17] *Com.* v. *Cotton,* 138 Mass. 501; *Com.* v. *Vincent,* 165 Mass. 18, 42 N. E. 332; *Hans* v. *State,* 50 Neb. 150, 69 N. W. 838; *State* v. *White,* 70 Vt. 225, 39 Atl. 1085. See *Boldt* v. *State,* 72 Wis. 14, 38 N. W. 177; *Com.* v. *Edds,* 14 Gray, 406; *People* v. *Caldwell,* 107 Mich. 374, 65 N. W. 213; Black, Intoxicating Liquors, §§ 499 et seq.

§ 887. Showing motive in sexual crimes.—Where intent and motive are in issue, in crimes of this class, former acts of the same kind are relevant to negative the issue that another or any different crime was contemplated or committed than the crime charged, and to show intent. Thus, in *rape,* circumstantial evidence showing prior acts is relevant where the prior acts are so connected with the particular crime at issue that the proof of one fact with its circumstances has some bearing upon the issue on trial, as showing the intent.[1] Such evidence has a peculiar relevancy where the charge is *assault with intent to commit rape,* as in this case the act need not be limited to the person assaulted, for it is the general purpose that is involved in the assault, and no particular person is essential to show such purpose and motive, and such evidence is relevant to show the lustful intent.[2]

In *abortion,* to prove intent, it is relevant to show that the accused operated in the same way on other occasions;[3] and evidence of a subsequent attempt by different means is admissible to show intent on the first occasion.[4] It is relevant to show the use of instruments or drugs on other occasions, both

[1] *State* v. *Lapage,* 57 N. H. 289, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; *Reg.* v. *Chambers,* 3 Cox, C. C. 92; *Reg.* v. *Rearden,* 4 Fost. & F. 76; *People* v. *Fultz,* 109 Cal. 258, 41 Pac. 1040; *Bigcraft* v. *People,* 30 Colo. 298, 70 Pac. 417; *State* v. *Scott,* 172 Mo. 536, 72 S. W. 897; *Reinoehl* v. *State,* 62 Neb. 619, 87 N. W. 355; *People* v. *O'Sullivan,* 104 N. Y. 483, 58 Am. Rep. 530, 10 N. E. 880; *Williams* v. *State,* 8 Humph. 585; *Proper* v. *State,* 85 Wis. 615, 55 N. W. 1035; *State* v. *Trusty,* 122 Iowa, 82, 97 N. W. 989; *State* v. *Carpenter,* 124 Iowa, 5, 98 N. W. 775; *State* v. *Crouch,* 130 Iowa, 478, 107 N. W. 173; *State* v. *Johnson,* 111 La. 935, 36 So. 30; *Harmon* v. *Territory,* 15 Okla. 147, 79 Pac. 765.

[2] *State* v. *Desmond,* 109 Iowa, 72, 80 N. W. 214. See *State* v. *Waters,* 45 Iowa, 389; *Com.* v. *Bean,* 137 Mass. 570; *State* v. *Johnson,* 133 Iowa, 38, 110 N. W. 170; *Childress* v. *State,* 51 Tex. Crim. Rep. 455, 103 S. W. 864; *State* v. *Allison,* 24 S. D. 622, 124 N. W. 747.

[3] *Com.* v. *Holmes,* 103 Mass. 440; *Com.* v. *Corkin,* 136 Mass. 429, 4 Am. Crim. Rep. 15.

[4] *Lamb* v. *State,* 66 Md. 285, 7 Atl. 399. See *Hays* v. *State,* 40 Md 648.

prior and subsequent, to negative innocent intent;[5] it should be observed again that such evidence is relevant only for the purpose of showing motive, or of negativing an alleged innocent intent; so that where evidence of other similar crimes is offered for the purpose of proving the commission of the offense on trial, it is irrelevant and improper.[6]

In *adultery*, from the very nature of the offense, direct proof can seldom be adduced; hence, facts and circumstances are relevant from which guilt can be established, but this must be to a degree that will satisfy the jury beyond a reasonable doubt.[7] The circumstances that are common to the offense,

[5] *Com.* v. *Brown*, 121 Mass. 71; *People* v. *Sessions*, 58 Mich. 594, 26 N. W. 291; *State* v. *Moothart*, 109 Iowa, 130, 80 N. W. 301; *Clark* v. *Com.* 111 Ky. 443, 63 S. W. 740; *People* v. *Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; *People* v. *Abbott*, 116 Mich. 263, 74 N. W. 529, 11 Am. Crim. Rep. 4; *Reg.* v. *Perry*, 2 Cox, C. C. 223; *Rex* v. *Bond* [1906] 2 K. B. 389, 75 L. J. K. B. N. S. 693, 70 J. P. 424, 54 Week. Rep. 586, 95 L. T. N. S. 296, 22 Times L. R. 633; *Sullivan* v. *State*, 121 Ga. 183, 48 S. E. 949; *Clark* v. *People*, 224 Ill. 554, 79 N. E. 941.

[6] Supra, § 30.

[7] *Gore* v. *State*, 58 Ala. 391; *State* v. *Crowley*, 13 Ala. 172; *Love* v. *State*, 124 Ala. 82, 27 So. 217; *State* v. *Schweitzer*, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787; *Weaver* v. *State*, 74 Ga. 376; *Crane* v. *People*, 168 Ill. 395, 48 N. E. 54; *State* v. *Wiltsey*, 103 Iowa, 54, 72 N. W. 415; *State* v. *Henderson*, 84 Iowa, 161, 50 N. W. 758; *Com.* v. *Gray*, 129 Mass. 474, 37 Am. Rep. 378; *Com.* v. *Clifford*, 145 Mass. 97, 13 N. E. 345; *People* v. *Fowler*, 104 Mich. 449, 62 N. W. 572; *People* v. *Montague*, 71 Mich. 447, 39 N. W. 585; *People* v. *Girdler*, 65 Mich. 68, 31 N. W. 624; *Carotti* v. *State*, 42 Miss. 334, 97 Am. Dec. 465; *State* v. *Coffee*, 39 Mo. App. 56; *State* v. *Clawson*, 30 Mo. App. 139; *State* v. *Way*, 5 Neb. 283; *State* v. *Winkley*, 14 N. H. 480; *State* v. *Snover*, 64 N. J. L. 65, 44 Atl. 850; *State* v. *Austin*, 108 N. C. 780, 13 S. E. 219; *State* v. *Poteet*, 30 N. C. (8 Ired. L.) 23; *State* v. *Stubbs*, 108 N. C. 774, 13 S. E. 90; *State* v. *Waller*, 80 N. C. 401; *Com.* v. *Bell*, 166 Pa. 405, 41 Atl. 123; *Swancoat* v. *State*, 4 Tex. App. 105; *Kahn* v. *State*, — Tex. Crim. Rep. —, 38 S. W. 989; *State* v. *Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *State* v. *Colby*, 51 Vt. 291; *Baker* v. *United States*, 1 Pinney Wis. 641; *State* v. *Thompson*, 31 Utah, 228, 87 Pac. 709; *State* v. *Nelson*, 39 Wash. 221, 81 Pac. 721; *Roller* v. *State*, 43 Tex. Crim. Rep. 433, 66 S. W. 777; *Monteith* v. *State*, 114 Wis. 165, 89

such as mutual disposition,[8] opportunity,[9] and, frequently, reputation for chastity in connection with testimony showing opportunity,[10] are all relevant. Likewise, evidence of prior acts [11] and subsequent conduct to the date averred in the indict-

N. W. 828; *Till* v. *State,* 132 Wis. 242, 111 N. W. 1109; *Coons* v. *State,* 49 Tex. Crim. Rep. 256, 91 S. W. 1085.

[8] *State* v. *Jackson,* 65 N. J. L. 62, 46 Atl. 767; *State* v. *Snover,* 65 N. J. L. 289, 47 Atl. 583, 15 Am. Crim. Rep. 24; *Thayer* v. *Thayer,* 101 Mass. 113, 100 Am. Dec. 110; *People* v. *Mathews,* 139 Cal. 527, 73 Pac. 416; *Lamphere* v. *State,* 114 Wis. 193, 89 N. W. 128; *Monteith* v. *State,* 114 Wis. 165, 89 N. W. 828; *State* v. *Brink,* 68 Vt. 659, 35 Atl. 492; *State* v. *Butts,* 107 Iowa, 653, 78 N. W. 687; *Boatright* v. *State,* 42 Tex. Crim. Rep. 442, 60 S. W. 760; *People* v. *Imes,* 110 Mich. 250, 68 N. W. 157; *People* v. *Montague,* 71 Mich. 447, 39 N. W. 585; *State* v. *Thompson,* 133 Iowa, 741, 111 N. W. 319; *State* v. *La More,* 53 Or. 261, 99 Pac. 417; *State* v. *Eggleston,* 45 Or. 346, 77 Pac. 738; *French* v. *State,* 47 Tex. Crim. Rep. 571, 85 S. W. 4.

[9] *Gardner* v. *State,* 81 Ga. 144, 7 S. E. 144; *Com.* v. *Tarr,* 4 Allen, 315; *State* v. *Ean,* 90 Iowa, 534, 58 N. W. 898; *Com.* v. *Bowers,* 121 Mass. 45; *Richardson* v. *State,* 34 Tex. 142; *Com.* v. *Mosier,* 135 Pa. 221, 19 Atl. 943; *Eldridge* v. *State,* 97 Ga. 192, 23 S. E. 832; *Starke* v. *State,* 97 Ga. 193, 23 S. E. 832; *State* v. *Snover,* 65 N. J. L. 289, 47 Atl. 583, 15 Am. Crim. Rep. 24; *Palmer* v. *State,* 165 Ala. 129, 51 So. 358; *Russell* v. *State,* 53 Tex. Crim. Rep. 500, 111 S. W. 568; *State* v. *Scott,* 28 Or. 331, 42 Pac. 1, 10 Am. Crim. Rep. 13; *State* v. *Eggleston,* 45 Or. 346, 77 Pac. 738; *State* v. *Thompson,* 133 Iowa, 741, 111 N. W. 319.

[10] *Com.* v. *Gray,* 129 Mass. 474, 37 Am. Rep. 378; *Blackman* v. *State,* 36 Ala. 295; *Palmer* v. *State,* 165 Ala. 129, 51 So. 358; *Sutton* v. *State,* 124 Ga. 815, 53 S. E. 381; *State* v. *Eggleston,* 45 Or. 346, 77 Pac. 738.

[11] *Cross* v. *State,* 78 Ala. 430; *McLeod* v. *State,* 35 Ala. 395; *Alsabrooks* v. *State,* 52 Ala. 24; *Brevaldo* v. *State,* 21 Fla. 789; *Crane* v. *People,* 168 Ill. 395, 48 N. E. 54; *State* v. *Markins,* 95 Ind. 464, 48 Am. Rep. 733; *State* v. *Smith,* 108 Iowa, 440, 79 N. W. 115; *State* v. *Briggs,* 68 Iowa, 416, 27 N. W. 358; *State* v. *Williams,* 76 Me. 480; *State* v. *Witham,* 72 Me. 531; *Com.* v. *Curtis,* 97 Mass. 574; *Com.* v. *Dacey,* 107 Mass. 206; *Com.* v. *Lahey,* 14 Gray, 91; *Com.* v. *Merriam,* 14 Pick. 518, 25 Am. Dec. 420; *Com.* v. *Durfee,* 100 Mass. 146; *Com.* v. *Pierce,* 11 Gray, 447; *Com.* v. *Thrasher,* 11 Gray, 450; *People* v. *Davis,* 52 Mich. 569, 18 N. W. 362; *People* v. *Hendrickson,* 53 Mich. 525, 19 N. W. 169; *State* v. *Coffee,* 39 Mo. App. 56; *State* v. *Clawson,* 30 Mo. App. 139; *State* v. *Way,* 5 Neb. 283; *State* v. *Jackson,* 65 N. J. L. 62, 46 Atl. 767; *State* v. *Snover,* 64 N. J. L. 65, 44 Atl.

ment is admissible,[12] even though such acts occurred in another state.[13] Such evidence is relevant notwithstanding the fact that it may prove other distinct offenses than the one on

850; *State* v. *Pippin,* 88 N. C. 646; *State* v. *Guest,* 100 N. C. 410, 6 S. E. 253; *State* v. *Kemp,* 87 N. C. 538; *Com.* v. *Bell,* 166 Pa. 405, 31 Atl. 123; *Cole* v. *State,* 6 Baxt. 239; *Burnett* v. *State,* 32 Tex. Crim. Rep. 86, 22 S. W. 47; *Henderson* v. *State,* — Tex. Crim. Rep. —, 45 S. W. 707; *Hill* v. *State,* 137 Ala. 66, 34 So. 406; *Radford* v. *State,* 7 Ga. App. 600, 67 S. E. 707; *Republic* v. *Waipa,* 10 Haw. 442; *State* v. *Brown,* — Iowa, —, 121 N. W. 513; *State* v. *Eggleston,* 45 Or. 346, 77 Pac. 738; *Com.* v. *Burk,* 2 Pa. Co. Ct. 12; *Russell* v. *State,* 53 Tex. Crim. Rep. 500, 111 S. W. 658; *State* v. *Potter,* 52 Vt. 33; *State* v. *Nelson,* 39 Wash. 221, 81 Pac. 721.

The authorities in the Texas court are not uniform. Reputation of the *particeps criminis,* does not seem to be admissible as evidence of a circumstance pointing to the commission of the offense. See *Boatright* v. *State,* 42 Tex. Crim. Rep. 442, 60 S. W. 760; *Guinn* v. *State,* — Tex. Crim. Rep. — 65 S. W. 376. A like conflict prevails as to prior and subsequent acts. *Quinn* v. *State,* 51 Tex. Crim. Rep. 155, 101 S. W. 248. See *Clifton* v. *State,* 46 Tex. Crim. Rep. 18, 108 Am. St. Rep. 983, 79 S. W. 824; *State* v. *Hilberg,* 22 Utah, 27, 61 Pac. 215; *State* v. *Snowden,* 23 Utah, 318, 65 Pac. 479; *Brevaldo* v. *State,* 21 Fla. 789; *McLeod* v. *State,* 35 Ala. 395; *Hill* v. *State,* 137 Ala. 66, 34 So. 406; *Bass* v. *State,* 103 Ga. 227, 29 S. E. 966; *Crane* v. *People,* 168 Ill. 395, 48 N. E. 54.

[12] *Alsabrooks* v. *State,* 52 Ala. 24; *Crane* v. *People,* 168 Ill. 395, 48 N. E. 54; *State* v. *Briggs,* 68 Iowa, 416, 27 N. W. 358; *State* v. *Moore,* 115 Iowa, 178, 88 N. W. 322; *State* v. *Williams,* 76 Me. 480; *Com.* v. *Curtis,* 97 Mass. 574; *People* v. *Hendrickson,* 53 Mich. 525, 19 N. W. 169; *State* v. *Way,* 5 Neb. 283; *Cole* v. *State,* 6 Baxt. 239; *Funderburg* v. *State,* 23 Tex. App. 392, 5 S. W. 244; *State* v. *Snowden,* 23 Utah, 318, 65 Pac. 479; *United States* v. *Griego,* 11 N. M. 392, 72 Pac. 20; *State* v. *Hilberg,* 22 Utah, 27, 61 Pac. 215; *Monteith* v. *State,* 114 Wis. 165, 89 N. W. 828; *State* v. *Thompson,* 31 Utah, 228, 87 Pac. 709.

[13] *Crane* v. *People,* 168 Ill. 395, 48 N. E. 54; *State* v. *Briggs,* 68 Iowa, 416, 27 N. W. 358; *Com.* v. *Nichols,* 114 Mass. 285, 19 Am. Rep. 346; *Funderburg* v. *State,* 23 Tex. App. 392, 5 S. W. 244; *State* v. *Guest,* 100 N. C. 410, 6 S. E. 253; *State* v. *Snover,* 65 N. J. L. 289, 47 Atl. 583, 15 Am. Crim. Rep. 24; *Nobles* v. *State,* 127 Ga. 212, 56 S. E. 125; *Coons* v. *State,* 49 Tex. Crim. Rep. 256, 91 S. W. 1085. See *Counts* v. *State,* 49 Tex. Crim. Rep. 329, 94 S. W. 220; *Com.* v. *Shanor,* 29 Pa. Super. Ct. 358; *State* v. *Kimball,* 74 Vt. 223, 52 Atl. 430.

trial.[14] It has been held that where an information charged but a single act in a single count, the prosecution could not show other instances of the same crime committed with the same person at other times.[15]

§ 888. Circumstantial evidence in conspiracy.—As we have already shown, a conspiracy may be inferred from circumstances.[1] While it can also be established by direct proof,[2] it cannot generally be proved except by circumstantial evidence.[3] It is seldom that any one act, taken by itself, can be

[14] *State* v. *Bridgman,* 49 Vt. 202, 24 Am. Rep. 124.

[15] *State* v. *Bates,* 10 Conn. 373.

[1] Supra, §§ 32, 698; Wharton, Crim. Law, 10th ed. § 1398.

[2] *United States* v. *Smith,* 2 Bond, 323, Fed. Cas. No. 16,322; *United States* v. *Lancaster,* 10 L.R.A. 333, 44 Fed. 896; *Eacock* v. *State,* 169 Ind. 488, 82 N. E. 1039.

[3] *United States* v. *Smith,* 2 Bond, 323, Fed. Cas. No. 16,322; *United States* v. *Goldberg,* 7 Biss. 175, Fed. Cas. No. 15,223; *United States* v. *Cole,* 5 McLean, 513, Fed. Cas. No. 14,832; *Rea* v. *Missouri,* 17 Wall. 532, 21 L. ed. 707; *United States* v. *Babcock,* 3 Dill. 581, Fed. Cas. No. 14,487; *Ferguson* v. *State,* 134 Ala. 63, 92 Am. St. Rep. 17, 32 So. 760; *Scott* v. *State,* 30 Ala. 503; *State* v. *Spalding,* 19 Conn. 233, 48 Am. Dec. 158; *Davis* v. *State,* 114 Ga. 104, 39 S. E. 906; *State* v. *Grant,* 86 Iowa, 216, 53 N. W. 120; *Com.* v. *Waterman,* 122 Mass. 43; *Com.* v. *Smith,* 163 Mass. 411. 40 N. E. 189; *People* v. *McKane,* 80 Hun, 322, 30 N. Y Supp. 95; *Kelley* v. *People,* 55 N. Y. 565, 14 Am. Rep. 342; *Myers* v. *State,* 6 Tex. App. 1; *Com.* v. *Meserve,* 154 Mass. 64, 27 N. E. 997; *Richards* v. *United States,* 99 C. C. A. 401, 175 Fed. 911; *Alkon* v. *United States,* 90 C. C. A. 116, 163 Fed. 810; *Smith* v. *United States,* 85 C. C. A. 353, 157 Fed. 721; *Chadwick* v. *United States,* 72 C. C. A. 343, 141 Fed. 225; *Olson* v. *United States,* 67 C. C. A. 21, 133 Fed. 849; *Collins* v. *State,* 138 Ala. 57, 34 So. 993; *Chapline* v. *State,* 77 Ark. 444, 95 S. W. 477; *Butt* v. *State,* 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 723; *People* v. *Donnolly,* 143 Cal. 394, 77 Pac. 177; *People* v. *Lawrence,* 143 Cal. 148, 68 L.R.A. 193, 76 Pac. 893; *People* v. *Nall,* 242 Ill. 284, 89 N. E. 1012; *Tedford* v. *People,* 219 Ill. 23, 76 N. E. 60; *Christensen* v. *People,* 114 Ill. App. 40; *Eacock* v. *State,* 169 Ind. 488, 82 N. E. 1039; *Cook* v. *State,* 169 Ind. 430, 82 N. E. 1047; *Sanderson* v. *State,* 169 Ind. 301, 82 N. E. 525; *State* v. *Caine,* 134 Iowa, 147, 111 N. W. 443; *State* v. *Walker,* 124 Iowa, 414, 100 N. W. 354; *Com.* v. *Ellis,* 133 Ky. 625, 118 S. W. 973; *Lawrence* v. *State,* 103 Md. 17, 63 Atl. 96; *People* v. *Salsbury,* 134 Mich. 537, 96 N. W. 936; *State* v.

seen as tending to prove a conspiracy, but when taken in connection with other acts, its tendency to prove the fact may be more clearly discerned.[4] We may be satisfied from circumstances attending a series of criminal acts, that they result from concerted and associated action, although if each circumstance was considered separately, it might not show confederation; but where linked together, circumstances that in themselves are inconclusive, yet taken as a whole, may show that apparently isolated acts spring from a common object and have in view the promotion of a common purpose.[5]

After the fact of the conspiracy itself has been established, it is relevant to show the means by which the conspirators sought to accomplish their purpose;[6] to show letters and documents that passed between the parties having reference to the conspiracy;[7] to show that the conspiracy was suggested by one conspirator to another,[8] or even to another person;[9]

Spaugh, 200 Mo. 571, 98 S. W. 55; *State* v. *Roberts,* 201 Mo. 702, 100 S. W. 484; *State* v. *Darling,* 199 Mo. 168, 97 S. W. 592; *State* v. *Sykes,* 191 Mo. 62, 89 S. W. 851; *O'Brien* v *State,* 69 Neb. 691, 96 N. W. 649; *Territory* v. *Leslie,* 15 N. M. 240, 106 Pac. 378; *State* v. *Ryan,* 47 Or. 338, 1 L.R.A.(N.S.) 862, 82 Pac. 703; *Ripley* v. *State,* 51 Tex. Crim. Rep. 126, 100 S. W. 943.

[4] *State* v. *Spalding,* 19 Conn. 237, 48 Am. Dec. 158; *Stalker* v. *State,* 9 Conn. 341.

[5] *Com.* v. *McClean,* 2 Pars. Sel. Eq. Cas. 368. See *Com.* v. *Warren,* 6 Mass. 74; *Com.* v. *Gillespie,* 7 Serg. & R. 469, 10 Am. Dec. 475; *Rex* v. *Brisac,* 4 East, 171.

[6] *Kelley* v. *People,* 55 N. Y. 565, 14 Am. Rep. 342; *Lawrence* v. *State,* 103 Md. 17, 63 Atl. 96. See *Sullivan* v. *People,* 108 Ill. App. 328; *Chadwick* v. *United States,* 72 C. C. A. 343, 141 Fed. 225.

[7] *Carter* v. *State,* 106 Ga. 372, 71 Am. St. Rep. 262, 32 S. E. 345, 11 Am. Crim. Rep. 125; *Bloomer* v. *State,* 48 Md. 521, 3 Am. Crim. Rep. 37. See *State* v. *Cardoza,* 11 S. C. 195; *Clune* v. *United States,* 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *United States* v. *Greene,* 146 Fed. 803; *State* v. *Dix,* 33 Wash. 405, 74 Pac. 570; *State* v. *Dilley,* 44 Wash. 207, 87 Pac. 133; *State* v. *Conroy,* 126 Iowa, 472, 102 N. W. 417.

[8] *State* v. *Ford,* 3 Strobh. L. 517, note; *Butt* v. *State,* 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 723.

[9] *People* v. *Arnold,* 46 Mich. 268,

to show possession of goods or property obtained as a result of the conspiracy, and these are relevant against any of the conspirators on trial;[10] also to show a division of such property between the co-conspirators.[11]

While the rule is well established that the conspiracy itself cannot be shown from the acts and declarations of one co-conspirator in the absence of the others (this rule being necessary to prevent the finding of the fact of the conspiracy from such acts and declarations alone),[12] yet the acts and declarations made in carrying out the conspiracy are relevant.[13] Where the fact of the conspiracy itself is in issue, it is relevant to show similar acts by the accused at or about the same time,[14]

9 N. W. 406; *Reinhold* v. *State*, 130 Ind. 467, 30 N. E. 306.

[10] *State* v. *Stevenson*, 26 Mont. 332, 67 Pac. 1001; *Fisher* v. *State*, 73 Ga. 595; *State* v. *Donavan*, 125 Iowa, 239, 101 N. W. 123.

[11] *Wiley* v. *State*, 92 Ark. 586, 124 S. W. 249; *Kimmell* v. *Greeting*, 2 Grant, Cas. 123.

[12] *Cox* v. *State*, 8 Tex. App. 254, 34 Am. Rep. 746. See *Blain* v. *State*, 33 Tex. Crim. Rep. 286, 26 S. W. 63; *United States* v. *Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States* v. *Goldberg*, 7 *Biss.* 175, Fed. Cas. No. 15,223; *United States* v. *Newton*, 52 Fed. 275; *United States* v. *McKee*, 3 Dill. 546, Fed. Cas. No. 15,685; *Gill* v. *State*, 59 Ark. 422, 27 S. W. 598; *Clawson* v. *State*, 14 Ohio St. 234; *People* v. *Irwin*, 77 Cal. 494, 20 Pac. 56; *Hauger* v. *United States*, 97 C. C. A. 372, 173 Fed. 54; *Collins* v. *State*, 138 Ala. 57, 34 So. 993; *Comnock* v. *State*, 87 Ark. 34, 112 S. W. 147; *State* v. *Thompson*, 69 Conn. 720, 38 Atl. 869; *Com.* v. *Ellis*, 133 Ky. 625, 118 S. W. 973; *People* v. *Zimmerman*, 3 Cal. App. 84, 84 Pac. 446.

[13] *United States* v. *Lancaster*, 10 L.R.A. 333, 44 Fed. 896; *People* v. *Bentley*, 75 Cal. 407, 17 Pac. 436; *People* v. *Rodley*, 131 Cal. 240, 63 Pac. 351; *Card* v. *State*, 109 Ind. 415, 9 N. E. 591; *Jones* v. *State*, 64 Ind. 473; *Com.* v. *Smith*, 163 Mass. 411, 40 N. E. 189; *People* v. *Saunders*, 25 Mich. 119; *Street* v. *State*, 43 Miss. 1; *People* v. *Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *State* v. *Brady*, 107 N. C. 822, 12 S. E. 325; *State* v. *Anderson*, 92 N. C. 732; *State* v. *Mace*, 118 N. C. 1244, 24 S. E. 798; *United States* v. *Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *Doyle* v. *United States*, 95 C. C. A. 153, 169 Fed. 625; *Marrash* v. *United States*, 93 C. C. A. 511, 168 Fed. 225; *People* v. *Nall*, 242 Ill. 284, 89 N. E. 1013; *People* v. *Salsbury*, 134 Mich. 537, 96 N. W. 936.

[14] *Davis* v. *United States*, 46 C. C. A. 619, 107 Fed. 753; *State* v.

but there must be shown a direct connection between the several unlawful, circumstantial acts, to render evidence of them relevant to the charge on trial.[15] And such acts are relevant, as circumstances, whether or not they were committed in the state in which the conspiracy was formed,[16] and such relevancy is not affected by the fact that such acts may tend to establish other distinct offenses, where they are offered for the purpose of showing motive on the part of the conspirators.[17]

Acquaintance of one conspirator with another has been held

Spalding, 19 Conn. 233, 48 Am. Dec. 158; *State* v. *Lee,* 91 Iowa, 499, 60 N. W. 119; *People* v. *Saunders,* 25 Mich. 119; *People* v. *Van Tassel,* 156 N. Y. 561, 51 N. E. 274; *Tarbox* v. *State,* 38 Ohio St. 581; *Com.* v. *O'Brien,* 140 Pa. 555, 21 Atl. 385; *Marrash* v. *United States,* 93 C. C. A. 511, 168 Fed. 225; *Alkon* v. *United States,* 90 C. C. A. 116, 163 Fed. 810; *Olson* v. *United States,* 67 C. C. A. 21, 133 Fed. 849; *Eacock* v. *State,* 169 Ind. 488, 82 N. E. 1039; *Sanderson* v. *State,* 169 Ind. 301, 82 N. E. 525; *State* v. *Allen,* 34 Mont. 403, 87 Pac. 177; *Standard Oil Co.* v. *State,* 117 Tenn. 658, 10 L.R.A.(N.S.) 1015, 100 S. W. 705; *Schultz* v. *State,* 133 Wis. 215, 113 N. W. 428.

[15] *Swan* v. *Com.* 104 Pa. 218, 4 Am. Crim. Rep. 188. See *Strout* v. *Packard,* 76 Me. 148, 49 Am. Rep. 601; *Van Gesner* v. *United States,* 82 C. C. A. 180, 153 Fed. 46; *People* v. *Zimmerman,* 3 Cal. App. 84, 84 Pac. 446; *State* v. *Crofford,* 121 Iowa, 395, 96 N. W. 889; *Lawrence* v. *State,* 103 Md. 17, 63 Atl. 96; *State* v. *Sykes,* 191 Mo. 62, 89 S. W. 851; *Com.* v. *Zuern,* 16 Pa. Super. Ct. 588; *Barrow* v. *State,* 121 Ga. 187, 48 S. E. 950; *Territory* v. *Johnson,* 16 Haw. 743, 758; *Com.* v. *Balverdi,* 218 Pa. 7, 66 Atl. 87; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *Baldwin* v. *State,* 46 Fla. 115, 35 So. 220.

[16] *Bloomer* v. *State,* 48 Md. 521, 3 Am. Crim. Rep. 37. See *Hatfield* v. *Com.* 11 Ky. L. Rep. 468, 12 S. W. 309; *State* v. *McIntosh,* 109 Iowa, 209, 80 N. W. 349; *People* v. *Summerfield,* 48 Misc. 242, 96 N. Y. Supp. 502; *State* v. *Loser,* 132 Iowa, 419, 104 N. W. 337.

[17] *State* v. *Stockford,* 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *State* v. *Donavan,* 125 Iowa, 239, 101 N. W. 122; *Com.* v. *Spencer,* 6 Super. Ct. 256, 270; *Com.* v. *Donnelly,* 40 Pa. Super. Ct. 116; *State* v. *McCahill,* 72 Iowa, 111, 30 N. W. 553, 33 N: W. 599; *State* v. *Adams,* 20 Kan. 311; *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81; *State* v. *Greenwade,* 72 Mo. 298; *Shotwell* v. *Com.* 23 Ky. L. Rep. 1649, 65 S. W. 820; *Ochs* v. *People,* 124 Ill. 399, 16 N. E. 662.

to be a strong circumstance, it being said that a conspiracy to commit crime is not likely to exist between strangers,[18] but proof of acquaintance is not always entitled to great weight,[19] although intimacy is an important circumstance, particularly where the alleged conspirators bore a direct relation to one and the other.[20]

It frequently happens in conspiracies of wide ramifications, that the persons to participate may be chosen by lot, or designated by number, or selected because of locality, and have no personal acquaintance with nor knowledge of the other, but are nevertheless intimately connected as important factors to complete the design.

§ 889. Showing motive in arson.— On a charge of maliciously burning property to defraud the insurer, intent is essential.[1] The rule that motive may be shown by circumstantial evidence is applied to cases of arson.[2] Thus, other attempts on the same building are admissible to show motive,[3] and an attempt to burn a dwelling by firing another structure is relevant on the question of motive.[4] The fact that accused immediately upon his arrest, and before he was charged with the crime, himself referred to the burning, is relevant.[5] Proof of threats by the accused prior to the burning, or that he removed property from the building just before the burning, is

[18] *Reinhold* v. *State,* 130 Ind. 467, 30 N. E. 306; *State* v. *Wheeler,* 129 Iowa, 100, 105 N. W. 374; *State* v. *Gadbois,* 89 Iowa, 25, 56 N. W. 272; *Scott* v. *State,* 30 Ala. 503; *People* v. *Childs,* 127 Cal. 363, 59 Pac. 768; *State* v. *Adams,* 20 Kan. 311.

[19] *State* v. *Wheeler,* 129 Iowa, 100, 105 N. W. 374.

[20] *United States* v. *Greene,* 146 Fed. 803.

[1] *Mai* v. *People,* 224 Ill. 414, 79 N. E. 633.

[2] *State* v. *Millmeier,* 102 Iowa, 692, 72 N. W. 275; *State* v. *Grimes,* 50 Minn. 123, 52 N. W. 275.

[3] *Com.* v. *McCarthy,* 119 Mass. 355; *Com.* v. *Bradford,* 126 Mass. 42.

[4] *Com.* v. *Wade,* 17 Pick. 395.

[5] *Meeks* v. *State,* 103 Ga. 420, 30 S. E. 252

relevant.[6] The fact that accused predicted the burning of a certain building,[7] or that another person would burn certain buildings, is relevant.[8]

Motive is also shown by proof of ill-will, but to be relevant, it must be limited to the accused, and such ill-will cannot be shown to exist among the members of his family.[9] But evidence of ill-will against the members of the owner's family is relevant.[10] Ill-will of the accused against the owner of the building,[11] or against its occupant,[12] or against one who has property in the building, is relevant,[13] but such ill-will cannot be shown as extending to the owner's agent.[14]

Where the accused has uttered threats against the person or the property of one whose property has been burned, such threats are relevant to show ill-will.[15]

[6] *People* v. *Smith*, 162 N. Y. 520, 56 N. E. 1001, 37 App. Div. 280, 55 N. Y. Supp. 932.

[7] *State* v. *Hallock*, 70 Vt. 159, 40 Atl. 51.

[8] *State* v. *Gailor*, 71 N. C. 88, 17 Am. Rep. 3.

[9] *Bell* v. *State*, 74 Ala. 420. See *Clinton* v. *State*, 56 Fla. 57, 47 So. 389. But see *Moore* v. *State*, 51 Tex. Crim. Rep. 468, 103 S. W. 188.

[10] *State* v. *Thompson*, 97 N. C. 496, 1 S. E. 921; *Bond* v. *Com.* 83 Va. 581, 3 S. E. 149.

[11] *Bell* v. *State*, 74 Ala. 420; *Hinds* v. *State*, 55 Ala. 145; *Overstreet* v. *State*, 46 Ala. 30; *Simpson* v. *State*, 111 Ala. 6, 20 So. 572; *Meeks* v. *State*, 103 Ga. 420, 30 S. E. 252; *People* v. *Eaton*, 59 Mich. 559, 26 N. W. 702; *State* v. *Rhodes*, 111 N. C. 647, 15 S. E. 1038; *State* v. *Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. Crim. Rep. 207; *Hudson* v. *State*, 61 Ala. 333; *Davis* v. *State*, 15 Tex. App. 594; *Winslow* v. *State*, 76 Ala. 42, 5 Am. Crim. Rep. 43; *State* v. *Hannett*, 54 Vt. 83, 4 Am. Crim. Rep. 38; *Ross* v. *State*, 109 Ga. 516, 35 S. E. 102; *Simpson* v. *State*, 111 Ala. 6, 20 So. 572; *State* v. *Allen*, 149 N. C. 458, 62 S. E. 597.

[12] *Oliver* v. *State*, 33 Tex. Crim. Rep. 541, 28 S. W. 202. See *Shepherd* v. *People*, 19 N. Y. 537; *State* v. *Barrett*, 151 N. C. 665, 65 S. E. 894.

[13] *McAdory* v. *State*, 62 Ala. 154; *State* v. *Emery*, 59 Vt. 84, 7 Atl. 129, 7 Am. Crim. Rep. 202.

[14] *State* v. *Battle*, 126 N. C. 1036, 35 S. E. 624; *Clinton* v. *State*, 56 Fla. 57, 47 So. 389.

[15] *McAdory* v. *State*, 62 Ala. 154; *Overstreet* v. *State*, 46 Ala. 30; *People* v. *Lattimore*, 86 Cal. 403, 24 Pac. 1091; *Carlton* v. *People*, 150 Ill. 181, 41 Am. St. Rep. 346,

It is relevant for the state to show a pecuniary motive on the part of the accused;[16] and in support of this it may show that he held a policy on the building or on goods in the building at the time of the fire;[17] or that he acted for the holder of such a policy;[18] or that the property was overinsured,[19] where it is also shown that the accused knew of the overinsurance;[20] or that the accused would gain an advantage by the destruction of records or other papers in the building.[21]

37 N. E. 244, 9 Am. Crim. Rep. 62; *State* v. *Millmeier*, 102 Iowa, 692, 72 N. W. 275; *State* v. *Fenlasan*, 78 Me. 495, 7 Atl. 385; *State* v. *Day*, 79 Me. 120, 8 Atl. 544; *Com.* v. *Choate*, 105 Mass. 451; *Com.* v. *Allen*, 128 Mass. 46, 35 Am. Rep. 356; *People* v. *Eaton*, 59 Mich. 559, 26 N. W. 702; *State* v. *Crawford*, 99 Mo. 74, 12 S. W. 354; *State* v. *Moore*, 61 Mo. 276; *State* v. *McMahon*, 17 Nev. 365, 30 Pac. 1000; *People* v. *Murphy*, 10 N. Y. Crim. Rep. 177, 17 N. Y. Supp. 427; *State* v. *Lytle*, 117 N. C. 799, 23 S. E. 476; *State* v. *Thompson*, 97 N. C. 496, 1 S. E. 921; *Hensley* v. *State*, 9 Humph. 243; *State* v. *Emery*, 59 Vt. 129, 7 Am. Crim. Rep. 202; *Sawyers* v. *Com.* 88 Va. 356, 13 S. E. 708; *Bond* v. *Com.* 83 Va. 581, 3 S. E. 149; *Gregg* v. *State*, 3 W. Va. 705; *Winslow* v. *State*, 76 Ala. 42, 5 Am. Crim. Rep. 43; *Mitchell* v. *State*, 140 Ala. 118, 103 Am. St. Rep. 17, 37 So. 76; *State* v. *Lockwood*, — Del. —, 74 Atl. 2; *Kinchien* v. *State*, 50 Fla. 102, 39 So. 467; *People* v. *Wagner*, 180 N. Y. 58, 72 N. E. 577; *State* v. *Ledford*, 133 N. C. 714, 45 S. E. 944; *State* v. *McLain*, 43 Wash. 267, 86 Pac. 390; supra, § 880.

[16] *Com.* v. *Hudson*, 97 Mass. 565; *State* v. *Brand*, 77 N. J. L. 486, 72 Atl. 131.

[17] *Com.* v. *Bradford*, 126 Mass. 42; *Com.* v. *McCarthy*, 119 Mass. 354. But see *People* v. *Doneburg*, 51 App. Div. 613, 64 N. Y. Supp. 438; *People* v. *Fitzgerald*, 156 N. Y. 253, 50 N. E. 846, 11 Am. Crim. Rep. 700; *State* v. *Watson*, 63 Me. 138; *Freund* v. *People*, 5 Park. Crim. Rep. 198; *People* v. *Fournier*, — Cal. —, 47 Pac. 1014; *Hinkle* v. *State*, — Ind. —, 91 N. E. 1090. See *Dunlap* v. *State*, 50 Tex. Crim. Rep. 504, 98 S. W. 845; *Lane* v. *Com.* 134 Ky. 519, 121 S. W. 486.

[18] *People* v. *Scott*, 10 Utah, 217, 37 Pac. 335. But see *Roberts* v. *State*, 7 Coldw. 359.

[19] *Stitz* v. *State*, 104 Ind. 359, 4 N. E. 145, 5 Am. Crim. Rep. 48; *Shepherd* v. *People*, 19 N. Y. 537; *People* v. *Kelly*, 11 App. Div. 495, 42 N. Y. Supp. 756.

[20] *People* v. *Kelly*, 11 App. Div. 495, 42 N. Y. Supp. 756; *Martin* v. *State*, 28 Ala. 71.

[21] *State* v. *Travis*, 39 La. Ann. 356, 1 So. 817; *Winslow* v. *State*, 76 Ala. 42, 5 Am. Crim. Rep. 43; *Luke* v. *State*, 49 Ala. 30, 20 Am. Rep. 269.

§ 890. Showing motive in assault and battery.—In the criminal action instituted on a charge of assault and battery, prior threats are admissible to show animus;[1] and threats by the accused[2] and conversations, both prior to and after the assault,[3] are relevant to show intent. It is proper also to ask the prosecuting witness as to the motive for the assault,[4] and the defendant himself may testify as to his own motive.[5]

On questions of intent and motive, courts admit evidence of former difficulties.[6] But the rule varies as to the circumstances of such difficulties. Thus, in some jurisdictions, while the fact of a former difficulty is relevant, the circumstances are excluded;[7] but a larger number admit the circumstances as well.[8]

[1] *Bolton* v. *State*, — Tex. Crim. Rep. —, 39 S. W. 672; *People* v. *Reycraft*, 156 Mich. 451, 120 N. W. 993.

[2] *Read* v. *State*, 2 Ind. 438; *Walker* v. *State*, 85 Ala. 7, 7 Am. St. Rep. 17, 4 So. 686; *State* v. *Henn*, 39 Minn. 476, 40 N. W. 572; *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *Fields* v. *State*, 46 Fla. 84, 35 So. 185; *Starr* v. *State*, 160 Ind. 661, 67 N. E. 527.

[3] *Doolittle* v. *State*, 93 Ind. 272; *Cogswell* v. *Com.* 17 Ky. L. Rep. 822, 32 S. W. 935; *Allen* v. *State*, 74 Ind. 216; *Richards* v. *State*, 3 Tex. Crim. Rep. 423; *State* v. *Davidson*, 44 Mo. 513; *Newport* v. *State*, 140 Ind. 299, 39 N. E. 926; *Larkin* v. *State*, 163 Ind. 375, 71 N. E. 959; *State* v. *Surry*, 23 Wash. 655, 63 Pac. 557; *State* v. *Thornton*, 135 N. C. 610, 48 S. E. 602; *State* v. *Koonse*, 123 Mo. App. 655, 101 S. W. 139; *State* v. *Roby*, 83 Vt. 121, 74 Atl. 638; *Tubbs* v. *State*, 50 Tex. Crim. Rep. 143, 95 S. W. 112; *Thompson* v. *State*, — Tex. Crim. Rep. —, 89 S. W. 1081; *Heard* v. *State*, 38 Ind. App. 511, 78 N. E. 358; *People* v. *Suesser*, 142 Cal. 354, 75 Pac. 1093. See *People* v. *Wells*, 145 Cal. 138, 78 Pac. 470.

[4] *Trimble* v. *State*, — Tex. Crim. Rep. —, 22 S. W. 879.

[5] *Filkins* v. *People*, 69 N. Y. 101, 25 Am. Rep. 143; *Cornelison* v. *Com.* 84 Ky. 583, 2 S. W. 235; *Brooke* v. *State*, 155 Ala. 78, 46 So. 491; *Ryan* v. *Territory*, 12 Ariz. 208, 100 Pac. 771. See *Berry* v. *State*, 30 Tex. Crim. Rep. 423, 17 S. W. 1080; *United States* v. *Lunt*, 1 Sprague, 311, Fed. Cas. No. 15,643; *Menach* v. *State*, — Tex. Crim. Rep. —, 97 S. W. 503; *Money* v. *State*, — Tex. Crim. Rep. —, 97 S. W. 90; *Greer* v. *State*, — Tex. Crim. Rep. —, 106 S. W. 359.

[6] *State* v. *Forsythe*, 89 Mo. 667, 1 S. W. 834.

[7] *May* v. *State*, 6 Tex. App. 191; *Latham* v. *State*, 39 Tex. Crim. Rep. 472, 46 S. W. 638; *Stewart* v. *State*,

On the defense, the accused may give evidence of declarations of ill-will by the prosecutor before the assault[9] and of his former difficulties with him;[10] he may also testify as to his knowledge of such matters, and that such knowledge was imparted to him by others;[11] and in matters of assault in obtaining possession of property, facts and circumstances are relevant on the part of the accused to show his effort to retain possession of such property.[12]

78 Ala. 436; *Wood* v. *State,* 128 Ala. 27, 86 Am. St. Rep. 71, 29 So. 557; *Gunter* v. *State,* 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632; *People* v. *Kenyon,* 93 Mich. 19, 52 N. W. 1033; *State* v. *Clayton,* 100 Mo. 516, 18 Am. St. Rep. 565, 13 S. W. 819.

[8] *State* v. *Sanders,* 106 Mo. 188, 17 S. W. 223; *Ross* v. *State,* 62 Ala. 224; *Tompkins* v. *State,* 17 Ga. 356; *People* v. *Deitz,* 86 Mich. 419, 49 N. W. 296; *Sullivan* v. *State,* 31 Tex. Crim. Rep. 486, 37 Am. St. Rep. 826, 20 S. W. 927; *Walker* v. *State,* 85 Ala. 7, 7 Am. St. Rep. 17, 4 So. 686; *State* v. *Schleagel,* 50 Kan. 325, 31 Pac. 1105; *State* v. *Montgomery,* 65 Iowa, 483, 22 N. W. 639, 5 Am. Crim. Rep. 54; *Trimble* v. *State,* — Tex. Crim. Rep. —, 22 S. W. 879; *Thomas* v. *State,* 117 Ala. 178, 23 So. 665; *People* v. *Dailey,* 143 N. Y. 638, 37 N. E. 823; *Yeary* v. *State,* — Tex. Crim. Rep. —, 66 S. W. 1106; *State* v. *Griffis,* 25 N. C. (3 Ired. L.) 504.

[9] *Gunter* v. *State,* 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632; *State* v. *Goodrich,* 19 Vt. 116, 47 Am. Dec. 676; *Harman* v. *State,* 3 Head, 243.

[10] *State* v. *Dee,* 14 Minn. 35, Gil. 27; *Gunter* v. *State,* 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632; *State* v. *Sullivan,* 55 W. Va. 597, 47 S. E. 267.

[11] See *State* v. *Dee,* 14 Minn. 35, Gil. 27; *United States* v. *Lunt,* 1 Sprague, 311, Fed. Cas. No. 15,643; *State* v. *Lull,* 48 Vt. 581.

[12] *State* v. *Cleaveland,* 82 Vt. 158, 72 Atl. 321; *Johnston* v. *United States,* 83 C. C. A. 299, 154 Fed. 445; *State* v. *Johnson,* 12 Ala. 840, 46 Am. Dec. 283; *People* v. *Teixeira,* 123 Cal. 297, 55 Pac. 988; *Filkins* v. *People,* 69 N. Y. 101, 25 Am. Rep. 143; *Smith* v. *State,* 105 Ala. 136, 17 So. 107; *State* v. *Downer,* 8 Vt. 424, 30 Am. Dec. 48; *Com.* v. *Ribert,* 144 Pa. 413, 22 Atl. 1031; *Com.* v. *Donahue,* 148 Mass. 529, 2 L.R.A. 623, 12 Am. St. Rep. 591, 20 N. E. 171, 8 Am. Crim. Rep. 45; *Com.* v. *Kennard,* 8 Pick. 133; *State* v. *Dooley,* 121 Mo. 591, 26 S. W. 558; *Anderson* v. *State,* 6 Baxt. 608; *Rex* v. *Mitton,* 3 Car. & P. 31, Moody & M. 107; *Clarke* v. *State,* 89 Ga. 768, 15 S. E. 699; *State* v. *Lockwood,* 1 Penn. (Del.) 76, 39 Atl. 589; *Goshen* v. *People,* 22 Colo. 270, 44 Pac. 503; *Com.* v. *Lynn,* 123 Mass.

§ 891. Showing motive in burglary.—In the crime of burglary, the specific intent to commit the offense must always be proved,[1] and while it can be proved by direct evidence, circumstantial evidence is always relevant.[2] After proof of the entry, proof of the commission of a felony is admissible to prove motive or intent, even though such evidence proves another crime.[3]

III. Motive in Homicide.

§ 892. Motive in homicide generally.—As we have shown,[1] the motives usually assigned in homicide are the de-

218; *State* v. *Elliot,* 11 N. H. 540; *State* v. *McKinley,* 82 Iowa, 445, 48 N. W. 804; *Money* v. *State,* — Tex. Crim. Rep. —, 97 S. W. 90. Contra, *Hickey* v. *United States,* 22 L.R.A.(N.S.) 728, 93 C. C. A. 616, 168 Fed. 536; *State* v. *Bradbury,* 67 Kan. 808, 74 Pac. 231.

[1] *People* v. *Hope,* 62 Cal. 291; *State* v. *Carpenter,* Houst. Crim. Rep. (Del.) 367; *State* v. *Fisher,* 1 Penn. (Del.) 303, 41 Atl. 208; *Davis* v. *State,* 22 Fla. 633; *Schwabacher* v. *People,* 165 Ill. 618, 46 N. E. 809; *State* v. *Carroll,* 13 Mont. 246, 33 Pac. 688; *State* v. *Green,* 15 Mont. 424, 39 Pac. 322; *State* v. *Cowell,* 12 Nev. 337; *Coleman* v. *State,* 26 Tex. App. 252, 9 S. W. 609; *Walton* v. *State,* 29 Tex. App. 163, 15 S. W. 646; *Mitchell* v. *State,* 33 Tex. Crim. Rep. 575, 28 S. W. 475; *State* v. *Eaton,* 3 Harr. (Del.) 554; *State* v. *Newbegin,* 25 Me. 500; *State* v. *Maxwell,* 42 Iowa, 208; *State* v. *Fisher,* 1 Penn. (Del.) 303, 41 Atl. 208; *Jenkins* v. *State,* 58 Fla. 62, 50 So. 582; *Price* v. *State,* — Tex. Crim. Rep. —, 83 S. W. 185.

[2] See supra, § 763; *State* v. *Fisher,* 1 Penn. (Del.) 303, 41 Atl. 208; *State* v. *Maxwell,* 42 Iowa, 208; *State* v. *McBryde,* 97 N. C. 393, 1 S. E. 925; *Alexander* v. *State,* 31 Tex. Crim. Rep. 359, 20 S. W. 756; *People* v. *Nagle,* 137 Mich. 88, 100 N. W. 273.

[3] *State* v. *Hale,* 156 Mo. 102, 56 S. W. 881; *Roberson* v. *State,* 40 Fla. 509, 24 So. 474; *Jones* v. *State,* 18 Fla. 889; *State* v. *Golden,* 49 Iowa, 48; *State* v. *Woods,* 31 La. Ann. 267; *Maden* v. *Com.* 4 Ky. L. Rep. 45; *Com.* v. *Doherty,* 10 Cush. 52; *People* v. *Piner,* 11 Cal. App. 542, 105 Pac. 780. See *Saldiver* v. *State,* 55 Tex. Crim. Rep. 177, 115 S. W. 584, 16 A. & E. Ann. Cas. 669; *Doyle* v. *State,* — Tex. Crim. Rep. —, 126 S. W. 1131; *Thompson* v. *State,* 4 Ga. App. 649, 62 S. E. 99.

[1] See supra, §§ 743 et seq. § 784; Wills, Circumstantial Ev. 5th Eng. ed. 49.

sire for revenge, getting rid of a person dangerous to the interests of another, escaping obligations, or gratifying a malignant passion, in those cases where the homicide appears to be wilful and deliberate; or where there appears the element of self-defense, that an attack has been made, either upon the accused or his reputation or the welfare of some member of his family. Again, where the emotions are not involved, we may assign avarice or covetousness as the predominant motive. As general as this classification is, it is hardly broad enough to embrace every motive. Motives are as various as the individuality of the person, and with widening interest or increasing complexities motives may develop that could not properly be assigned to any general classification.

§ 893. Relevancy of evidence in homicide.—Evidence of every material fact or circumstance that will throw light on a homicide, and every motive that might have influenced the mind of the accused, relevant in a prosecution on the homicide charge. Evidence of every fact, on the part of the state, that may tend to establish the hypothesis of guilt, and, on the other hand, of every circumstance that may tend to prove the innocence of the accused, is admissible, with the single qualification that when taken in connection with all other facts, its relevancy is made to appear.[1]

§ 894. Every essential element in homicide may be established by circumstantial evidence.—It is now the rule that every essential element required to prove the homicide can be established by circumstantial evidence, and this also includes proof of the *corpus delicti;* but such circumstantial

[1] *Cobb* v. *State,* 27 Ga. 648; *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471; *Poe* v. *State,* 10 Lea, 673; *Simms* v. *State,* 10 Tex. App. 131; *State* v. *Mowry,* 21 R. I. 376, 43 Atl. 871.

evidence must be so strong as to leave no ground for a reasonable doubt.[1]

§ 895. Relevancy of circumstantial evidence to show motive.—When proof has been made of the *corpus delicti* in a homicide prosecution, all facts and circumstances that tend to show motive on the part of the accused are relevant,[1] and equally relevant are the relations between the accused and the deceased, and all feeling that existed between them.[2] The

[1] *People* v. *Rulloff*, 3 Park. Crim. Rep. 401; *State* v. *Williams*, 46 Or. 287, 80 Pac. 655; *Tyner* v. *State*, 5 Humph. 383; *Mitchum* v. *State*, 11 Ga. 615; *Bines* v. *State*, 118 Ga. 320, 68 L.R.A. 33, 45 S. E. 376, 12 Am. Crim. Rep. 205. See supra, § 325.

[1] *Dill* v. *State*, 1 Tex. App. 278; *Flanagan* v. *State*, 46 Ala. 703; *Kelsoe* v. *State*, 47 Ala. 573; *People* v. *Durrant*, 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; *State* v. *West*, Houst. Crim. Rep. (Del.) 382; *Fraser* v. *State*, 55 Ga. 325, 1 Am. Crim. Rep. 315; *Weyrich* v. *People*, 89 Ill. 90; *Davidson* v. *State*, 135 Ind. 254, 34 N. E. 972; *Jones* v. *State*, 64 Ind. 473; *Binns* v. *State*, 57 Ind. 46, 26 Am. Rep. 48; *State* v. *Seymour*, 94 Iowa, 699, 63 N. E. 661; *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471; *State* v. *Edwards*, 34 La. Ann. 1012; *Kernan* v. *State*, 65 Md. 253, 4 Atl. 124; *Gillum* v. *State*, 62 Miss. 547; *Bateman* v. *State*, 64 Miss. 233, 1 So. 172; *Webb* v. *State*, 73 Miss. 456, 19 So. 238; *Story* v. *State*, 68 Miss. 609, 10 So. 47; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; *State* v. *Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State* v. *David*, 131 Mo. 380, 33 S. W. 28; *Gravely* v. *State*, 45 Neb. 878, 64 N. W. 452; *State* v. *Palmer*, 65 N. H. 216, 20 Atl. 6, 8 Am. Crim. Rep. 196; *People* v. *Osmond*, 138 N. Y. 80, 33 N. E. 739; *People* v. *Sutherland*, 154 N. Y. 345, 48 N. E. 518; *People* v. *Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51; *People* v. *Benham*, 160 N. Y. 402, 55 N. E. 11; *People* v. *Jones*, 99 N. Y. 667, 2 N. E. 49; *M'Kee* v. *People*, 36 N. Y. 113; *Hendrickson* v. *People*, 10 N. Y. 13, 61 Am. Dec. 721; *Hester* v. *Com.* 85 Pa. 139; *McManus* v. *Com.* 91 Pa. 57; *Sayres* v. *Com.* 88 Pa. 291; *Erb* v. *Com.* 98 Pa. 347; *McBride* v. *Com.* 95 Va. 818, 30 S. E. 454; *Gray* v. *State*, 47 Tex. Crim. Rep. 375, 83 S. W. 705; *Josephine* v. *State*, 39 Miss. 614.

[2] *Ex parte Nettles*, 58 Ala. 268; *Polk* v. *State*, 62 Ala. 237; *Phillips* v. *State*, 68 Ala. 469; *Allen* v. *State*, 111 Ala. 80, 20 So. 490; *Gray* v. *State*, 63 Ala. 66; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *People* v. *Kern*, 61 Cal. 244; *People* v. *French*, 69 Cal. 169, 10 Pac. 378; *People* v. *Young*, 102 Cal. 411, 36

application of the rule is not limited by the remoteness of such circumstances, as that goes only to the weight, and not to the relevancy.[3] There is no rule by which remoteness that may affect the relevancy of such evidence can be established, but this must be determined from the circumstances of each case.[4] It is not affected by the fact that the crime is out of proportion to the motive sought to be shown.[5]

Pac. 770; *People* v. *Sehorn,* 116 Cal. 503, 48 Pac. 495; *Fearson* v. *United States,* 10 App. D. C. 536; *Shaw* v. *State,* 60 Ga. 246; *Fisher* v. *People,* 23 Ill. 283; *Binns* v. *State,* 66 Ind. 428; *Siberry* v. *State,* 133 Ind. 677, 33 N. E. 681, 149 Ind. 688, 39 N. E. 936, 47 N. E. 458; *State* v. *Crafton,* 89 Iowa, 109, 56 N. W. 257; *State* v. *Cole,* 63 Iowa, 695, 17 N. W. 183; *State* v. *Helm,* 97 Iowa, 378, 66 N. W. 751; *State* v. *Rainsbarger,* 74 Iowa, 196, 37 N. W. 153; *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471; *Ross* v. *Com.* 21 Ky. L. Rep. 1344, 55 S. W. 4, 13 Am. Crim. Rep. 294; *Utterback* v. *Com.* 22 Ky. L. Rep. 1011, 59 S. W. 515, 60 S. W. 15; *Helton* v. *Com.* 27 Ky. L. Rep. 137, 84 S. W. 574; *State* v. *Fontenot,* 48 La. Ann. 305, 19 So. 111; *State* v. *Savage,* 69 Me. 112; *Com.* v. *Costley,* 118 Mass. 1; *Dillin* v. *People,* 8 Mich. 357; *Washburn* v. *People,* 10 Mich. 372; *Wellar* v. *People,* 30 Mich. 16, 1 Am. Crim. Rep. 276; *People* v. *Bemis,* 51 Mich. 423, 16 N. W. 794; *People* v. *Parmelee,* 112 Mich. 291, 70 N. W. 577; *State* v. *Lentz,* 45 Minn. 177, 47 N. W. 720; *Josephine* v. *State,* 39 Miss. 614; *State* v. *Mahly,* 68 Mo. 315, 3 Am. Crim. Rep. 183; *State* v. *Evans,* 158 Mo. 589, 59 S. W. 994; *Clough* v. *State,* 7 Neb. 320; *Lillie* v. *State,* 72 Neb. 228, 100 N. W. 316; *People* v. *Willson,* 109 N. Y. 345, 16 N. E. 540; *People* v. *Place,* 157 N. Y. 584, 52 N. E. 576; *People* v. *Barberi,* 149 N. Y. 256, 52 Am. St. Rep. 717, 43 N. E. 635; *State* v. *Gooch,* 94 N. C. 987; *Smith* v. *Territory,* 11 Okla. 669, 69 Pac. 805; *McMeen* v. *Com.* 114 Pa. 300, 9 Atl. 878; *State* v. *Bodie,* 33 S. C. 117, 11 S. E. 624; *State* v. *Senn,* 32 S. C. 392, 11 S. E. 292; *Fisher* v. *State,* 10 Lea, 151; *Cartwright* v. *State,* 12 Lea, 620; *Aycock* v. *State,* 2 Tex. App. 381; *Hamblin* v. *State,* 41 Tex. Crim. Rep. 135, 50 S. W. 1019, 51 S. W. 1111; *Villereal* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 715; *Mack* v. *State,* 48 Wis. 271, 4 N. W. 449; *Thiede* v. *Utah,* 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62; *Simons* v. *People,* 150 Ill. 66, 36 N. E. 1019.

[3] *Weaver* v. *State,* 43 Tex. Crim. Rep. 340, 65 S. W. 534, 46 Tex. Crim. Rep. 607, 81 S. W. 39; *Baines* v. *State,* 43 Tex. Crim. Rep. 490, 66 S. W. 847; *State* v. *Sheppard,* 49 W. Va. 582, 39 S. E. 676.

[4] *Hardy* v. *Com.* 110 Va. 910, 67 S. E. 522; *State* v. *Bradley,* 64 Vt. 466, 24 Atl. 1053; *State* v. *Gates,* 28 Wash. 689, 69 Pac. 385.

[5] *Lillie* v. *State,* 72 Neb. 228, 100

However, motive cannot be established through facts and circumstances of which the accused himself had no knowledge;[6] but this is again limited by the fact that actual knowledge need not be shown[7] where it appears that there was opportunity to be informed, or that a rumor concerning the same existed in the vicinity where the accused and the deceased were neighbors.[8]

§ 896. Proof of motive.—Motive in homicide is a question of fact to be determined by the jury;[1] it may be inferred from the crime itself,[2] or from the actions of the accused.[3] The conduct and attitude of the parties toward each other are circumstances relevant on proof of motive, in connection with the other facts and circumstances surrounding the act.[4] Hence it is relevant to show the birthplace, education, and manners and customs of the country of which the accused was a native and in which he had been brought up.[5] If the accused killed another under a belief that he had been wronged,

N. W. 316; *People* v. *Enwright*, 134 Cal. 527, 66 Pac. 726.

[6] *People* v. *Morgan*, 124 Mich. 527, 83 N. W. 275; *Son* v. *Territory*, 5 Okla. 526, 49 Pac. 923; *State* v. *Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *Barkman* v. *State*, 41 Tex. Crim. Rep. 105, 52 S. W. 23; *Attaway* v. *State*, 41 Tex. Crim. Rep. 395, 55 S. W. 45; *People* v. *Chin Hane*, 108 Cal. 597, 41 Pac. 697; *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95; *Gillum* v. *State*, 62 Miss. 547; *People* v. *Osmond*, 138 N. Y. 80, 33 N. E. 739; *Cockerell* v. *State*, 32 Tex. Crim. Rep. 585, 25 S. W. 421; *Lancaster* v. *State*, — Tex. Crim. Rep. —, 31 S. W. 515.

[7] *Marable* v. *State*, 89 Ga. 425, 15 S. E. 455.

[8] *Lancaster* v. *State*, — Tex. Crim. Rep. —, 31 S. W. 515.

[1] *Fendrick* v. *State*, — Tex. Crim. Rep. —, 56 S. W. 626. See *Carwile* v. *State*, 148 Ala. 576, 39 So. 220.

[2] *Wheeler* v. *State*, 158 Ind. 687, 63 N. E. 975.

[3] *Perryman* v. *State*, 36 Tex. 321.

[4] *People* v. *Jones*, 99 N. Y. 667, 2 N. E. 49; *Ex parte Nettles*, 58 Ala. 268; *Commander* v. *State*, 60 Ala. 1; *McKinney* v. *State*, 8 Tex. App. 626.

[5] *People* v. *Grunzig*, 2 Edm. Sel. Cas. 236. See *Long* v. *State*, 52 Miss. 23.

the state of his mind induced by such belief is relevant.[6] While the accused cannot testify as to the intent with which he did the deed,[7] the statements as to the motives which prompted him are relevant, though not conclusive in his favor.[8]

§ 897. Desire for pecuniary gain.—It is always relevant to prove any facts or circumstances that show robbery or theft [1] or pecuniary gain by obtaining property, as a motive for the homicide.[2] In these cases, any fact or circumstance

[6] *People* v. *Webster,* 139 N. Y. 73, 34 N. E. 730.

[7] *Lewis* v. *State,* 96 Ala. 6, 38 Am. St. Rep. 75, 11 So. 259; *Com.* v. *Woodward,* 102 Mass. 155; *Seams* v. *State,* 84 Ala. 410, 4 So. 521.

[8] *Davis* v. *State,* 51 Neb. 301, 70 N. W. 984. See *State* v. *Banks,* 73 Mo. 593; *State* v. *Jones,* 14 Mo. App. 589; *Nelson* v. *State,* — Tex. Crim. Rep. —, 58 S. W. 107; *Poole* v. *State,* 45 Tex. Crim. Rep. 348, 76 S. W. 565; *Butler* v. *State,* 33 Tex. Crim. Rep. 232, 26 S. W. 201.

[1] *Byers* v. *State,* 105 Ala. 31, 16 So. 716; *Stafford* v. *State,* 55 Ga. 591; *Marable* v. *State,* 89 Ga. 425, 15 S. E. 453; *Shelby* v. *Com.* 15 Ky. L. Rep. 552, 24 S. W. 614; *State* v. *Crowley,* 33 La. Ann. 782; *People* v. *Wolf,* 95 Mich. 625, 55 N. W. 357; *State* v. *Jackson,* 95 Mo. 623, 8 S. W. 749; *State* v. *Donnelly,* 130 Mo. 642, 32 S. W. 1124; *Clough* v. *State,* 7 Neb. 320; *Kennedy* v. *People,* 39 N. Y. 245; *State* v. *Howard,* 82 N. C. 623; *State* v. *Wintzingerode,* 9 Or. 153; *Howser* v. *Com.* 51 Pa. 332; *Ettinger* v. *Com.* 98 Pa. 338; *Early* v. *State,* 9 Tex. App. 476; *Lancaster* v. *State,* — Tex. Crim. Rep. —, 31 S. W. 515; *State* v. *Coella,* 8 Wash. 512, 36 Pac. 474; *State* v. *Craemer,* 12 Wash. 217, 40 Pac. 944; *People* v. *Leung Ock,* 141 Cal. 323, 74 Pac. 986; *People* v. *Antony,* 146 Cal. 124, 79 Pac. 858; *People* v. *Woods,* 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652; *State* v. *Rice,* 7 Idaho, 762, 66 Pac. 87; *Musser* v. *State,* 157 Ind. 423, 61 N. E. 1; *Whitney* v. *Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257, 12 Am. Crim. Rep. 170; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *People* v. *Ascher,* 126 Mich. 637, 86 N. W. 140; *State* v. *Lucey,* 24 Mont. 295, 61 Pac. 994; *Smith* v. *Territory,* 11 Okla. 669, 69 Pac. 805; *Hedrick* v. *State,* 40 Tex. Crim. Rep. 532, 51 S. W. 252; *State* v. *Mortensen,* 26 Utah, 312, 73 Pac. 562, 633.

[2] *Davidson* v. *State,* 135 Ind. 254, 34 N. E. 972; *State* v. *Williamson,* 106 Mo. 162, 17 S. W. 172; *Clough* v. *State,* 7 Neb. 320; *Marion* v. *State,* 20 Neb. 233. 57 Am. Rep. 825, 29 N. W. 911; *People* v. *Buchanan,* 145 N. Y. 1, 39 N. E. 846; *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 551; *Goersen* v. *Com.* 99 Pa. 388, 11 W. N. C. 405, 106 Pa. 477, 51

showing that the deceased was in possession of money is relevant, and the previous possession by deceased of a considerable sum of money, known to the accused, may be shown on the issue of a desire for pecuniary gain.[3] So, evidence of urgent need of money is relevant in a prosecution for homicide alleged to have been committed in attempting robbery;[4] the possession of money or property which might tempt robbery may be shown.[5] And evidence of knowledge, on the part of the accused, of the fact, may be shown by his own statements or his relations with the deceased.[6] It is relevant to show that the accused had a plan to defraud deceased out of money, as a motive.[7] The fact that the accused knew of insurance

Am. Rep. 534; *People* v. *Weber,* 149 Cal. 325, 86 Pac. 671; *State* v. *Kuhn,* 117 Iowa, 216, 90 N. W. 733; *State* v. *Tettaton,* 159 Mo. 354, 60 S. W. 743; *Golin* v. *State,* 37 Tex. Crim. Rep. 90, 38 S. W. 794; *McBride* v. *Com.* 95 Va. 818, 30 S. E. 454; *State* v. *Sheppard,* 49 W. Va. 582, 39 S. E. 676.

[3] *Kennedy* v. *People,* 39 N. Y. 245; *People* v. *Jackson,* 182 N. Y. 66, 74 N. E. 565; *State* v. *Rice,* 7 Idaho, 762, 66 Pac. 87; *Howser* v. *Com.* 51 Pa. 332; *Gay* v. *State,* 42 Tex. Crim. Rep. 450, 60 S. W. 771; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439.

[4] *Turner* v. *State,* 48 Tex. Crim. Rep. 585, 89 S. W. 975; *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 560. See *Kennedy* v. *People,* 39 N. Y. 245.

[5] *Jerome* v. *State,* 61 Neb. 459, 85 N. W. 394; *Marable* v. *State,* 89 Ga. 425, 15 S. E. 453; *State* v. *Donnelly,* 130 Mo. 642, 32 S. W. 1124; *Cordova* v. *State,* 6 Tex. App. 207; *State* v. *Lucey,* 24 Mont. 295, 61 Pac. 994; *State* v. *Rice,* 7 Idaho, 762, 66 Pac. 87; *State* v. *Crowley,* 33 La. Ann. 782; *Howser* v. *Com.* 51 Pa. 332; *People* v. *Antony,* 146 Cal. 124, 79 Pac. 858; *State* v. *Bailey,* 79 Conn. 589, 65 Atl. 951; *Cook* v. *State,* 134 Ga. 347, 67 S. E. 812; *State* v. *Shelton,* 223 Mo. 118, 122 S. W. 732; *Shumway* v. *State,* 82 Neb. 152, 117 N. W. 407, 119 N. W. 517; *Elsworth* v. *State,* 54 Tex. Crim. Rep. 38, 111 S. W. 963; *Thurman* v. *Com.* 107 Va. 912, 60 S. E. 99.

[6] *State* v. *Jackson,* 95 Mo. 623, 8 S. W. 749; *Jerome* v. *State,* 61 Neb. 459, 85 N. W. 394; *Marable* v. *State,* 89 Ga. 425, 15 S. E. 453.

[7] *Byers* v. *State,* 105 Ala. 31, 16 So. 716. See *People* v. *Ascher,* 126 Mich. 637, 86 N. W. 140; *People* v. *Hill,* 1 Cal. App. 414, 82 Pac. 398; *Roberts* v. *Com.* 10 Ky. L. Rep. 433, 8 S. W. 270.

payable to him, or upon which he could realize, is relevant as indicating motive.[8]

§ 898. Quarrels and ill feeling as showing motive in homicide.—All facts and circumstances that tend to show a state of feeling between the parties, upon which a motive for the homicide may be reasonably assigned, are relevant. Thus, the fact that the accused had been convicted of burglary of the deceased's house, and that he had just returned from serving out his sentence, is relevant to show motive;[1] evidence that the accused was angered at the deceased and his brother, and that he had said that they were trying to run him off, but that he intended to arm himself, and that he would not be run off, is relevant upon the issue of motive;[2] and, likewise, former assault and difficulties may be shown, where motive is in issue.[3]

[8] *Com.* v. *Robinson,* 146 Mass. 571, 16 N. E. 452; *State* v. *West,* Houst. Crim. Rep. (Del.) 371; *State* v. *Shackelford,* 148 Mo. 493, 50 S. W. 105; *Com.* v. *Clemmer,* 190 Pa. 202, 42 Atl. 675. See *People* v. *Pope,* 108 Mich. 361, 66 N. W. 213; *Reg.* v. *Heesom,* 14 Cox, C. C. 40; *State* v. *Coleman,* 17 S. D. 594, 98 N. W. 175; *Brandt* v. *Com.* 94 Pa. 290; *State* v. *Rainsbarger,* 74 Iowa, 196, 37 N. W. 153; *People* v. *Morgan,* 124 Mich. 527, 83 N. W. 275; *Van Wyk* v. *People,* 45 Colo. 1, 99 Pac. 1009; *Com.* v. *Rivet,* 205 Mass. 464, 91 N. E. 877; supra, § 880.

[1] *Powell* v. *State,* 13 Tex. App. 244.

[2] *Brewer* v. *Com.* 10 Ky. L. Rep. 122, 8 S. W. 339.

[3] *Crass* v. *State,* 31 Tex. Crim. Rep. 312, 20 S. W. 579; *Sullivan* v. *State,* 31 Tex. Crim. Rep. 486, 37 Am. St. Rep. 826, 20 S. W. 927; *Kelsoe* v. *State,* 47 Ala. 573; *Kinkler* v. *State,* 32 Ark. 539; *People* v. *Kern,* 61 Cal. 244; *People* v. *Walters,* 98 Cal. 138, 32 Pac. 864; *Kelly* v. *State,* 49 Ga. 12; *Gravely* v. *State,* 45 Neb. 878, 64 N. W. 452; *Bell* v. *State,* — Ala. —, 54 So. 116; *State* v. *McHamilton,* 128 La. 498, 54 So. 971; *State* v. *Durant,* 87 S. C. 532, 70 S. E. 306. See *Baum* v. *State,* — Tex. Crim. Rep. — 133 S. W. 271; *Pressley* v. *State,* 166 Ala. 17, 52 So. 337; *Gallant* v. *State,* 167 Ala. 60, 52 So. 739; *Hurley* v. *Territory,* — Ariz. —, 108 Pac. 222. But see *White* v. *State,* 59 Fla. 53, 52 So. 805; *State* v. *Tweed,* 152 N. C. 843, 68 S. E. 139; *Sanders* v. *State,* 134 Ala. 74, 32 So. 654; *Shirley* v *State,* 144 Ala. 35, 40 So. 269;

It is also relevant on a question of motive to show causes or grounds for ill feeling. Thus, it may be shown that accused had filed a bill for divorce against his wife, and that the deceased was her principal witness;[4] so a witness may testify that in his capacity as foreman he had discharged accused from the employ of deceased, in order to show motive for killing deceased;[5] where it appeared that accused had threatened that the day after his victim, who had bought the accused's land, at a sheriff's sale, should get a deed for it, he would kill him unless he gave it up, evidence of such fact is relevant as showing a cause of ill feeling;[6] and any causes which might reasonably engender ill feeling, such as disinheritance, and the attitude of the parties to each other, are always relevant.[7]

People v. *Colvin,* 118 Cal. 349, 50 Pac. 539; *People* v. *Donlan,* 135 Cal. 489, 67 Pac. 761; *Maloy* v. *State,* 52 Fla. 101, 41 So. 791; *Harris* v. *Com.* 25 Ky. L. Rep. 297, 74 S. W. 1044; *Ward* v. *Com.* 29 Ky. L. Rep. 62, 91 S. W. 700; *Powers* v. *Com.* 29 Ky. L. Rep. 277, 92 S. W. 975; *People* v. *Hall,* 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357; *State* v. *Shafer,* 26 Mont. 11, 66 Pac. 463; *People* v. *Decker,* 157 N. Y. 186, 51 N. E. 1018; *People* v. *Gallagher,* 174 N. Y. 505, 66 N. E. 1113; *Wells* v. *Territory,* 14 Okla. 436, 78 Pac. 124; *Hamblin* v. *State.* 41 Tex. Crim. Rep. 135, 50 S. W. 1019, 51 S. W. 1111; *Sebastian* v. *State,* 41 Tex. Crim. Rep. 248, 53 S. W. 875; *Baines* v. *State,* 43 Tex. Crim. Rep. 490, 66 S. W. 847.

[4] *Marler* v. *State,* 68 Ala. 580.

[5] *Morrison* v *State,* 84 Ala. 405, 4 So. 402; *Powers* v. *State,* 23 Tex. Crim. Rep. 42, 5 S. W. 153.

[6] *State* v. *Shepherd,* 30 N. C. (8 Ired. L.) 195.

[7] *State* v. *Ingram,* 23 Or. 434, 31 Pac. 1049; *Bowen* v. *State,* 140 Ala. 65, 37 So. 233; *Lee* v. *State,* 72 Ark. 436, 81 S. W. 385; *People* v. *Barthleman,* 120 Cal. 7, 52 Pac. 112; *Maloy* v. *State,* 52 Fla. 101, 41 So. 791; *People* v. *Valliere,* 123 Cal. 576, 56 Pac. 433; *People* v. *Donnolly,* 143 Cal. 394, 77 Pac. 177; *Lawrence* v. *State,* 45 Fla. 42, 34 So. 87; *State* v. *Davis,* 6 Idaho, 159, 53 Pac. 678; *Cloud* v. *Com.* 7 Ky. L. Rep. 818; *State* v. *Goddard,* 146 Mo. 177, 48 S. W. 82; *State* v. *Rose,* 129 N. C. 575, 40 S. E. 83; *Gay* v. *State,* 40 Tex. Crim. Rep. 242, 49 S. W. 612; *Neely* v. *State,* — Tex. Crim. Rep. —, 56 S. W. 625; *Honeycutt* v. *State,* — Tex. Crim. Rep. —, 63 S. W. 639; *Long* v. *State,* 48 Tex. Crim. Rep.

§ 899. Concealment of other crimes as motive in homicide.— Facts and circumstances are relevant, on a homicide charge, to show that the motive for the homicide was the concealment of a prior crime, when they tend to prove that the accused was guilty of a prior crime, and knew that he was suspected by the deceased to be so guilty,[1] or that deceased was likely to discover the fact;[2] or that there was an attempt to conceal stolen goods,[3] or that the deceased had knowledge of the prior crime.[4]

And on the same principle, it is relevant as showing motive, to introduce evidence that the deceased was a prosecutor of or a witness against accused for another offense;[5] thus, on a homicide prosecution, a complaint filed, or an indictment

175, 88 S. W. 203; *State* v. *Campbell,* 25 Utah, 342, 71 Pac. 529; *State* v. *Weisenberger,* 42 Wash. 426, 85 Pac. 20.

[1] *Moore* v. *United States,* 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; *Smith* v. *State,* 44 Tex. Crim. Rep. 53, 68 S. W. 267; *State* v. *Rainsbarger,* 74 Iowa, 196, 37 N. W. 153; *State* v. *Dooley,* 89 Iowa, 584, 57 N. W. 414; *Fletcher* v. *State,* — Tex. Crim. Rep. —, 68 S. W. 173; *State* v. *Noakes,* 70 Vt. 247, 40 Atl. 249; *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *Sage* v. *State,* 127 Ind. 15, 26 N. E. 667; *State* v. *Kline,* 54 Iowa, 183, 6 N. W. 184.

[2] *State* v. *Kent* (*State* v. *Pancoast*), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *People* v. *Cook,* 148 Cal. 334, 83 Pac. 43; *State* v. *Seymour,* 94 Iowa, 699, 63 N. W. 661.

[3] *McConkey* v. *Com.* 101 Pa. 416; *Roberts* v. *Com.* 10 Ky. L. Rep. 433, 8 S. W. 270; *State* v. *Fontenont,* 48 La. Ann. 305, 19 So. 111.

[4] *Blackwell* v. *State,* 29 Tex. Crim. Rep. 194, 15 S. W. 597; *Pontius* v. *People,* 82 N. Y. 339. See *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65; *Johnson* v. *State,* 29 Tex. App. 150, 15 S. W. 647; *Robinson* v. *State,* 114 Ga. 56, 39 S. E. 862; *Bess* v. *Com.* 116 Ky. 927, 77 S. W. 349; *State* v. *Miller,* 156 Mo. 76, 56 S. W. 907; *Smith* v. *State,* 44 Tex. Crim. Rep. 53, 68 S. W. 267; *Goebel* v. *State,* 45 Tex. Crim. Rep. 415, 76 S. W. 460.

[5] *Easterwood* v. *State,* 34 Tex. Crim. Rep. 400, 31 S. W. 294; *Kunde* v. *State,* 24 Tex. Crim. Rep. 65, 3 S. W. 325; *Coward* v. *State,* 6 Tex. App. 59; *Childs* v. *State,* 55 Ala. 25; *Carden* v. *State,* 84 Ala. 417, 4 So. 823; *Hodge* v. *State,* 97 Ala. 37, 38 Am. St. Rep. 145, 12 So. 164; *Turner* v. *State,* 70 Ga. 765; *Kirk* v. *State,* 73 Ga. 620; *Butler* v. *State,* 91 Ga. 161, 16 S. E.

procured, by deceased against accused, is admissible in evidence as tending to show motive.[6]

But while such evidence is relevant as establishing motive, it is irrelevant and improper to admit evidence of the facts connected with the other crime charged against accused.[7]

§ 900. Showing motive in marital homicide.—On a charge of marital homicide, all facts and circumstances relating to ill treatment, previous assaults, personal violence, threats, and ill feeling toward the wife, as well as evidence that the wife brought suit against the husband for nonsupport, or had had him arrested for threats or cruelty, are all relevant as tending to show motive in such crimes.[1]

But proof of a quarrel between husband and wife, unconnected with the homicide, is inadmissible to show motive, until

984; *Mask* v. *State,* 32 Miss. 405; *Gillum* v. *State,* 62 Miss. 547; *State* v. *Palmer,* 65 N. H. 216, 20 Atl. 6, 8 Am. Crim. Rep. 196; *State* v. *Morris,* 84 N. C. 756.

[6] *State* v. *Geddes,* 22 Mont. 68, 55 Pac. 919; *Smith* v. *State,* 48 Fla. 307, 37 So. 573; *Zipperian* v. *People,* 33 Colo. 134, 79 Pac. 1018; *Renfro* v. *State,* 42 Tex. Crim. Rep. 393, 56 S. W. 1013; *Canon* v. *State,* — Tex. Crim. Rep. —, 128 S. W. 141; *Wilson* v. *State,* — Tex. Crim. Rep. —, 129 S. W. 613.

[7] *Martin* v. *Com.* 93 Ky. 189, 19 S. W. 580; *Carden* v. *State,* 84 Ala. 417, 4 So. 823; *Williams* v. *State,* 69 Ga. 11; *Binns* v. *State,* 46 Ind. 311. See *Attaway* v. *State,* 41 Tex. Crim. Rep. 395, 55 S. W. 45; *State* v. *Hyde,* 234 Mo. 200, 136 S. W. 316.

[1] *State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238; *State* v. *O'Neil,* 51 Kan. 651, 24 L.R.A. 555, 33 Pac. 287; *Carroll* v. *State,* 45 Ark. 539; *Thiede* v. *People,* 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62, 11 Utah, 241, 39 Pac. 837; *Com.* v. *Holmes,* 157 Mass. 233, 34 Am. St. Rep. 270, 32 N. E. 6; *People* v. *Williams,* 3 Park. Crim. Rep. 84; *McCann* v. *People,* 3 Park. Crim. Rep. 272; *People* v. *Otto,* 4 N. Y. Crim. Rep. 149, 101 N. Y. 690, 5 N. E. 788. See *Pinckord* v. *State,* 13 Tex. App. 468; *Gonzales* v. *State,* 31 Tex. Crim. Rep. 508, 21 S. W. 253; *Smith* v. *State,* 92 Ala. 30, 9 So. 408; *Porter* v. *State,* 173 Ind. 694, 91 N. E. 340; *Com.* v. *Howard,* 205 Mass. 128, 91 N. E. 397; *Wilson* v. *State,* — Tex. Crim. Rep. —, 129 S. W. 613.

it is supplemented by evidence showing a continued difference of feeling as a result of such quarrel.[2]

§ 901. Desire to be rid of a burden or obstacle as showing motive.—As a general rule, it is relevant to inquire into all of the personal relations between the accused and the deceased, as to whether or not the same are a burden upon, or oppressive to, or an obstacle in the way of, one or the other.[1] Thus, it is relevant to show that the accused was legally bound to maintain deceased, or entitled to his property after death;[2] or that accused had the beneficial possession of lands in which deceased desired a homestead;[3] or that, in the relations of employer and employee, deceased had threatened and discharged accused;[4] or that accused was a debtor of deceased, and had been importuned and pressed for the debt so as to make the death of deceased a relief to accused;[5] or that in the event of death accused would succeed to the estate of deceased.[6] So, evidence that deceased was opposed to or prevented a desired marriage of the accused is relevant;[7] and also evidence that the

[2] *People* v. *Blake,* 1 Wheeler C. C. 272.

[1] *People* v. *Buchanan,* 145 N. Y. 1, 39 N. E. 846; *People* v. *Sutherland,* 154 N. Y. 345, 48 N. E. 518; *Davidson* v. *State,* 135 Ind. 254, 34 N. E. 972; *Benson* v. *State,* 119 Ind. 488, 21 N. E. 1109; *Com.* v. *Snell,* 189 Mass. 12, 3 L.R.A.(N.S.) 1019, 75 N. E. 75; *Miller* v. *State,* 68 Miss. 221, 8 So. 273.

[2] *Davidson* v. *State,* 135 Ind. 254, 34 N. E. 972.

[3] *State* v. *Tettaton,* 159 Mo. 354, 60 S. W. 743.

[4] *Powers* v. *State,* 23 Tex. Crim. Rep. 42, 5 S. W. 153.

[5] Bemis's *Webster Case,* 421; *State* v. *Mortensen,* 26 Utah, 312, 73 Pac. 562, 633.

[6] *Gallant* v. *State,* 167 Ala. 60, 52 So. 739. See *State* v. *Hyde,* 234 Mo. 200, 136 S. W. 316.

[7] *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95; *Felix* v. *State,* 18 Ala. 720; *Fraser* v. *State,* 55 Ga. 325, 1 Am. Crim. Rep. 315; *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471; *State* v. *Lentz,* 45 Minn. 177, 47 N. W. 720; *Stephens* v. *People,* 4 Park. Crim. Rep. 396; *State* v. *Burton,* 63 Kan. 602, 66 Pac. 633.

accused sought permission to visit the daughter of deceased, which was denied him because he was a married man.[8]

§ 902. Desire for revenge as showing motive.—To show the state of mind of the accused towards the deceased, it is relevant to introduce in evidence facts and circumstances relating to any ill treatment of the accused by the deceased,[1] or

[8] *Johnson* v. *State,* 17 Ala. 618.

[1] *McAnally* v. *State,* 74 Ala. 9; *Garrett* v. *State,* 76 Ala. 18; *Holmes* v. *State,* 100 Ala. 80, 14 So. 864; *Ellis* v. *State,* 120 Ala. 333, 25 So. 1; *Gray* v. *State,* 63 Ala. 66; *Walker* v. *State,* 63 Ala. 105; *Stitt* v. *State,* 91 Ala. 10, 24 Am. St. Rep. 853, 8 So. 669; *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *People* v. *Taylor,* 36 Cal. 255; *People* v. *Brown,* 76 Cal. 573, 18 Pac. 678; *People* v. *Gibson,* 106 Cal. 458, 39 Pac. 864; *People* v. *Thomson,* 92 Cal. 506, 28 Pac. 589; *People* v. *Colvin,* 118 Cal. 349, 50 Pac. 539; *People* v. *Conkling,* 111 Cal. 616, 44 Pac. 314; *State* v. *Green,* 35 Conn. 203; *Monroe* v. *State,* 5 Ga. 85; *Choice* v. *State,* 31 Ga. 424; *Brown* v. *State,* 51 Ga. 502; *Starke* v. *State,* 81 Ga. 593, 7 S. E. 807; *Roberts* v. *State,* 123 Ga. 146, 51 S. E. 374; *Koerner* v. *State,* 98 Ind. 7; *State* v. *Moelchen,* 53 Iowa, 310, 5 N. W. 186; *State* v. *Helm,* 97 Iowa, 378, 66 N. W. 751; *State* v. *Perigo,* 70 Iowa, 657, 28 N. W. 452; *State* v. *Seymour,* 94 Iowa, 699, 63 N. W. 661; *State* v. *McKinney,* 31 Kan. 570, 3 Pac. 356, 4 Am. Crim. Rep. 538; *State* v. *O'Neil,* 51 Kan. 651, 24 L.R.A. 555, 33 Pac. 287; *Thomas* v. *Com.* 14 Ky. L. Rep. 288, 20 S. W. 226; *Com.* v. *Gray,* 17 Ky. L. Rep. 354, 30 S. W. 1015; *Wade* v. *Com.* 106 Ky. 321, 50 S. W. 271; *Bess* v. *Com.* 118 Ky. 858, 82 S. W. 576; *State* v. *Coleman,* 111 La. 303, 35 So. 560; *Williams* v. *State,* 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512; *Com.* v. *Storti,* 177 Mass. 339, 58 N. E. 1021; *Com.* v. *Holmes,* 157 Mass. 233, 34 Am. St. Rep. 270, 32 N. E. 6; *People* v. *Simpson,* 48 Mich. 474, 12 N. W. 662; *State* v. *Nugent,* 8 Mo. App. 563; *State* v. *Lewis,* 80 Mo. 110; *State* v. *Dettmer,* 124 Mo. 426, 27 S. W. 1117; *Territory* v. *Manton,* 8 Mont. 95, 19 Pac. 387, 8 Am. Crim. Rep. 521; *State* v. *Shafer,* 26 Mont. 11, 66 Pac. 463; *Hendrickson* v. *People,* 1 Park. Crim. Rep. 406; *People* v. *Kemmler,* 119 N. Y. 580, 24 N. E. 9; *People* v. *Benham,* 160 N. Y. 402, 55 N. E. 11; *People* v. *Lyons,* 110 N. Y. 618, 17 N. E. 391; *Com.* v. *Crossmire,* 156 Pa. 304, 27 Atl. 40; *Sayres* v. *Com.* 88 Pa. 291; *Stone* v. *State,* 4 Humph. 27; *Carr* v. *State,* 41 Tex. 544; *Medina* v. *State,* — Tex. Crim. Rep. —, 49 S. W. 380; *Flores* v. *State,* — Tex. Crim. Rep. —, 38 S. W. 790; *Young* v. *State,* 41 Tex. Crim. Rep. 442, 55 S. W. 331; *State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238;

any act which had greatly excited the anger of the accused.[2]

Not only are quarrels and ill-will relevant in general, but the facts from which a stress of feeling may be reasonably inferred are also relevant. Thus, it may be shown that the deceased procured an indictment against the accused,[3] or had procured an indictment against the brother of the accused,[4] or an accessory of the accused;[5] or that deceased had uttered a slander against the wife of the accused;[6] but in order to make such facts relevant, it must be shown that the accused himself knew the facts.[7]

§ 903. Jealousy and unrequited love as motive.—It is always relevant to put in evidence jealousy and unrequited love, and facts on which they rest, as showing motive in homicide;[1] such feelings may be proved either by the declarations

Nicholas v. *Com.* 91 Va. 741, 21 S. E. 364; *State* v. *Ackles,* 8 Wash. 462, 36 Pac. 597; *Watts* v. *State,* 5 W. Va. 535; *Boyle* v. *State,* 61 Wis. 440, 21 N. W. 289; *Theal* v. *Reg.* 7 Can. S. C. 397; *Miera* v. *Territory,* 13 N. M. 192, 81 Pac. 586; *Fraser* v. *State,* 55 Ga. 325, 1 Am. Crim. Rep. 315.

[2] *Rea* v. *State,* 8 Lea, 356; *Lawrence* v. *State,* 45 Fla. 42, 34 So. 87; *Harris* v. *Com.* 25 Ky. L. Rep. 297, 74 S. W. 1044; *People* v. *Williams,* 3 Park. Crim. Rep. 84; *People* v. *Kennedy,* 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51; *People* v. *Clarke,* 130 Cal. 642, 63 Pac. 138; *State* v. *Campbell,* 25 Utah, 342, 71 Pac. 529.

[3] *Singleton* v. *State,* 71 Miss. 782, 42 Am. St. Rep. 488, 16 So. 295; *Carden* v. *State,* 84 Ala. 417, 4 So. 823; *Smith* v. *State,* 48 Fla. 307, 37 So. 573; *Kunde* v. *State,* 22 Tex. Crim. Rep. 65, 3 S. W. 325.

[4] *Coward* v. *State,* 6 Tex. App. 59.

[5] *State* v. *Welch,* 22 Mont. 92, 55 Pac. 927; *Finch* v. *State,* 81 Ala. 41, 1 So. 565; *Mask* v. *State,* 32 Miss. 405.

[6] *Massie* v. *Com.* 15 Ky. L. Rep. 562, 24 S. W. 611.

[7] *Gillum* v. *State,* 62 Miss. 547; *Goodall* v. *State,* — Tex. Crim. Rep. —, 47 S. W. 359; *Earles* v. *State,* 47 Tex. Crim. Rep. 559, 85 S. W. 1.

[1] *Com.* v. *Madan,* 102 Mass. 1; *Nesbit* v. *State,* 43 Ga. 238; *Jones* v. *State,* 117 Ga. 324, 43 S. E. 715; *Fearson* v. *United States,* 10 App.

of the accused,[2] or by facts and circumstances that show the relation between the accused, the deceased, and the person who was the cause of such feeling;[3] and where the homicide involves husband and wife, in proving motive it is relevant to show unhappy marital relations.[4]

It is relevant to show that accused was a rejected suitor, and deceased an accepted suitor of the same woman;[5] to show that both parties were in love with the same woman;[6] to show that two men visited the same woman, and that, just after one of them was killed, the other said he had warned him not to visit the woman, as she would prove a curse to him, and it had

D. C. 536; *Fisher* v. *People,* 23 Ill. 283; *Mathley* v. *Com.* 120 Ky. 389, 86 S. W. 988; *Templeton* v. *People,* 27 Mich. 501; *State* v. *Larkin,* 11 Nev. 316; *People* v. *Place,* 157 N. Y. 584, 52 N. E. 576; *People* v. *Sutherland,* 154 N. Y. 345, 48 N. E. 518; *People* v. *Martell,* 138 N. Y. 595, 33 N. E. 838; *Com.* v. *McManus,* 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 22 Atl. 761; *Reeves* v. *State,* 47 Tex. Crim. Rep. 340, 83 S. W. 803; *State* v. *Bean,* 77 Vt. 384, 60 Atl. 807.

[2] *State* v. *Larkins,* 5 Idaho, 200, 47 Pac. 945; *Brewer* v. *Com.* 87 Ky. 122, 8 S. W. 339; *State* v. *Stratford,* 149 N. C. 483, 62 S. E. 882; *Reyes* v. *State,* 55 Tex. Crim. Rep. 422, 117 S. W. 152.

[3] *State* v. *Reed,* 50 La. Ann. 990, 24 So. 131; *Com.* v. *McManus,* 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 22 Atl. 761; *Hoxie* v. *State,* 114 Ga. 19, 39 S. E. 944; *Washington* v. *State,* 155 Ala. 2, 46 So. 778; *People* v. *Easton,* 148 Cal. 50, 82 Pac. 840; *Mathley* v. *Com.* 120 Ky. 389, 86 S. W. 988; *McCorquodale* v. *State,* 54 Tex. Crim. Rep. 344, 98 S. W. 879.

[4] *Thiede* v. *Utah,* 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62; *People* v. *Kern,* 61 Cal. 244; *Doolittle* v. *State,* 93 Ind. 272; *Siberry* v. *State,* 133 Ind. 677, 33 N. E. 681; *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65; *People* v. *Willson,* 109 N. Y. 345, 16 N. E. 540; *State* v. *Langford,* 44 N. C. (Busbee, L.) 436; *Com.* v. *Crossmire,* 156 Pa. 304, 27 Atl. 40; *McCann* v. *People,* 3 Park. Crim. Rep. 272; *People* v. *Benham,* 160 N. Y. 402, 55 N. E. 11; *People* v. *Brasch,* 193 N. Y. 46, 85 N. E. 809; *Rice* v. *State,* 54 Tex. Crim. Rep. 149, 112 S. W. 299; *State* v. *Guthrie,* 145 N. C. 492, 59 S. E. 652; *Reeves* v. *State,* 47 Tex. Crim. Rep. 340, 83 S. W. 803. See *Hedger* v. *State,* 144 Wis. 279, 128 N. W. 80.

[5] *Hunter* v. *State,* 43 Ga. 483; *Brown* v. *Com.* 13 Ky. L. Rep. 372, 17 S. W. 220.

[6] *State* v. *Andrews,* 73 S. C. 257, 53 S. E. 423.

now come to pass;[7] meretricious relations between accused and deceased, and the facts leading up to such relations, are relevant where they tend to show motive for the homicide,[8] but, in order to be relevant, the grounds for jealousy must always be shown to have been known to the accused.[9]

§ 904. Disturbed marital relations as motive in homicide.—Disturbed marital relations, such as a desire to be rid of the spouse, or an infatuation for or unlawful relations with another, or an infatuation for or unlawful relations with the spouse of the deceased, are always relevant upon the question of motive in homicide prosecutions. Thus, on the trial of accused for wife murder, it is relevant to prove that preceding the homicide, he had asked the mother of a single woman for permission to visit her daughter, which was denied him because he was married;[1] so it is relevant to prove improper intimacy between the accused and a woman other than his wife;[2] to prove that accused stated that he was tired of, and

[7] *McCue* v. *Com.* 78 Pa. 185, 21 Am. Rep. 7, 1 Am. Crim. Rep. 268.

[8] *People* v. *Sutherland,* 154 N. Y. 345, 48 N. E. 518; *Mobley* v. *State,* 41 Fla. 621, 26 So. 732; *Pannell* v. *State,* 59 Tex. Crim. Rep. 383, 128 S. W. 133.

[9] *Phillips* v. *State,* 22 Tex. App. 139, 2 S. W. 601; *People* v. *Hill,* 116 Cal. 562, 48 Pac. 711; *People* v. *Osmond,* 138 N. Y. 80, 33 N. E. 739. See *Newman* v. *State,* 58 Tex. Crim. Rep. 443, 126 S. W. 578; *Young* v. *State,* 59 Tex. Crim. Rep. 137, 127 S. W. 1058.

[1] *Johnson* v. *State,* 17 Ala. 618.

[2] *Hall* v. *State,* 40 Ala. 698; *Johnson* v. *State,* 94 Ala. 35, 10 So. 667; *State* v. *Hinkle,* 6 Iowa, 380; *Stricklin* v. *Com.* 83 Ky. 566; *Com.* v. *Howard,* 205 Mass. 128, 91 N. E. 397; *People* v. *Nileman,* 8 N. Y. S. R. 300; *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65; *Wilkerson* v. *State,* 31 Tex. Crim. Rep. 86, 19 S. W. 903; *Brunson* v. *State,* 124 Ala. 37, 27 So. 410; *Nordan* v. *State,* 143 Ala. 13, 39 So. 406; *People* v. *Bowers,* 1 Cal. App. 501, 82 Pac. 553. See *Hinshaw* v. *State,* 147 Ind. 334, 47 N. E. 157; *State* v. *Callaway,* 154 Mo. 91, 55 S. W. 444; *Reinhart* v. *People,* 82 N. Y. 607; *People* v. *Scott,* 153 N. Y. 40, 46 N. E. 1028; *People* v. *Montgomery* 176 N. Y. 219, 68 N. E. 258; *Rice* v. *State,* 49 Tex. Crim. Rep. 569, 94 S. W. 1024; *State* v. *Legg,* 59 W. Va. 315, 3 L.R.A.(N.S.) 1152, 53 S. E. 545.

intended to divorce, his wife, and to show that deceased was an obstacle to the success of the divorce suit;[3] to show conduct and conversation of accused in reference to a girl with whom he was infatuated, and conduct and conversation tending to show dissatisfaction with his wife;[4] to show that the accused had unwillingly entered into the marriage relation with a woman, and his desire to be rid of her;[5] and to show a design to kill his wife, and to manufacture sufficient evidence of wealth to induce another to marry him,—forged deeds and letters made by the accused are admissible.[6] But declarations not made in the presence of the spouse, too remote to be dying declarations or parts of the *res gestæ*, relating to past transactions, are not relevant to show motive;[7] and the record of a divorce suit on the prosecution of the husband for the murder of his wife is not relevant;[8] and on the part of one accused of having killed his wife as a result of his loss of love and affection for her, and his infatuation for another woman, an affectionate letter written by the wife to the husband is relevant to disprove motive for the crime.[9]

But where the unlawful relations are with, or the infatuation is for, the spouse of the deceased, evidence of such relations, and the facts that tend to establish them, are always relevant as showing motive.[10] Thus, where accused is charged

[3] *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95.

[4] *Duncan* v. *State*, 88 Ala. 31, 7 So. 104; *Hendrickson* v. *People*, 1 Park. Crim. Rep. 406; *Stephens* v. *People*, 19 N. Y. 549; *People* v. *Willson*, 109 N. Y. 345, 16 N. E. 540.

[5] *Nordan* v. *State*, 143 Ala. 13, 39 So. 406.

[6] *Morrison* v. *State*, 40 Tex. Crim. Rep. 473, 51 S. W. 358.

[7] *Weyrich* v. *People*, 89 Ill. 90.

[8] *Binns* v. *State*, 57 Ind. 46, 26 Am. Rep. 48; *Baum* v. *State*, — Tex. Crim. Rep. —, 133 S. W. 271.

[9] *Pettit* v. *State*, 135 Ind. 393, 34 N. E. 1118.

[10] *Pate* v. *State*, 94 Ala. 14, 10 So. 665; *Johnson* v. *State*, 24 Fla. 162, 4 So. 535; *State* v. *Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *Templeton* v. *People*, 27 Mich. 501; *Miller* v. *State*, 68 Miss.

with the killing of deceased to enable him to enjoy a closer intimacy with the wife of deceased, it is proper to give in evidence letters written by him to the wife, containing endearing expressions, and also the wife's letters to her husband, formal in their nature, and without affectionate allusions towards him;[11] so, also, it is proper to show that an intimate friendship existed between accused and the wife of deceased;[12] to show that the wife of deceased was in the company of the accused by compulsion, and against her will;[13] to show that the unlawful relations continued after the homicide, as corroborating the prior intimacy;[14] to show that accused and the wife of deceased lived together in another city, to which they had gone immediately after the homicide;[15] to show that charges of un-Masonic conduct had been served on accused shortly before the homicide, charging him with the seduction of the wife of deceased;[16] to show that accused had said that the wife of deceased "was the only woman he had ever loved," that he was going to Nebraska with her, and make her husband "bite the dust;"[17] to show that accused had induced deceased to marry his sister-in-law to cover up accused's unlawful relations with her, and that accused had then formed a design of killing deceased in order to renew the unlawful relations;[18] where the wife of deceased testified that she was compelled to remain in

221, 8 So. 273; *Stout* v. *People*, 4 Park. Crim. Rep. 71; *Com.* v. *Ferrigan*, 44 Pa. 386; *Ouidas* v. *State*, 78 Miss. 622, 29 So. 525; *Com.* v. *Fry*, 198 Pa. 379, 48 Atl. 257; *Weaver* v. *State*, 43 Tex. Crim. Rep. 340, 65 S. W. 534; *State* v. *Chase*, 68 Vt. 405, 35 Atl. 336.

[11] *Stokes* v. *State*, 71 Ark. 112, 71 S. W. 248. See *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471.

[12] *People* v. *Brown*, 130 Cal. 591, 62 Pac. 1072.

[13] *Tompkins* v. *Com.* 117 Ky. 138, 77 S. W. 712.

[14] *State* v. *Goddard*, 162 Mo. 198, 62 S. W. 697.

[15] *State* v. *Abbatto*, 64 N. J. L. 658, 47 Atl. 10.

[16] *Martin* v. *State*, 17 Ohio C. C. 406, 9 Ohio C. D. 621.

[17] *State* v. *Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

[18] *Weaver* v. *State*, 46 Tex. Crim. Rep. 607, 81 S. W. 39.

the company of accused, it is error to exclude evidence on the part of the accused, that the association between him and the witness arose at her request, and without compulsion on his part;[19] and while it is relevant to show the fact of the serving of charges of un-Masonic conduct on accused, the subsequent proceedings of the lodge and its officers as to the disposition of said charges are irrelevant;[20] and it is irrelevant to show unlawful relations between the accused and the divorced wife of deceased, as showing motive for the crime.[21]

§ 905. Accused testifying to his own motive.—For some time after the removal of disqualification of parties in interest as witnesses, the view was urged upon the court that accused could not testify as to his own motive or intent in committing the act charged. This arose, apparently, from an unwillingness on the part of the courts to recognize that the accused was as fully qualified as a witness as those who had no interest in the prosecution.

But with the exception of one state, Alabama,[1] the rule is universal that on a prosecution for a crime, whenever the intent of the accused is relevant to the issue, or whenever the intent of the accused in doing the act charged becomes material, the accused may testify as to his own motive and intent.[2]

[19] *Tompkins* v. *Com.* 117 Ky. 138, 77 S. W. 712.

[20] *Martin* v. *State,* 17 Ohio C. C. 406, 9 Ohio C. D. 621. See *Mack* v. *State,* 48 Miss. 271, 4 N. W. 449.

[21] *People* v. *Wright,* 144 Cal. 161, 77 Pac. 877.

[1] *Fonville* v. *State,* 91 Ala. 39, 8 So. 688; *Toliver* v. *State,* 94 Ala. 111, 10 So. 428; *Brown* v. *State,* 79 Ala. 51; *Pate* v. *State,* 162 Ala. 32, 50 So. 357; *Patterson* v. *State,* 156 Ala. 62, 47 So. 52; *Smith* v. *State,* 145 Ala. 17, 40 So. 957.

[2] *State* v. *Ferguson,* 71 Conn. 227, 41 Atl. 769; *Greer* v. *State,* 53 Ind. 420; *State* v. *Wright,* 40 La. Ann. 589, 4 So. 486; *Com.* v. *Kimball,* 24 Pick. 366; *State* v. *Banks,* 73 Mo. 592; *State* v. *Williams,* 95 Mo. 247, 6 Am. St. Rep. 46, 8 S. W. 217; *Crawford* v. *United States,* 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260, 15 A. & E. Ann. Cas. 392; *Richards* v. *United States,* 99 C. C. A. 401, 175 Fed. 911; *Ryan* v. *Territory,* 12 Ariz. 208, 100 Pac. 770; *Eatman* v. *State,* 48 Fla. 21,

But the testimony of the accused as to his own motive is not conclusive,[3] and it necessarily follows that his testimony is of little weight when his acts indicate a motive contrary to his testimony.[4] And in cases of fraud, where the accused does and intends to do that which, from its consequences, the law pronounces fraudulent, he is held to intend the fraud inseparable from the act, and his testimony to the contrary is irrelevant.[5]

IV. Circumstances in Homicide.

§ 906. Circumstances in homicide generally.—There is no crime known to the law, in which so wide a range of inquiry into all the circumstances is permitted as in homicide.

The circumstances that *precede* are generally found in

37 So. 576; *Penick* v. *Morgan County,* 131 Ga. 385, 62 S. E. 300; *Lane* v. *People,* 142 Ill. App. 571; *State* v. *Loos,* 145 Iowa, 170, 123 N. W. 962; *Hamilton* v. *Com.* 33 Ky. L. Rep. 1014, 112 S. W. 603; *State* v. *Morin,* 102 Me. 290, 66 Atl. 650; *State* v. *Johnson,* 17 N. D. 554, 118 N. W. 230; *Snow* v. *State,* 3 Okla. Crim. Rep. 291, 105 Pac. 575; *Jones* v. *State,* 58 Tex. Crim. Rep. 312, 125 S. W. 914; *Brown* v. *State,* 127 Wis. 193, 106 N. W. 536, 7 A. & E. Ann. Cas. 258; *Nurnberger* v. *United States,* 84 C. C. A. 377, 156 Fed. 721.

[3] *Greer* v. *State,* 53 Ind. 420; *Green* v. *State,* 91 Ark. 510, 121 S. W. 727.

[4] *State* v. *Musick,* 101 Mo. 261, 14 S. W. 212; *Vermont* v. *United States,* 98 C. C. A. 500, 174 Fed. 792; *United States* v. *Breese,* 173 Fed. 402; *Brown* v. *State,* 127 Wis. 193, 106 N. W. 536, 7 A. & E. Ann. Cas. 258.

[5] *Cheatham* v. *Hawkins,* 80 N. C. 161; *Sweeney* v. *Conley,* 71 Tex. 543, 9 S. W. 548; *Connor* v. *Hodges,* 7 Ga. App. 153, 66 S. E. 546.

It has been argued that because of the fact that we cannot enter into or feel the state of another person's mind, testimony on the part of another as to the motive or intent of such person is inadmissible; but it is held in England that where the criminal intent is material, and allowed to be proved or denied, then it may be stated as a general rule that in all cases where a witness is competent, and it is admissible to prove the criminal intent, a witness will also be competent to rebut the imputation. Fox Libel Act (32 Geo. III. See chap. 60); *Stockdale's Trial,* 22 How. St. Tr. 300.

threats, preparation, previous attempts, previous difficulties, and opportunity. The circumstances that are *contemporaneous* are found in physical and mental conditions, in declarations of the accused, of the party assaulted, and of third persons, and in the nature of the act. The *subsequent* circumstances are found in the possession of money or property of the deceased, in flight, avoidance of arrest, false explanations, admissions, and confessions; intimidating, bribing, or influencing witnesses or jurors; destruction of evidence, fabrication of evidence, and other inculpatory circumstances.

§ 907. Threats in homicide in general.—On a charge of homicide, threats by the accused to kill deceased are relevant as circumstances that indicate malice or premeditation as well as motive.[1] Thus, it is relevant to show that accused said, "I will not run from him," and "I can't take everything," as tending to show that the subsequent homicide was in resentment, and not self-defense;[2] to show that deceased had said to a justice of the peace that accused had threatened to kill him, and that he desired accused's arrest, where it is also shown that in a conversation between the justice and the accused, the accused was informed of the deceased's complaint;[3] to show that accused, while drunk, talked to himself, and threatened to kill deceased;[4] to show that accused had threatened to resist arrest, as showing malice toward deceased, who was an officer,

[1] *Babcock* v. *People,* 13 Colo. 515, 22 Pac. 817; *State* v. *Pain,* 48 La. Ann. 311, 19 So. 138; *State* v. *Sullivan,* 51 Iowa, 142, 50 N. W. 572; *State* v. *Stackhouse,* 24 Kan. 445; *State* v. *Jones,* 47 La. Ann. 1524, 18 So. 515; *State* v. *Ridgely,* 2 Harr. & McH. 120, 1 Am. Dec. 372; *People* v. *Brunt,* 11 N. Y. S. R. 59, 27 Week. Dig. 427; *Stewart* v. *State,* 1 Ohio St. 66; *McMahon* v. *State,* 16 Tex. App. 357.

[2] *Allen* v. *State,* 111 Ala. 80, 20 So. 490.

[3] *State* v. *Moelchen,* 53 Iowa, 310, 5 N. W. 186. See *State* v. *Birdwell,* 36 La. Ann. 859.

[4] *Smith* v. *Com.* 9 Ky. L. Rep. 215, 4 S. W. 798.

and a knowledge of the contemplated arrest;[5] to show that accused had threatened deceased with a sling shot, on a charge of homicide by poison, as tending to prove the animus of accused;[6] to show that accused said, "We have come here to kill deceased, and we are going to do it;"[7] to show that accused said, relative to use of water for irrigation, "that he would have water, or would kill deceased;"[8] to show that accused said that he would kill deceased that day;[9] and any threat is relevant where it is connected by circumstances showing that it was made by accused, and included the deceased.[10]

But it is irrelevant to give in evidence threats not connecting the accused and the deceased. Thus, it was not relevant to give in evidence messages to deceased purporting to come from accused, stating that they were ready for him, where no effort was made to produce the messengers;[11] and where accused, when drinking, had threatened to knock down three and kill one man, it is error to exclude the part relating to the knocking down, since the threat as a whole might be mere braggadocio.[12] The fact that accused had made an unsuccessful attempt to rob a certain person, and threatened to murder him, is not

[5] *People* v. *Gosch,* 82 Mich. 22, 46 N. W. 101.

[6] *Le Beau* v. *People,* 34 N. Y. 223.

[7] *Morris* v. *State,* 146 Ala. 66, 41 So. 274.

[8] *People* v. *Dice,* 120 Cal. 189, 52 Pac. 477.

[9] *Davis* v. *State,* 126 Ala. 44, 28 So. 617; *State* v. *Pollard,* 132 Mo. 288, 34 S. W. 29; *Wilson* v. *State,* 128 Ala. 17, 29 So. 569.

[10] *People* v. *Fitzgerald,* 138 Cal. 39, 70 Pac. 1014; *State* v. *Exum,* 138 N. C. 599, 50 S. E. 283; *State* v. *Wong Gee,* 35 Or. 276, 57 Pac. 914. See *People* v. *Lee Chuck,* 74 Cal. 30, 15 Pac. 322; *Burgess* v. *State,* 93 Ga. 304, 20 S. E. 331; *Leach* v. *People,* 53 Ill. 311; *State* v. *Brown,* 67 Iowa, 289, 25 N. W. 248; *Nichols* v. *Com.* 11 Bush, 575; *People* v. *Evans,* — Cal. —, 41 Pac. 444; *State* v. *Horne,* 9 Kan. 119; *State* v. *Oliver,* 43 La. Ann. 1003, 10 So. 201; *State* v. *Guy,* 69 Mo. 430; *Taylor* v. *State,* 135 Ga. 622, 70 S. E. 237; *Wheeler* v. *State,* — Tex. Crim. Rep. —, 136 S. W. 68; *Hurley* v. *Territory,* — Ariz. —, 108 Pac. 222; *Hardy* v. *Com.* 110 Va. 910, 67 S. E. 522.

[11] *Mitchell* v. *State,* 71 Ga. 128.

[12] *People* v. *Curtis,* 52 Mich. 616, 18 N. W. 385.

relevant to show that accused was present at the murder of such person subsequently committed;[13] nor is it relevant to show that defendant had been armed, and once threatened, laughingly, to kill his brother or kill somebody before Saturday night, where there were no circumstances connecting his being armed with the killing, nor any pretense that he and deceased were not on good terms when the remarks were made.[14]

§ 908. Impersonal and conditional threats by accused.—The relevancy of the threats is not affected by the fact that they are impersonal or conditional, where the circumstances show that they were directed towards or included the deceased. Thus, it is relevant to show that previous to the homicide, in speaking of his father, the accused remarked that he did not know but that he should kill someone in a week;[1] to show that accused said he was going to kill a man before sundown;[2] to show that after a difficulty in the earlier part of the day, accused said: "I will see you later;"[3] to show that accused said to deceased, who was in front of him: "Stop there, or I will kill you;"[4] and to show that accused had threatened deceased if he caught him on his side of the road.[5]

The principle is not affected because the threat also involves the accused;[6] but the burden of proof is on the prosecution to show that the impersonal or indefinite threat was directed

[13] *Com.* v. *Farrell,* 187 Pa. 408, 41 Atl. 382, 11 Am. Crim. Rep. 468.

[14] *Strange* v. *State,* 38 Tex. Crim. Rep. 280, 42 S. W. 551.

[1] *State* v. *Hoyt,* 47 Conn. 518, 36 Am. Rep. 89.

[2] *Hodge* v. *State,* 26 Fla. 11, 7 So. 593; *Ford* v. *State,* 71 Ala. 385; *Jones* v. *State,* 76 Ala. 8; *King* v. *State,* 89 Ala. 146, 7 So. 750; *Johnson* v. *Com.* 9 Bush, 224.

[3] *Drake* v. *State,* 110 Ala. 9, 20 So. 450.

[4] *Howard* v. *Com.* 24 Ky. L. Rep. 612, 69 S. W. 721.

[5] *State* v. *Rose,* 129 N. C. 575, 40 S. E. 83.

[6] *State* v. *Fitzgerald,* 130 Mo. 407, 32 S. W. 1113; *State* v. *Russell,* 91 N. C. 624; *State* v. *Ellis,* 101 N. C. 765, 9 Am. St. Rep. 49, 7 S. E. 704; *Mimms* v. *State,* 16 Ohio

toward the deceased.[7] Thus, a statement of accused, made to witness, "You are mad now, but you are not half as mad as I was last night, and if I had found the party I was looking for, I expect I would be in jail now," is irrelevant, in the absence of facts showing that the remark concerned the deceased.[8] It is irrelevant to permit deceased's brother to testify that accused had asked him if he had ever heard that accused had charged a man for a drink of water, and, on being answered affirmatively, accused continued that he would kill any person who said he had charged a man for a drink of water, where deceased's name was not mentioned.[9] It is irrelevant to permit the witness who heard the threats to testify that in his opinion they were directed towards deceased.[10]

Conditional threats against any person who had done or might do a certain act are relevant where it is shown that deceased did the act named, or brought himself within the condition. Thus, it is relevant to show that accused had stated that he would kill deceased if she did not do what he wanted her to do;[11] to show that accused threatened to kill deceased if he did not marry a certain young lady;[12] to show that ac-

St. 226; *Jones* v. *State,* 4 Tex. App. 436; *Simms* v. *State,* 10 Tex. App. 131; *Mathis* v. *State,* 34 Tex. Crim. Rep. 39, 28 S. W. 817; *Benedict* v. *State,* 14 Wis. 423. See *Roland* v. *State,* 105 Ala. 41, 17 So. 99; *Com.* v. *Madan,* 102 Mass. 1; *Moore* v. *People,* 26 Colo. 213, 57 Pac. 857; *Starr* v. *State,* 160 Ind. 661, 67 N. E. 527; *Barnes* v. *Com.* 24 Ky. L. Rep. 1143, 70 S. W. 827; *Davis* v. *State,* — Tex. Crim. Rep. —, 56 S. W. 53; *De la Garza* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 484; *Brown* v. *State,* 43 Tex. Crim. Rep. 293, 65 S. W. 529; *Holloway* v. *State,* 45 Tex. Crim. Rep. 303, 77 S. W. 14.

[7] *Holley* v. *State,* 39 Tex. Crim. Rep. 301, 46 S. W. 39; *Hall* v. *State,* 43 Tex. Crim. Rep. 257, 64 S. W. 248.

[8] *McMahon* v. *State,* 46 Tex. Crim. Rep. 540, 81 S. W. 296.

[9] *Melton* v. *State,* 47 Tex. Crim. Rep. 451, 83 S. W. 822; *Gaines* v. *State,* — Tex. Crim. Rep. —. 53 S. W. 623.

[10] *Johnson* v. *Com.* 9 Bush. 224.

[11] *Barnes* v. *State,* 134 Ala. 36, 32 So. 670.

[12] *Jarvis* v. *State,* 138 Ala. 17, 34 So. 1025.

cused had threatened to kill any man "who fooled with Mandy Smith;" [13] to show that accused had threatened to kill anybody "who hits M. T."[14] The fact that the jury may not believe that the deceased did the act upon which the threat was conditioned does not affect the relevancy of the threat.[15]

§ 909. Threats by accused against classes of persons.— Threats by accused against a class of persons prima facie referable to the deceased, though his name is not mentioned, are admissible against the accused.[1] Thus, it is relevant to show threats of violence, by the accused, shortly before the homicide, against policemen, though they were not directed against the deceased himself; [2] to show that accused threatened to kill anyone found in the company of a certain lady; [3] to show threats against all who might be concerned in the arrest of accused; [4] to show threats against the family of which deceased was a member; [5] and to show threats against the race to which deceased belonged.[6]

But it is not relevant to show threats against a member of the family other than the deceased, unless the threats are such

[13] *Mathis* v. *State*, 34 Tex. Crim. Rep. 39, 28 S. W. 817.

[14] *Jordan* v. *State*, 79 Ala. 9.

[15] *People* v. *Simmons*, 7 Cal. App. 559, 95 Pac. 48. See *Hardy* v. *Com.* 110 Va. 910, 67 S. E. 522.

[1] *Harrison* v. *State*, 79 Ala. 29.

[2] *Dixon* v. *State*, 13 Fla. 636; *State* v. *Grant*, 79 Mo. 113, 49 Am. Rep. 218. See *Palmer* v. *People*, 138 Ill. 356, 32 Am. St. Rep. 146, 28 N. E. 130.

[3] *Brown* v. *State*, 105 Ind. 385, 5 N. E. 900; *Com.* v. *Britton*, Campb. (Pa.) 513, 3 Legal Gaz. 26; *Mathis* v. *State*, 34 Tex. Crim. Rep. 39, 28 S. W. 817.

[4] *Parker* v. *State*, 136 Ind. 284, 35 N. E. 1105.

[5] *State* v. *Belton*, 24 S. C. 185, 58 Am. Rep. 245. See *Anderson* v. *State*, 79 Ala. 5; *People* v. *Graig*, 111 Cal. 460, 44 Pac. 186; *People* v. *Gross*, 123 Cal. 389, 55 Pac. 1054; *People* v. *Bezy*, 67 Cal. 223, 7 Pac. 643, 6 Am. Crim. Rep. 508; *Sebastian* v. *State*, 41 Tex. Crim. Rep. 248, 53 S. W. 875; *Hurley* v. *Territory*, — Ariz. —, 108 Pac. 222.

[6] *Anderson* v. *State*, 15 Tex. App. 447; *Thompson* v. *State*, 55 Ga. 47; *State* v. *Gallehugh*, 89 Minn. 212, 94 N. W. 723; *Harris* v. *State*, 109 Ga. 280, 34 S. E. 583.

that they exhibit accused's feelings toward the deceased. Thus, threats against a brother of the deceased are not relevant,[7] but where the threat was directed against the wife and daughter of deceased, it was held relevant, as showing malice against the deceased himself.[8]

§ 910. Threats of accused against third persons.—As a general rule, threats of accused uttered against third persons are not relevant on a charge of homicide, where the deceased himself was not threatened,[1] unless offered as a part of the *res gestæ*.[2] But when the circumstances are such that the threats, though made to third persons, tend to show malice toward the deceased, then such threats are relevant. Thus, it is relevant to show that accused made the threat to a woman with whom both accused and deceased were intimate;[3] to show that accused had threatened to kill the father, and had offered money to have him killed, on charge for killing the sons as they left the father's home during the night;[4] to show that accused had threatened to kill another at a place designated and in a manner described, which corresponded to the place at and the manner in which deceased was killed, as tending directly to estab-

[7] *People* v. *Bezy*, 67 Cal. 223, 7 Pac. 643, 6 Am. Crim. Rep. 508; *Shaw* v. *State*, 79 Miss. 21, 30 So. 42, 12 Am. Crim. Rep. 616.

[8] *Moore* v. *State*, 31 Tex. Crim. Rep. 234, 20 S. W. 563; *Gravely* v. *State*, 45 Neb. 878, 64 N. W. 452; *State* v. *Kohne*, 48 W. Va. 335, 37 S. E. 553.

[1] *People* v. *Bezy*, 67 Cal. 223, 7 Pac. 643, 6 Am. Crim. Rep. 508; *State* v. *Weaver*, 57 Iowa, 730, 11 N. W. 675; *State* v. *Laque*, 41 La. Ann. 1070, 6 So. 787; *Abernethy* v. *Com.* 101 Pa. 322; *Ogeltree* v. *State*, 28 Ala. 693; *Ford* v. *State*, 71 Ala. 385; *State* v. *Barfield*, 29 N. C. (7 Ired. L.) 299; *Carr* v. *State*, 23 Neb. 749, 37 N. W. 630.

[2] *Killins* v. *State*, 28 Fla. 313, 9 So. 711.

[3] *Shackleford* v. *State*, 79 Ala. 26. See *Woolfolk* v. *State*, 85 Ga. 69, 11 S. E. 814.

[4] *Rawlins* v. *State*, 124 Ga. 31, 52 S. E. 1, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 A. & E. Ann. Cas. 783; *Turner* v. *State*, 4 Lea, 206.

lish the guilt of accused;[5] to show that a conspiracy existed, when the third person threatened was killed at the same time as the deceased;[6] to show that accused had threatened a person who had attempted to alleviate the pain suffered by deceased after the fatal assault;[7] to sho wa subsequent threat by accused against a third person who was a witness of the homicide.[8]

The question of whether or not the threat made to the third person included the deceased is a question of fact for the jury, to be determined from all the circumstances in the case.[9]

§ 911. Remoteness of threats in homicide by the accused.—The relevancy of threats as evidence against the accused is not affected by the fact that they were near or remote to the homicide in question,[1] as the length of time intervening is a circumstance to be considered by the jury in determining whether or not there was a connection between the threat and the homicidal act.[2] The length of time intervening does not affect the relevancy of the testimony; but its nearness or remoteness to the act is a circumstance affecting its weight and credibility.[3]

[5] *Com.* v. *Snell,* 189 Mass. 12, 3 L.R.A.(N.S.) 1019, 75 N. E. 75.

[6] *Woolfolk* v. *State,* 85 Ga. 69, 11 S. E. 814; *Slade* v. *State,* 29 Tex. App. 381, 16 S. W. 253.

[7] *Snodgrass* v. *Com.* 89 Va. 679, 17 S. E. 238. See also *State* v. *Partlow,* 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14.

[8] *Roma* v. *State,* 55 Tex. Crim. Rep. 344, 116 S. W. 598.

[9] *Newton* v. *State,* 92 Ala. 33, 9 So. 404.

[1] *State* v. *Glahn,* 97 Mo. 679, 11 S. W. 260.

[2] *State* v. *Lee,* 58 S. C. 335, 36 S. E. 706.

[3] *Abbott* v. *Com.* 24 Ky. L. Rep. 148, 68 S. W. 124; *State* v. *Hoyt,* 46 Conn. 330; *Goodwin* v. *State,* 96 Ind. 550; *Pulliam* v. *State,* 88 Ala. 1, 6 So. 839; *Rains* v. *State,* 88 Ala. 91, 7 So. 315; *Griffin* v. *State,* 90 Ala. 596, 8 So. 670; *Pate* v. *State,* 94 Ala. 14, 10 So. 665; *Phillips* v. *State,* 62 Ark. 119, 34 S. W. 539; *United States* v. *Neverson,* 1 Mackey, 152; *Hodge* v. *State,* 26 Fla. 11, 7 So. 593; *Everett* v. *State,* 62 Ga. 65; *Jefferds* v. *People,* 5 Park. Crim. Rep. 522; *State* v. *Campbell,* 35 S. C. 28, 14 S. E. 292; *McCay* v. *State,* 27 Tex. App. 415, 11 S. W. 454; *State* v. *Brad-*

§ 912. Threats by deceased against the accused.—Threats uttered by the deceased against the accused are not relevant as justification for the homicide, unless they tend to show necessity for self-defense.[1] Where there is no doubt that the accused was the aggressor, such threats are irrelevant.[2] And such threats are always irrelevant where it is clear that they could have had no possible effect on the accused, such as creating in his mind a fear of the deceased, or that the assault was not made in self-defense.[3] Such threats, whether communicated or not communicated (unless accompanied or followed by such hostile demonstrations or overt acts as naturally induce a reasonable belief in the mind of the accused that he is in danger of his life or serious bodily harm), are irrelevant when not a part of the *res gestæ*, or where there is no doubt who made the assault,[4] or where it is clear, from all the evi-

ley, 67 Vt. 465, 32 Atl. 238. But see contra, *Mackmasters* v. *State*, 81 Miss. 374, 33 So. 2; *Harrison* v. *State*, 79 Ala. 29; *Harris* v. *State*, 109 Ga. 280, 34 S. E. 583.

[1] *Rutledge* v. *State*, 88 Ala. 85, 7 So. 335; *Gilmore* v. *State*, 141 Ala. 51, 37 So. 359; *Dunn* v. *State*, 143 Ala. 67, 39 So. 147; *Green* v. *State*, 69 Ala. 6; *Steele* v. *State*, 33 Fla. 348, 14 So. 841; *Jenkins* v. *State*, 80 Md. 72, 30 Atl. 566; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Hinson* v. *State*, 66 Miss. 532, 6 So. 463; *Johnson* v. *State*, 54 Miss. 430; *Holly* v. *State*, 55 Miss. 424; *State* v. *Taylor*, 64 Mo. 358; *Territory* v. *Thomason*, 4 N. M. 154, 13 Pac. 223; *People* v. *Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486; *State* v. *Byrd*, 121 N. C. 684, 28 S. E. 353; *Campbell* v. *State*, 111 Wis. 152, 86 N. W. 855.

[2] *Morrison* v. *Com.* 24 Ky. L. Rep. 2493, 67 L.R.A. 529, 74 S. W. 277; *Ragsdale* v. *State*, 134 Ala. 24, 32 So. 674; *Steele* v. *State*, 33 Fla. 348, 14 So. 841; *State* v. *Fontenot*, 48 La. Ann. 305, 19 So. 111; *Oden* v. *State*, — Miss. —, 27 So. 992; *State* v. *Alexander*, 66 Mo. 148; *State* v. *Smith*, 164 Mo. 567, 65 S. W. 270; *Territory* v. *Thomason*, 4 N. M. 154, 13 Pac. 223; *Mealer* v. *State*, 32 Tex. Crim. Rep. 102, 22 S. W. 142.

[3] *State* v. *McGonigle*, 14 Wash. 594, 45 Pac. 20; *Com.* v. *Lenox*, 3 Brewst. (Pa.) 249. See *Ross* v. *State*, 8 Wyo. 351, 57 Pac. 924.

[4] *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *Smith* v. *State*, 25 Fla. 517, 6 So. 482; *Steele* v. *State*, 33 Fla. 348, 14 So. 841; *Wilson* v. *State*, 140 Ala. 43, 37 So. 93; *Carroll* v. *State*, 23 Ala. 28, 58 Am. Dec. 282; *Hughey* v. *State*, 47 Ala. 97; *Roberts* v. *State*, 68 Ala. 156; *Burke* v. *State*, 71 Ala. 377;

dence, that the accused could have avoided killing deceased, had he chosen to do so.[5]

However, the exceptions that render them relevant are almost as numerous as the grounds of irrelevancy. Evidence of threats in connection with overt acts indicating hostility and ill-will is relevant where they are of such a character as to impress the accused with a reasonable, well-grounded, and honest conviction that the killing of deceased is immediately necessary to save his life, or to prevent serious bodily harm, and they should be taken into consideration and weighed in connection with such acts, to determine the existence of a conviction of actual danger.[6] And the exception extends to

Rutledge v. *State*, 88 Ala. 85, 7 So. 335; *McPherson* v. *State*, 29 Ark. 231; *People* v. *Campbell*, 59 Cal. 243, 43 Am. Rep. 257; *Leigh* v. *People*, 113 Ill. 372; *Linga* v. *State*, 29 Ga. 470; *Ellis* v. *State*, 152 Ind. 326, 52 N. E. 82; *State* v. *Casgrave*, 42 La. Ann. 753, 7 So. 714; *State* v. *Brooks*, 39 La. Ann. 817, 2 So. 498; *State* v. *Janvier*, 37 La. Ann. 644; *State* v. *Tasby*, 110 La. Ann. 121, 34 So. 300; *State* v. *Demareste*, 41 La. Ann. 617, 6 So. 136; *State* v. *Stewart*, 47 La. Ann. 410, 16 So. 945; *State* v. *Frierson*, 51 La. Ann. 706, 25 So. 396; *State* v. *Thomas*, 111 La. 804, 35 So. 914; *State* v. *Periaux*, 107 La. 601, 31 So. 1016; *Jenkins* v. *State*, 80 Md. 72, 30 Atl. 566; *Turpin* v. *State*, 55 Md. 463; *Guice* v. *State*, 60 Miss. 714; *Harris* v. *State*, 47 Miss. 318; *Holly* v. *State*, 55 Miss. 424; *Newcamb* v. *State*, 37 Miss. 383; *State* v. *Taylar*, 64 Mo. 358; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; *Territary* v. *Campbell*, 9 Mont. 16, 22 Pac. 121; *State* v. *Hall*, 9 Nev. 58; *State* v. *Stewart*, 9 Nev. 120; *State* v. *Talla*, 72 N. J. L. 515, 3 L.R.A.(N.S.) 523, 62 Atl. 675; *Real* v. *People*, 55 Barb. 551; *State* v. *Hensley*, 94 N. C. 1021; *State* v. *Kenyan*, 18 R. I. 217, 26 Atl. 199; *United States* v. *Leighton*, 3 Dak. 29, 13 N. W. 347; *Irwin* v. *State*, 43 Tex. 236; *People* v. *Halliday*, 5 Utah, 467, 17 Pac. 118; *State* v. *Cushing*, 17 Wash. 544, 50 Pac. 512; *Allisan* v. *United States*, 160 U. S. 203, 40 L. ed. 395, 16 Sup. Ct. Rep. 252, 10 Am. Crim. Rep. 432.

[5] *Hays* v. *Cam.* 12 Ky. L. Rep. 611, 14 S. W. 833.

[6] *De Arman* v. *State*, 71 Ala. 351; *Pritchett* v. *State*, 22 Ala. 39, 58 Am. Dec. 250; *Cleveland* v. *State*, 86 Ala. 1, 5 So. 426; *People* v. *Tamkin*, 62 Cal. 468; *Garner* v. *State*, 28 Fla. 114, 29 Am. St. Rep. 232, 9 So. 835; *Taylor* v. *State*, 121 Ga. 348, 49 S. E. 303; *Walker* v. *People*, 133 Ill. 110, 24 N. E. 424; *Campbell* v. *People*, 16 Ill. 17, 61 Am. Dec. 49; *Enlow* v. *State*, 154 Ind. 664, 57 N. E. 539; *Wood* v. *State*, 92 Ind. 269; *De Forest* v. *State*, 21 Ind. 23; *Rapp*

the threats and hostile acts of a third person whom the deceased had mistaken for the accused.[7] Such threats are relevant where the well-grounded conviction of the accused that he was in danger of his life or great bodily harm might excuse the act, or reduce the crime from murder to manslaughter.[8] They are also relevant to show the animus or disposition of the de-

v. *Com.* 14 B. Mon. 614; *Carico* v. *Com.* 7 Bush, 124; *State* v. *Dee,* 14 Minn. 35, Gil. 27; *State* v. *Glahn,* 97 Mo. 679, 11 S. W. 260; *State* v. *Harrod,* 102 Mo. 590, 15 S. W. 373; *State* v. *Harris,* 59 Mo. 550; *State* v. *Rider,* 90 Mo. 54, 1 S. W. 825; *State* v. *Alexander,* 66 Mo. 148; *State* v. *Harrington,* 12 Nev. 125; *People* v. *Walworth,* 4 N. Y. Crim. Rep. 355; *State* v. *Shields,* 1 Ohio Dec. (Reprint), 17; *State* v. *Snelbaker,* 8 Ohio Dec. (Reprint), 466; *Souey* v. *State,* 13 Lea, 472; *Sims* v. *State,* 9 Tex. App. 586; *Gatling* v. *State,* — Tex. Crim. Rep. —, 76 S. W. 471; *White* v. *Territory,* 3 Wash. Terr. 397, 19 Pac. 37; *State* v. *Zeigler,* 40 W. Va. 593, 21 S. E. 763, 10 Am. Crim. Rep. 463; *State* v. *Evans,* 33 W. Va. 417, 10 S. E. 792. See *State* v. *Donahoe,* 78 Iowa, 486, 43 N. W. 297; *Aiken* v. *State,* — Tex. Crim. Rep. —, 64 S. W. 57.

[7] *Cleveland* v. *State,* 86 Ala. 1, 5 So. 426.

[8] *Wallace* v. *United States,* 162 U. S. 466, 40 L. ed. 1039, 16 Sup. Ct. Rep. 859; *Eiland* v. *State,* 52 Ala. 322; *Powell* v. *State,* 52 Ala. 1; *Noles* v. *State,* 26 Ala. 31, 62 Am. Dec. 711; *Harkness* v. *State,* 129 Ala. 71, 30 So. 73; *Palmore* v. *State,* 29 Ark. 248; *Atkins* v. *State,* 16 Ark. 568; *People* v. *Anderson,* 39 Cal. 703; *People* v. *Lombard,* 17 Cal. 316; *People* v. *Williams,* 17 Cal. 142; *People* v. *Scoggins,* 37 Cal. 676; *Keener* v. *State,* 18 Ga. 194, 63 Am. Dec. 269; *Howell* v. *State,* 5 Ga. 48; *Monroe* v. *State,* 5 Ga. 85; *Campbell* v. *People,* 6 Ill. 17, 61 Am. Dec. 49; *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 322; *Cornelius* v. *Com.* 15 B. Mon. 539; *Holloway* v. *Com.* 11 Bush, 344; *Campbell* v. *Com.* 88 Ky. 402, 21 Am. St. Rep. 348, 11 S. W. 290; *State* v. *Robertson,* 30 La. Ann. 340; *State* v. *McCoy,* 29 La. Ann. 593; *Brownell* v. *People,* 38 Mich. 732; *State* v. *Spaulding,* 34 Minn. 361, 25 N. W. 793; *Hawthorne* v. *State,* 61 Miss. 749; *Johnson* v. *State,* 54 Miss. 430; *Johnson* v. *State,* — Miss. —, 27 So. 880; *Long* v. *State,* 52 Miss. 23; *State* v. *Harris,* 59 Mo. 550; *State* v. *Downs,* 91 Mo. 19, 3 S. W. 219; *State* v. *Bryant,* 55 Mo. 75; *State* v. *Keene,* 50 Mo. 357; *State* v. *Harris,* 73 Mo. 287; *People* v. *Rector,* 19 Wend. 569; *People* v. *Taylor,* 177 N. Y. 237, 69 N. E. 534; *State* v. *Matthews,* 78 N. C. 526; *State* v. *Turpin,* 77 N. C. 473, 24 Am. Rep. 455; *State* v. *Dodson,* 4 Or. 64; *Horbach* v. *State,* 43 Tex. 242, 1 Am. Crim. Rep. 330; *Alexander* v. *State,* 25 Tex. App. 260, 8 Am. St. Rep. 438, 7 So. 867; *State* v. *Abbott,* 8 W. Va. 741; *United States* v. *Rice,* 1 Hughes, 560, Fed.

ceased,[9] or to rebut the inference of malice.[10] They are also relevant when there is a doubt as to who began the difficulty in which the killing occurred.[11]

When such threats are sought to be introduced as excuse or justification, the accused must first show that he heard them or had been informed of them, as otherwise they afford no justification or excuse for the homicidal act.[12]

Uncommunicated threats are relevant to show the feeling and disposition of the deceased toward the accused;[13] to show

Cas. No. 16,153; *Reg.* v. *Weston*, 14 Cox, C. C. 346; *Meade's Case*, 1 *Lewin*, C. C. 184.

[9] *Fitzhugh* v. *State*, 13 Lea, 258; *People* v. *Gaimari*, 176 N. Y. 84, 68 N. E. 112; *Poole* v. *State*, 45 Tex. Crim. Rep. 348, 76 S. W. 565; *State* v. *Clifford*, 59 W. Va. 1, 52 S. E. 981. See *Williams* v. *United States*, 4 Ind. Terr. 269, 69 S. W. 871.

[10] *State* v. *Clifford*, 59 W. Va. 1, 52 S. E. 981.

[11] *People* v. *Thomson*, 92 Cal. 506, 28 Pac. 589; *Brown* v. *State*, 55 Ark. 593, 18 S. W. 1051; *Lee* v. *State*, 72 Ark. 436, 81 S. W. 385; *Burroughs* v. *United States*, 6 Ind. Terr. 168, 90 S. W. 8; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; *State* v. *Shadwell*, 26 Mont. 52, 66 Pac. 508; *Bethune* v. *State*, 49 Tex. Crim. Rep. 166, 90 S. W. 1014; *Wiggins* v. *Utah*, 93 U. S. 465, 23 L. ed. 941, 4 Am. Crim. Rep. 494.

[12] *Keener* v. *State*, 18 Ga. 194, 63 Am Dec. 269. See *Powell* v. *State*, 19 Ala. 577; *People* v. *Henderson*, 28 Cal. 465; *People* v. *Lombard*, 17 Cal. 316; *Hughey* v. *State*, 47 Ala. 97; *Hoye* v. *State*, 39 Ga. 718; *Peterson* v. *State*, 50 Ga. 142; *State* v. *Leonard*, 6 La. Ann. 420; *State* v. *Mullen*, 14 La. Ann. 577; *Newcomb* v. *State*, 37 Miss. 383; *State* v. *Jackson*, 17 Mo. 544, 59 Am. Dec. 281; *Evans* v. *State*, 44 Miss. 762; *Harris* v. *State*, 47 Miss. 318; *State* v. *Hays*, 23 Mo. 287; *State* v. *Hall*, 9 Nev. 58; *Myers* v. *State*, 33 Tex. 525.

[13] *Keener* v. *State*, 18 Ga. 194, 63 Am. Dec. 269. But see *People* v. *Arnold*, 15 Cal. 476; *Roberts* v. *State*, 68 Ala. 156; *Green* v. *State*, 69 Ala. 6; *Babcock* v. *People*, 13 Colo. 515, 22 Pac. 817; *Davidson* v. *People*, 4 Colo. 145; *State* v. *Powell*, 5 Penn. (Del.) 24, 61 Atl. 966; *McCoy* v. *People*, 175 Ill. 224, 51 N. E. 777; *Bell* v. *State*, 66 Miss. 195, 5 So. 389; *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492; *State* v. *Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *State* v. *Dodson*, 4 Or. 64; *Little* v. *State*, 6 Baxt. 493; *Potter* v. *State*, 85 Tenn. 88, 1 S. W. 614; *State* v. *Evans*, 33 W. Va. 417, 10 S. E. 792; *State* v. *Abbott*, 8 W. Va. 743; *White* v. *Territory*, 3 Wash. Terr. 397, 19 Pac. 37; *State* v. *Sullivan*, 51 Iowa, 142, 50 N. W. 572; *Dupree* v. *State*, 33 Ala. 380, 73 Am. Dec. 422; *Sinclair* v. *State*, 87 Miss. 330, 2 L.R.A.

whether or not the killing was malicious or in self-defense;[14] to show who was the aggressor,[15] or as tending to show who was the aggressor;[16] or where they tend to show that the de-

(N.S.) 553, 112 Am. St. Rep. 446, 39 So. 522; *People* v. *Rodawald*, 177 N. Y. 408, 70 N. E. 1; *State* v. *Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; *State* v. *Abbott*, 8 W. Va. 741; *Wiggins* v. *Utah*, 93 U. S. 467, 23 L. ed. 942, 4 Am. Crim. Rep. 465.

Such threats are also relevant to corroborate threats which have been communicated to the accused. See *Roberts* v. *State*, 68 Ala. 156; *Davidson* v. *People*, 4 Colo. 145; *Holler* v. *State*, 37 Ind. 57, 10 Am. Rep. 74; *Cornelius* v. *Com.* 15 B. Mon. 539; *State* v. *Williams*, 40 La. Ann. 168, 3 So. 629; *State* v. *Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *Levy* v. *State*, 28 Tex. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596; *Evans* v. *State*, 58 Ark. 47, 22 S. W. 1026.

[14] *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492.

[15] *Roberts* v. *State*, 68 Ala. 156; *Sparks* v. *Com.* 89 Ky. 644, 20 S. W. 167; *Miller* v. *Com.* 89 Ky. 653, 10 S. W. 137; *Sinclair* v. *State*, 87 Miss. 330, 2 L.R.A.(N.S.) 553, 112 Am. St. Rep. 446, 39 So. 522; *State* v. *Alexander*, 66 Mo. 148; *State* v. *Lee*, 66 Mo. 165; *Levy* v. *State*, 28 Tex. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596; *State* v. *Thawley*, 4 Harr. (Del.) 562; *Howell* v. *State*, 5 Ga. 48; *Campbell* v. *People*, 16 Ill. 17, 61 Am. Dec. 49; *Schnier* v. *People*, 23 Ill. 17; *Williams* v. *People*, 54 Ill. 422; *De Forest* v. *State*, 21 Ind. 23; *Rapp* v. *Com.* 14 B. Mon. 615; *Com.* v. *Wilson*, 1 Gray, 337; *People* v. *Shorter*, 4 Barb. 460, 2 N. Y. 193, 51 Am. Dec. 286; *Patterson* v. *People*, 46 Barb. 625; *People* v. *Rector*, 19 Wend. 569.

[16] *State* v. *McNally*, 87 Mo. 644; *Burns* v. *State*, 49 Ala. 370, 1 Am. Crim. Rep. 324; *Brown* v. *State*, 55 Ark. 593, 18 S. W. 1051; *People* v. *Farley*, 124 Cal. 594, 57 Pac. 571; *Davidson* v. *People*, 4 Colo. 145; *Wilson* v. *State*, 30 Fla. 234, 17 L.R.A. 654, 11 So. 556; *Mayfield* v. *State*, 110 Ind. 591, 11 N. E. 618; *Hart* v. *Com.* 85 Ky. 77, 7 Am. St. Rep. 576, 2 S. W. 673; *Prine* v. *State*, 73 Miss. 838, 19 So. 711; *Bell* v. *State*, 66 Miss. 192, 5 So. 389; *State* v. *Spencer*, 160 Mo. 118, 83 Am. St. Rep. 463, 60 S. W. 1048; *State* v. *Bailey*, 94 Mo. 311, 7 S. W. 425; *People* v. *Walworth*, 4 N. Y. Crim. Rep. 355; *People* v. *Rodawald*, 177 N. Y. 408, 70 N. E. 1; *State* v. *Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *State* v. *Tarter*, 26 Or. 38, 37 Pac. 53; *Little* v. *State*, 6 Baxt. 491; *Reeves* v. *State*, 34 Tex. Crim. Rep. 483, 31 S. W. 382; *Wiggins* v. *Utah*, 93 U. S. 465, 23 L. ed. 941, 4 Am. Crim. Rep. 465; *State* v. *Bodie*, 33 S. C. 117, 11 S. E. 624. See *Lingo* v. *State*, 29 Ga. 470; *Hoye* v. *State*, 39 Ga. 718; *Pritchett* v. *State*, 22 Ala. 39, 58 Am. Dec. 250; *Pitman* v. *State*, 22 Ark. 354; *People* v. *Scoggins*, 37 Cal. 677; *Holler* v. *State*, 37 Ind. 57, 10 Am. Rep. 74; *Cornelius* v.

ceased would in all probability attempt to carry his threats into execution when opportunity occurred.[17] Impersonal threats by the deceased are relevant where it is shown that they refer to the accused;[18] it is relevant to show conditional threats if the accused comes within the condition;[19] and threats by deceased, against the family of the accused, are relevant where they are sufficiently definite to show malice or ill-will against the accused himself.[20]

It appears to be clearly established by the great weight of authority that threats by the deceased against the accused are never relevant as justification or excuse for the act; that they are never relevant where it is clear they could not have affected the accused by way of creating a fear of the deceased; that they are never relevant where there is no doubt that the accused was the aggressor, or where it is clear that the homicide could have been avoided, and the accused chosen so to do.

But they are relevant when they tend to show self-defense; when they are a part of the *res gestæ;* when it is shown that they put the accused in fear of the deceased, and he claims that he killed deceased to save his own life, or to prevent great bodily harm; when they tend to reduce the crime from murder to manslaughter; when there is doubt as to who was

Com. 15 B. Mon. 539; *State* v. *Goodrich,* 19 Vt. 116, 47 Am. Dec. 676.

See *Johnson* v. *State,* 66 Miss. 189, 5 So. 95.

[17] *Stokes* v. *People,* 53 N. Y. 164, 13 Am. Rep. 492; *Holloway* v. *Com.* 11 Bush, 344; *State* v. *McNeely,* 34 La. Ann. 1022. See *Sims* v. *State,* 9 Tex. App. 586; *Wilson* v. *State,* 30 Fla. 234, 17 L.R.A. 654, 11 So. 556; *People* v. *Arnold,* 15 Cal. 476.

[18] *Heffington* v. *State,* 41 Tex. Crim. Rep. 315, 54 S. W. 755; *People* v. *Farley,* 124 Cal. 594, 57 Pac. 571; *Henson* v. *State,* 120 Ala. 316, 25 So. 23; *People* v. *Kennedy,* 51 N. Y. S. R. 811, 22 N. Y. Supp. 267; *Pitts* v. *State,* 140 Ala. 70, 37 So. 101; *Harbour* v. *State,* 140 Ala. 103, 37 So. 330; *Bell* v. *State,* 84 Ark. 128, 104 S. W. 1108; *People* v. *Quimby,* 6 Cal. App. 482, 92 Pac. 493.

[19] *Territory* v. *Hall,* 10 N. M. 545, 62 Pac. 1083.

[20] *State* v. *Hopper,* 142 Mo. 478, 44 S. W. 272; *Wheeler* v. *Com.* 120 Ky. 697, 87 S. W. 1106.

the aggressor in bringing about the fatal difficulty; and when, although uncommunicated, they tend to corroborate communicated threats.

§ 913. Threats against deceased by third persons.— The general rule is that threats by third persons against the deceased are not relevant in a prosecution for the homicide.[1] But this rule is subject to the qualifications that where the third person is an accomplice or an accessory or acting in concert with the accused,[2] or where the threats uttered in the presence of accused are such as to require a denial, which he fails to make, then such threats are relevant evidence.[3] Also where threats of a third person are part of the *res gestæ*, or connect such third person with the homicide;[4] or where it is shown that such third person had armed himself and was hunting for the deceased, his threats against the deceased are relevant as

[1] *Com.* v. *Abbott*, 130 Mass. 472; *Alston* v. *State*, 63 Ala. 178; *State* v. *Beaudet*, 53 Conn. 536, 55 Am. Rep. 155, 4 Atl. 237, 7 Am. Crim. Rep. 84; *Woolfolk* v. *State*, 81 Ga. 551, 8 S. E. 724; *Jones* v. *State*, 64 Ind. 474; *Stroud* v. *Com.* 14 Ky. L. Rep. 179, 19 S. W. 976; *Cloud* v. *Com.* 7 Ky. L. Rep. 818; *State* v. *Laque*, 41 La. Ann. 1070, 6 So. 787; *State* v. *Crawford*, 99 Mo. 74, 12 S. W. 354; *State* v. *Duncan*, 28 N. C. (6 Ired. L.) 236; *Preston* v. *State*, 4 Tex. App. 186; *Boothe* v. *State*, 4 Tex. App. 202; *Walker* v. *State*, 6 Tex. App. 576; *Holt* v. *State*, 9 Tex. App. 571; *Wills* v. *State*, — Tex. Crim. Rep. —, 22 S. W. 969; *Henry* v. *State*, — Tex. Crim. Rep.—, 30 S. W. 802; *Buel* v. *State*, 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

[2] *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95; *State* v. *Gaylord*, 70 S. C. 415, 50 S. E. 20; *Gardner* v. *People*, 4 Ill. 83; *State* v. *McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599; *Bell* v. *State*, — Tex. Crim. Rep. —, 24 S. W. 644; *McCoy* v. *State*, 27 Tex. App. 415, 11 S. W. 454.

[3] *State* v. *Ellis*, 101 N. C. 765, 9 Am. St. Rep. 49, 7 S. E. 704; *Poole* v. *State*, 45 Tex. Crim. Rep. 348, 76 S. W. 565. See *Roma* v. *State*, 55 Tex. Crim. Rep. 344, 116 S. W. 598; *Ripley* v. *State*, 51 Tex. Crim. Rep. 126, 100 S. W. 943. But contra see *Hoffman* v. *Com.* 134 Ky. 726, 121 S. W. 690.

[4] *State* v. *Hawley*, 63 Conn. 47, 27 Atl. 417; *Morgan* v. *Com.* 14 Bush, 106.

See also *Buel* v. *State*, 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

part of the *res gestæ*.[5] But such threats, to be relevant, must be of such character that they show such continued hostility toward the deceased as to lead to the inference that such feeling continued down to the time of the homicide and furnished a motive for its commission.[6]

§ 914. Caution in admitting evidence of threats.—While the general rule is that every declaration which indicates, however vaguely and indefinitely, an intention upon the part of the threatener to inflict violence upon another,[1] is relevant, nevertheless, such threats must have a clear and an obvious relation to the particular homicide charged.[2] The accused is entitled to show all the surrounding circumstances under which the threats were made,[3] what occasioned them,[4] what was in his mind at the time he made the threats,[5] and his motive in uttering them.[6] Thus, where a witness testified that accused had said he would "have to kill the deceased," it is relevant for the accused to explain this statement by showing that he uttered the words because he anticipated, from threats made by the deceased and communicated to him, that he would be forced to kill deceased as a matter of self-defense.[7] A very different meaning can be attributed to accused's expression viewed from his standpoint, from that which naturally attaches to it, if the

[5] *Alexander* v. *United States,* 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350.

[6] *Com.* v. *Abbott,* 130 Mass. 472.

[1] *Rambo* v. *State,* — Tex. Crim. Rep. —, 69 S. W. 163.

[2] *Raines* v. *State,* 81 Miss. 489, 33 So. 19, 13 Am. Crim. Rep. 404.

[3] *People* v. *Curtis,* 52 Mich. 616, 18 N. W. 385; *Atkins* v. *State,* 16 Ark. 568; *People* v. *Eastwood,* 14 N. Y. 562; *Bolzer* v. *People,* 129 Ill. 112, 4 L.R.A. 579, 21 N. E. 818.

[4] *Utzman* v. *State,* 32 Tex. Crim. Rep. 426, 24 S. W. 412.

[5] *State* v. *Kirby,* 62 Kan. 436, 63 Pac. 752, 15 Am. Crim. Rep. 212; *Pratt* v. *State,* 50 Tex. Crim. Rep. 227, 96 S. W. 8.

[6] *Bolzer* v. *People,* 129 Ill. 112, 4 L.R.A. 579, 21 N. E. 818; *People* v. *Gaimari,* 176 N. Y. 84, 68 N. E. 112.

[7] *State* v. *Pruett,* 49 La. Ann. 283, 21 So. 842.

See *Haynes* v. *State,* 17 Ga. 465.

threat is permitted to stand without explanation.[8] And in addition to these things, it is important to observe: First, that the words supposed to be declaratory of criminal intention may have been misunderstood or misremembered; second, that it does not necessarily follow, because a man avows an intention or threatens to commit a crime, that such intention really exists in his mind; the words may have been uttered through bravado, or with a view of intimidating, annoying, extorting money, or other collateral objects; third, another person, really desirous of committing the offense, may have profited by the occasion of the threat, to avert suspicion from himself. An instance of this is given in the "Causes Célèbres." [9] A woman of extremely bad character and violent temper, in the open street, threatened a man who had done something to displease her, that she would "get his hams cut across for him." He was found dead a short time afterwards with his hams cut across. This was, of course, sufficient to excite suspicion against the female, who, according to the practice of continental tribunals at that time, was put to the torture, confessed the crime, and was executed. A person was, however, soon after taking into custody for some other offense, who confessed that he was the murderer; that, happening to be passing when the threat was uttered, he conceived the idea of committing the crime, as he knew the woman's bad character would be sure to tell against her. So, it must be recollected that the tendency of a threat or declaration of this nature is to frustrate its own accomplishment. By threatening a man, you put him on his guard, and force him to have recourse to such means of protection as the force of the law, or any extrajudicial powers which he may have at command, may be capable of affording him.[10]

[8] *State* v. *Pruett*, 49 La. Ann. 283, 21 So. 842.

[9] Causes Célèbres, 437.

[10] Wharton, Homicide, Bowlby's ed. 935.

§ 915. Circumstances showing preparation for crime.—Any circumstance showing that the accused contemplated or made preparation to commit a crime, where such conduct has an obvious connection with the crime, is relevant on the part of the prosecution. Thus, it is relevant to show that a short time prior to the homicide, accused proposed to exchange knives with the witness, assigning as a reason that his knife was too small;[1] to show that the accused had borrowed a knife from witness with a view to an expected difficulty, where it was also in evidence that the deceased was killed by a knife;[2] to show that accused urged a brother of deceased to meet him to give him his father's pistol;[3] to show that witness felt a pistol on accused's person just before the shooting, and asked him what he was going to do with it;[4] in cases where the evidence indicates death by poison, to show that accused purchased or had possession of poison.[5] And where it was already in evidence that accused was intimately associated with deceased, whom he had duped in her financial affairs, it was relevant to permit a witness, who was a hack driver, to testify that some months prior to the homicide, accused talked with him concerning putting a person into his hack and allowing the horses to run over a certain bluff into a lake, and to state that accused asked him what he would ask for his hack and team, as showing that, at the time of the conversation, accused contemplated committing the crime.[6] It is relevant to show an unsuccessful attempt

[1] *Ford* v. *State*, 71 Ala. 385.

[2] *Finch* v. *State*, 81 Ala. 41, 1 So. 565.

[3] *Burton* v. *State*, 107 Ala. 108, 18 So. 284. See *State* v. *Kinsauls*, 126 N. C. 1095, 36 S. E. 31; *Woodward* v. *State*, 42 Tex. Crim. Rep. 188, 58 S. W. 135; *Webb* v. *State*, 138 Ala. 53, 34 So. 1011; *McLean* v. *State*, 1 Shannon, Cas. 478.

[4] *Garlitz* v. *State*, 71 Md. 293, 4 L.R.A. 601, 18 Atl. 39.

[5] *Com.* v. *Hobbs*, 140 Mass. 443, 5 N. E. 158; *State* v. *Cole*, 94 N. C. 958; *People* v. *Ledwon*, 153 N. Y. 10, 46 N. E. 1046; *Levering* v. *Com.* 132 Ky. 666, 136 Am. St. Rep. 192, 117 S. W. 253, 19 A. & E. Ann. Cas. 140.

[6] *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63.

on the part of accused to insure the life of deceased without her knowledge;[7] to show, where accused's hostility was directed against deceased and another person jointly, that accused had such other person arrested and imprisoned on a trumped up charge, as showing preparation and creating opportunity for commission of the crime.[8]

But it seems that it is irrelevant, in explanation of the possession of a gun, for the accused to testify to a statement made, at the time he bought it, that it was his purpose to kill dogs,[9] or to show that people in his county generally carried pistols;[10] or to show that whenever he went armed, it was to some public gathering.[11] But the general weight of authority is that the accused may show all the circumstances connected with his possession of the weapon or any article that has an apparent connection with the crime charged. Thus, accused may show that his possession of the gun was for a lawful purpose and in no way connected with the deceased;[12] he may show that he was threatened by the deceased;[13] where testimony has been introduced tending to show possession of a gun prior to the killing, accused may show that it was impossible for him to have concealed or disposed of the gun prior to his arrest on the charge.[14] On a charge of poison he may show his reason for the purchase of the poison.[15]

It is to be noted, however, that while accused is permitted

[7] *Com.* v. *Crossmire,* 156 Pa. 304, 27 Atl. 40.

[8] *Hubby* v. *State,* 8 Tex. App. 597.

[9] *State* v. *Holcomb,* 86 Mo. 371.

[10] *Cresswell* v. *State,* 14 Tex. App. 1.

[11] *Pettis* v. *State,* 47 Tex. Crim. Rep. 66, 81 S. W. 312.

See *Gregory* v. *State,* 140 Ala. 16, 37 So. 259.

[12] *Moore* v. *State,* 44 Tex. Crim. Rep. 526, 72 S. W. 595; *Smith* v. *State,* 46 Tex. Crim. Rep. 267, 108 Am. St. Rep. 991, 81 S. W. 712, 936; *Aaron* v. *State,* 31 Ga. 167; *Fenwick* v. *State,* 63 Md. 239; *Cotton* v. *State,* 31 Miss. 504; *Taliaferro* v. *State,* 40 Tex. 523.

[13] *Hunter* v. *State,* 74 Miss. 515, 21 So. 305.

[14] *Burton* v. *State,* 107 Ala. 108, 18 So. 284.

[15] *People* v. *Cuff,* 122 Cal. 589, 55 Pac. 407.

to testify, in explanation of his possession of a gun, that he had been threatened by deceased, it is irrelevant to ask him why he happened to be carrying a revolver with which he shot deceased;[16] or to offer evidence that he carried a pistol, because a person, other than the deceased, who was not present at the homicide and who had taken no part therein, had threatened his life;[17] or that accused was in a state of mental excitement just prior to the homicide, arising out of quarrels with persons other than the deceased, and that he procured and carried the pistol on account of those other difficulties.[18] It would seem, however, that such testimony should be permitted to show that the possession of the gun had no reference to the deceased to rebut the inference of preparation with regard to the killing of deceased, as the rule is that malice is not to be inferred merely from the possession of a deadly weapon lawfully carried.[19]

Great caution should be observed in admitting in evidence circumstances that are incident to the ordinary relations of life, and giving to them an appearance of preparation, from the well-known fact that the existence of a prosecution tends to throw suspicion upon every act of the accused. Circumstances, trivial in themselves, take on an exaggerated character the moment that suspicion is directed toward a person accused of a crime, and because of this tendency, no circumstances should be admitted that cannot be shown to have a direct and obvious relevancy to the crime charged. The relevancy of the circumstances should appear at the time it is of-

[16] *State* v. *Kennade,* 121 Mo. 405, 26 S. W. 347.

[17] *State* v. *Taylor,* 126 Mo. 531, 29 S. W. 598.

[18] *State* v. *Anderson,* 4 Nev. 265.

[19] *Atkins* v. *State,* 16 Ark. 568; *Ex parte Wray,* 30 Miss. 673; *Raines* v. *State,* 81 Miss. 489, 33 So. 19, 13 Am. Crim. Rep. 404; *Donnellan* v. *Com.* 7 Bush, 676; *State* v. *Newton,* 4 Nev. 410. See *Cotton* v. *State,* 31 Miss. 504; *Klyce* v. *State,* 78 Miss. 450, 28 So. 827; *Williams* v. *United States,* 6 Ind. Terr. 1, 88 S. W. 334.

See *Melton* v. *State,* 47 Tex. Crim. Rep. 451, 83 S. W. 822.

fered in evidence. The practice of admitting evidence and relying upon the power of the court to withdraw it from the jury, should the court be convinced that it is irrelevant, cannot be too severely condemned.

Notwithstanding the withdrawal of the evidence, its effect still remains, and jurors being untrained in matters of discriminating between relevant and irrelevant evidence, the error is not cured.[20] Thus it was error to permit a witness for the prosecution to testify that, sometime prior to the homicide, he was in a blacksmith shop, when accused picked up a piece of iron, saying he wanted to put it into the head of a maul; and afterwards witness saw it under the buggy seat,—as tending to show that accused had struck deceased with a slung shot.[21] It was irrelevant, on a homicide prosecution, to permit testimony that accused, when gambling, had a custom of leaving the table and going outside, to show that accused had procured a pistol, when accused had explained his purpose in going out.[22]

§ 916. Circumstances showing ability and opportunity to commit crime.—The general rule is, that the guilt of the accused cannot be inferred from the fact that he had the ability or opportunity to commit the crime charged.[1] But there may be in the concrete case on trial circumstances where it becomes material to show that the accused could or could not commit the crime charged, to show his physical capacity or the lack of it, his technical skill or lack of it in crimes involving skill, his possession or lack of possession of means convenient

[20] *Drury* v. *Territory,* 9 Okla. 398, 60 Pac. 101, 13 Am. Crim. Rep. 300; *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357.

[21] *Ireland* v. *Com.* 22 Ky. L. Rep. 478, 57 S. W. 616.

[22] *State* v. *Shadwell,* 22 Mont. 559, 57 Pac. 281.

[1] *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357.

But see *Costelo* v. *Crowell,* 139 Mass. 591, 2 N. E. 698; *People* v. *Thiede,* 11 Utah, 241, 39 Pac. 837, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62.

or appropriate, or any other circumstances relevant to the issue on the question raised. Hence, as a general rule, ability and opportunity, or the lack of it, is some evidence of the probability that the accused did or did not commit the act charged, and circumstances may thus have a probative force in establishing the fact.[2] Thus, where the evidence against accused is entirely circumstantial, his conduct, situation, and locality, as affording him opportunity of knowing at what time the deceased left a certain place on the morning of the homicide, and whether or not it was an unusual occurrence for him to be at that place at that particular time, are circumstances which, though weak in themselves, are, nevertheless, relevant as showing knowledge and opportunity.[3] It is relevant on a homicide case to show accused's possession of means of committing the act in the manner in which it was committed,[4] to show, where there is testimony that the bullet which killed deceased was of a certain caliber, that accused had a gun of the same caliber in his possession on the night of the homicide;[5] to show, by a witness, who did not see the act, that a few minutes before it, the accused had a jack knife in his possession, where it is shown that deceased died from an incised wound, penetrating the heart, even though no person saw the weapon at the time the blow was struck;[6] to show that accused illustrated to witness a particular grip, by which he claimed that he could easily shut any body's wind off, it appearing that such grip was the same as described by the doctor in explaining how deceased was

[2] *Ingalls* v. *State*, 48 Wis. 647, 4 N. W. 785.

[3] *Campbell* v. *State*, 23 Ala. 44; *State* v. *Seymour*, 94 Iowa, 699, 63 N. W. 661.

[4] *State* v. *McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. Crim. Rep. 538.

[5] *State* v. *Barrett*, 40 Minn. 65, 41 N. W. 459; *De La Garza* v. *State*, — Tex. Crim. Rep. —, 61 S. W. 484; *People* v. *Higgins*, 127 Mich. 291, 86 N. W. 812; *State* v. *Aspara*, 113 La. 940, 37 So. 883; *Merrick* v. *State*, 63 Ind. 327.

[6] *People* v. *Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Jones* v. *State*, 137 Ala. 12, 34 So. 681; *Morgan* v. *Territory*, 16 Okla. 530, 85 Pac. 718.

strangled and how the bruises on her neck and head were made;[7] to show that accused had had experience with firearms;[8] to show, on a charge of homicide by producing an abortion, that defendant had previously issued a circular stating that he could be consulted in relation to such matters;[9] to show, where the evidence tended to establish death by fracture of the skull, that it was possible to fracture an infant's skull by pressure of the hands, to establish the fact that accused possessed the means by which the skull might have been crushed;[10] to show that accused was in the vicinity about the time the homicide is alleged to have been committed;[11] and special circumstances, not consistent with accused's innocence, together with a particular opportunity and a temptation to commit the crime charged, are to be considered in support of a verdict of guilty.[12] But the evidence of ability and opportunity must be that which has a direct bearing upon or serves to explain matters relevant to the crime charged. Thus it was error on a prosecution for homicide by the administration of arsenic to admit evidence that arsenic was found in the remains of a boy who had died four months previous to the alleged murder;[13] it was error to cause a captain of police to testify that, on the night of the homicide, he learned from another person what

[7] *Com.* v. *Crossmire,* 156 Pa. 304, 27 Atl. 40; *Moore* v. *State,* 2 Ohio St. 500.

[8] *State* v. *McDonald,* 14 R. I. 270; *Allen* v. *Com.* 26 Ky. L. Rep. 808, 82 S. W. 589; *Lillie* v. *State,* 72 Neb. 228, 100 N. W. 316; *State* v. *Mowry,* 21 R. I. 376, 43 Atl. 871; *State* v. *Thrailkill,* 71 S. C. 136, 50 S. W. 551; *People* v. *Evans,* — Cal. —, 41 Pac. 444.

[9] *Weed* v. *People,* 56 N. Y. 628.

See *People* v. *Sessions,* 58 Mich. 594, 26 N. W. 291.

[10] *State* v. *Noakes,* 70 Vt. 247, 40 Atl. 249.

[11] *State* v. *Johnson,* 111 La. 935, 36 So. 30; *Richardson* v. *State,* 145 Ala. 46, 41 So. 82, 8 A. & E. Ann. Cas. 108; *Stallworth* v. *State,* 146 Ala. 8, 41 So. 184; *Kinnemer* v. *State,* 66 Ark. 206, 49 S. W. 815; *United States* v. *Randall,* Deady, 524, Fed. Cas. No. 16,118.

[12] *United States* v. *Randall,* Deady, 524, Fed. Cas. No. 16,118.

[13] *People* v. *Collins,* 144 Mich. 121, 107 N. W. 1114.

he knew about accused, and that the police, from such circumstance, formed the theory that accused committed the crime.[14]

§ 917. Circumstances preceding the homicide.—The relevancy of acts and circumstances to the homicide charged, that precede its commission, cannot be determined by a rule of practice, applicable to all cases, other than to state that the testimony so tendered shall show, in the first instance, a clear and connected relation to the crime. When such testimony, even though otherwise relevant, appeals strongly to the emotions or to a prejudice that may dominate the jury, its value as tending to establish the facts in issue is seriously impaired; and where this condition exists, the limitations on its admission should be strictly enforced, or it should be entirely excluded. The question is one for the determination of the trial court in the concrete case. It is in the rulings upon the admission or rejection of testimony of such collateral circumstances, that courts most frequently err. Among a large number of rulings the following cases show where the admission was upheld or held reversible error:

The evidence tended to show a conspiracy between accused and his codefendant (not on trial) to murder deceased; telegrams were offered, purporting to come from the codefendant to accused and from deceased to accused, in furtherance of the conspiracy, and, it being shown that such telegrams were received by the deceased and treated by him as having been actually sent by the persons purporting to send them, they were properly relevant.[1] Conduct, actions, and general behavior of the accused, immediately preceding the homicide, are relevant to show that he was armed and in a vicious humor.[2] A conversation, preceding the homicide, between accused and the de-

[14] *Devine* v. *People*, 100 Ill. 290.

[1] *State* v. *Winner*, 17 Kan. 298.

[2] *Kernan* v. *State*, 65 Md. 253, 4 Atl. 124; *Com.* v. *Eaton*, 8 Phila. 428; *State* v. *Thrailkill*, 71 S. C. 136, 50 S. E. 551.

ceased, who was his father-in-law, concerning the removal of the wife and her things to his own home, by the deceased, was relevant to show that deceased was on a peaceful mission with accused's permission.[3] Where accused pleaded self-defense to a homicide which occurred at his "cider joint," it is relevant to show that deceased went in on invitation to get a drink, as tending to prove that he did not enter the place as an aggressor.[4] Where the deceased, a policeman, asked witness if he had seen anybody, saying he was looking for a holdup and thought he could not be far away, this conversation occurring about ten minutes before the killing, it was relevant as showing deceased's acts and as explanatory of them.[5] It was held relevant to receive evidence that, just preceding the homicide, accused was intoxicated, that he fired his gun, that he crossed the dancing floor with his gun in his hand, making insulting and threatening remarks to the people, as showing a desire on his part to create trouble.[6] On an assault with intent to kill, it was relevant to show that the prosecuting witness was the bearer of a peaceful message to the accused, where the message and its delivery were closely related to the shooting.[7] Preceding acts rendering crime easier, safer, more certain, and more effectual in accomplishing the object, are relevant where they are connected with the offense charged, even though the acts themselves may show other crimes.[8] Where it became material to explain the presence of the deceased at the place of the homicide, as to whether or not he was there on a lawful mission, an officer may testify that he had a warrant for ac-

[3] *Bondman* v. *State,* 145 Ala. 680, 40 So. 85.

See *People* v. *Gee Gong,* 15 Cal. App. 28, 114 Pac. 78, 81.

[4] *Watkins* v. *United States,* 3 Ind. Terr. 281, 54 S. W. 819.

[5] *State* v. *Healy,* 105 Iowa, 162, 74 N. W. 916.

[6] *Hutsell* v. *Com.* 25 Ky. L. Rep. 262, 75 S. W. 225.

See *Elmore* v. *State,* — Tex. Crim. Rep. —, 78 S. W. 520.

[7] *State* v. *Hinton,* 49 La. Ann. 1354, 22 So. 617.

[8] *Com.* v. *Robinson,* 146 Mass. 571, 16 N. E. 452.

cused, and requested deceased to be at the place of the homicide and to notify the officer if he discovered accused.[9] Where accused had conspired with others, to rob, and in the attempt the homicide was committed, and it was also shown that accused had first visited the house to be robbed and then gone to signal the others, it was relevant to permit a witness to testify that she heard somebody talking, to connect accused with the other persons who, almost immediately after the conversation, appeared on the scene.[10] It is relevant to show, preceding the homicide, that accused was following his customary course, namely, *en route* to visit at a house where he was accustomed to visit, to rebut the claim of accused that deceased was pursuing him because of a previous difficulty.[11] It is relevant to show that, a short time preceding the homicide, accused met the witness and asked him at what part of the body he should aim to shoot a man if he desired to kill him.[12] It is relevant to show the actions, movements, and declarations of the deceased on the day of the homicide, which explained his presence at the place where he was killed, notwithstanding the general rule that such acts, movements, and declarations are not admissible against accused where he was not present and had no notice of them.[13] On a homicide charge, the state's theory was that accused had given deceased poisoned whisky to produce a miscarriage, which caused her death. It was error to refuse testimony that, a few days preceding her death, witness heard her say she was pregnant, and had asked him to procure ergot for her, that he refused, but, at her request, her brother-in-law had taken money from her and agreed to get it.[14] Where manslaughter was charged as the result of a steam-

[9] *Patterson* v. *State,* 134 Ga. 264, 67 S. E. 816.

[10] *Bass* v. *State,* 59 Tex. Crim. Rep. 186, 127 S. W. 1020.

[11] *Witherspoon* v. *State,* 168 Ala. 87, 53 So. 271.

[12] *Com.* v. *Polichinus,* 229 Pa. 311, 78 Atl. 382.

[13] *Bazanno* v. *State,* — Tex. Crim. Rep. —, 132 S. W. 777.

[14] *Brown* v. *Com.* 26 Ky. L. Rep. 1269, 83 S. W. 645.

boiler explosion due to the wilful negligence of the engineer in leaving it unattended, it was relevant to show that the engineer had been warned that danger would follow his absence from the engine room.[15] Where a homicide arose from a report, imputed to accused, it was error to exclude evidence on the part of accused, showing that he did not make such report.[16]

On the other hand, it was irrelevant to permit the widow of deceased to testify, in the absence of a showing that deceased was decoyed from his house, that several nights preceding the homicide and after deceased had retired, someone came and knocked on the side of the house, but went away without saying anything when deceased went out.[17] On a charge of homicide committed in a saloon, it was irrelevant to show that deceased was in the saloon the day before, in the absence of any fact connecting his presence with the homicide.[18] On a homicide charge, the petition of deceased for the annulment of his marriage to accused is irrelevant.[19] Evidence of the purchase of buckshot by a third person preceding the homicide is irrelevant, where it is not shown that accused knew of the purchase or that he used buckshot in the homicide.[20] On a charge of uxoricide, where the evidence tended to show unlawful relations between accused and a woman staying at his house, and a witness had testified that accused and deceased lived happily together until such woman came to the house, it is irrelevant to permit such witness to further testify that, after the woman went to the house, she had often seen deceased crying.[21]

[15] *People* v. *Thompson*, 122 Mich. 411, 81 N. W. 344.

[16] *Roberts* v. *State*, 48 Tex. Crim. Rep. 378, 88 S. W. 221.

[17] *Smith* v. *State*, 137 Ala. 22, 34 So. 396, 13 Am. Crim. Rep. 410; *Colquit* v. *State*, 107 Tenn. 381, 64 S. W. 713; *Clements* v. *State*, — Tex. Crim. Rep. —, 134 S. W. 728.

[18] *Smith* v. *State*, 142 Ala. 14, 39 So. 329; *State* v. *Kuehner*, 93 Mo. 193, 6 S. W. 118.

[19] *State* v. *Kennedy*, 177 Mo. 98, 75 S. W. 979.

[20] *Patterson* v. *State*, — Tex. Crim. Rep. —, 60 S. W. 557.

[21] *Caddell* v. *State*, 129 Ala. 57, 30 So. 76.

§ 918. Relevancy of previous difficulties between deceased and accused.—The general rule is that circumstances showing previous difficulties or encounters between the accused and the deceased are relevant where such circumstances have an obvious connection with, or serve to explain, the facts and circumstances of the homicide charge on trial.

The length of time intervening is only material as affecting the credibility and weight to be given to such evidence. Where the difficulty is followed by continuous hostility or a disposition to renew at every opportunity, the weight of the testimony is correspondingly increased. Where the difficulty is temporary or followed by a cessation of hostilities, or former peaceful relations had been resumed, the circumstances of the previous difficulties are of little value.

Thus, where a quarrel commenced at one place and terminated in a homicide at another, during the same night, in the same village, it was relevant to show all that transpired at both places, even though an interval of time elapsed between the rencounter.[1] Under the law, in Alabama, where the accused makes his statement to the jury, he may state that he had a previous difficulty with one of the parties to the homicide, and he may give its general nature, but not the details of the difficulty;[2] and the rule is, in the majority of states, that while the accused may show a previous difficulty between him and the deceased, yet it is irrelevant to state the details or the merits of such rencounter.[3] On a prosecution for assault with intent to kill, in which accused took part as an accessory, it was relevant to show a difficulty, immediately preceding, between the principal and another, which took place in the presence of the party assaulted.[4] Where testimony was admitted

[1] *Stiles* v. *State*, 57 Ga. 183.

[2] *Harrison* v. *State*, 78 Ala. 5.

[3] *State* v. *Sorter*, 52 Kan. 531, 34 Pac. 1036; *Phillips* v. *State*, — Ala. —, 54 So. 111; *Thacker* v. *Com.* 24 Ky. L. Rep. 1584, 71 S. W. 931; *Thompson* v. *State*, 84 Miss. 758, 36 So. 389; *Sanford* v. *State*, 143 Ala. 78, 39 So. 370.

[4] *Elmore* v. *State*, 110 Ala. 63, 20

as to a difficulty between accused and deceased, on the day preceding the homicide, but was restricted by the trial court to the purpose of showing malice on the part of the accused, the supreme court held that it should not have been so restricted, but should have been allowed to show the motives and conduct of the parties at the homicide.[5] Where parties mutually agree to arm and fight, then separate and arm themselves, and meet again within an hour to fight with pistols, all acts and declarations of both parties during the interval are relevant on the prosecution.[6] Where the testimony showed that deceased entered the office of accused immediately after he had been addressed by accused in an offensive manner from the office window, and it had also been shown that there had been a previous difficulty, it was error to exclude a question on cross-examination as to whether or not witness had noticed deceased about accused's office some days previous, as his presence there would tend to show that he had not gone into the office on account of the insult and that there was no existing difficulty.[7] Where accused and deceased had a dispute, and witness had effected a compromise, a subsequent quarrel arising, each asserting the other had violated the compromise, whereupon accused left, but returned the next day and shot deceased, it was relevant to show by the witness all the facts of the compromise as tending to prove which of the parties was right in the controversy.[8] On a charge of manslaughter by hauling the deceased by the hair of her head and throwing her violently upon a sofa, other acts of violence occurring the same evening are relevant.[9] On a charge of uxoricide, it is relevant to show that

So. 323; *Untreinor* v. *State*, 146 Ala. 26, 41 So. 285.

See *Young* v. *State*, 41 Tex. Crim. Rep. 442, 55 S. W. 331.

[5] *Haynes* v. *State*, 17 Ga. 465.

[6] *Cox* v. *State*, 64 Ga. 374, 37 Am. Rep. 76.

[7] *Tracy* v. *People*, 97 Ill. 101.

[8] *Com.* v. *Gray*, 17 Ky. L. Rep. 354, 30 S. W. 1015.

[9] *State* v. *Pike*, 65 Me. 111.

See *People* v. *Curtis*, 52 Mich. 616, 18 N. W. 385.

accused made declarations reflecting on his wife, to show a long course of ill treatment, to show that they quarreled or that he continuously maltreated the deceased.[10] On a charge of homicide, it is relevant to give evidence of a difficulty occurring between accused and deceased two years previous, where the evidence shows a continuous state of hostility.[11]

But where the previous difficulty does not tend to establish hostile relation between the accused and the deceased and has no apparent connection with the homicide, it is irrelevant. Thus, on a homicide trial accused cannot show hostile relations between deceased and another person not connected with the homicide or shown to have been near the spot.[12] Where two fought, were separated, and half an hour afterwards, and where one was examining his wounds, the other stabbed him, on the trial for the second stabbing it was irrelevant to offer evidence of the first affray, because the two difficulties were so distinct that they had no relation to each other.[13] Where accused had refused to pay a bill sent by deceased, and finally sent deceased a very insulting message, which precipitated the homicide, the reason why accused refused to pay the bill is irrelevant on the trial of the homicide.[14] Where accused sought to prove that, several hours preceding the homicide, he had a difficulty with K, in which K sought to shoot him, such testimony was irrele-

[10] *People* v. *Buchanan*, 145 N. Y. 1, 39 N. E. 846; *State* v. *Rash*, 34 N. C. (12 Ired. L.) 382, 55 Am. Dec. 420; *State* v. *Langford*, 44 N. C. (Busbee, L.) 436; *People* v. *Thiede*, 11 Utah, 241, 39 Pac. 837, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62.

See *Coffman* v. *State*, — Tex. Crim. Rep. —, 136 S. W. 779.

[11] *Com.* v. *Storti*, 177 Mass. 339, 58 N. E. 1021.

[12] *Banks* v. *State*, 72 Ala. 522.

See *People* v. *Smith*, 26 Cal. 665; *People* v. *Mitchell*, 100 Cal. 328, 34 Pac. 698.

[13] *Whilden* v. *State*, 25 Ga. 396, 71 Am. Dec. 181.

See *Sewell* v. *Com.* 3 Ky. L. Rep. 86; *Caskey* v. *Com.* 15 Ky. L. Rep. 257, 23 S. W. 368; *State* v. *Bowser*, 42 La. Ann. 936, 8 So. 474; *Hale* v. *State*, 72 Miss. 140, 16 So. 387.

[14] *State* v. *Petsch*, 43 S. C. 132, 20 S. E. 993.

vant on a trial for killing deceased, without evidence that accused had mistaken the deceased for K.[15] Testimony as to deceased's conduct towards others than the accused, just before the homicide, is irrelevant,[16] and where accused had a difficulty with a third person, just prior to the homicide, which difficulty was in no manner connected with the homicide, and where deceased was not present at it or in any way concerned in it, the testimony was irrelevant and calculated to excite and mislead the jury.[17]

§ 919. Preceding circumstances in homicide tending to show conspiracy.—Where the preceding circumstances or difficulties in homicide prosecutions tend also to show conspiracy or concert of action, great latitude is allowed in the relevancy of the circumstances that show confederation. The rule as to the relevancy of the acts and declarations of one conspirator, as original evidence against all of the conspirators, applies in criminal cases as in civil cases, and this rule is universal.[1] The relevancy of such testimony is not affected by the

[15] *Sherar* v. *State,* 30 Tex. App. 349, 17 S. W. 621. See *Joyce* v. *Com.* 78 Va. 287.

[16] *Smith* v. *State,* 142 Ala. 14, 39 So. 329. Contra, *State* v. *Shadwell,* 22 Mont. 559, 57 Pac. 281.

[17] *Joyce* v. *Com.* 78 Va. 287.

[1] *Wiborg* v. *United States,* 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; *Johnson* v. *State,* 29 Ala. 62, 65 Am. Dec. 383; *Thomas* v. *State,* 133 Ala. 139, 32 So. 250; *Richards* v. *United States,* 99 C. C. A. 401, 175 Fed. 911; *Way* v. *State,* 155 Ala. 52, 46 So. 273; *Doghead Glory* v. *State,* 13 Ark. 236; *Butt* v. *State,* 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 723; *People* v. *Geiger,* 49 Cal. 643; *People* v. *Carson,* 155 Cal. 164, 99 Pac. 970; *Solander* v. *People,* 2 Colo. 48; *Moore* v. *People,* 31 Colo. 336, 73 Pac. 30; *State* v. *Glidden,* 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *State* v. *Stockford,* 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Malone* v. *State,* 8 Ga. 408; *Rawlins* v. *State,* 124 Ga. 31, 52 S. E. 1; *Wilson* v. *People,* 94 Ill. 299; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Graff* v. *People,* 208 Ill. 312, 70 N. E. 299; *Nevill* v. *State,* 60 Ind. 309; *Eacock* v. *State,* 169 Ind. 488, 82 N. E. 1039; *State* v. *McCahill,* 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599; *State* v. *Caine,* 134 Iowa, 147, 111 N. W. 443;

fact that all the conspirators were not present when the acts were done or the declarations made,[2] or that certain of the

Miller v. *Com.* 78 Ky. 15, 39 Am. Rep. 194; *Gambrell* v. *Com.* 130 Ky. 513, 113 S. W. 476; *State* v. *Banks,* 40 La. Ann. 736, 5 So. 18; *State* v. *Gebbia,* 121 La. 1083, 47 So. 32; *State* v. *Soper,* 16 Me. 293, 33 Am. Dec. 665; *Lawrence* v. *State,* 103 Md. 17, 63 Atl. 96; *Com.* v. *Waterman,* 122 Mass. 43; *Com.* v. *Rogers,* 181 Mass. 184, 63 N. E. 421; *People* v. *Parker,* 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; *People* v. *Mol,* 137 Mich. 692, 68 L.R.A. 871, 100 N. W. 913, 4 A. & E. Ann. Cas. 960; *State* v. *Beebe,* 17 Minn. 241, Gil. 218; *State* v. *Swain,* 68 Mo. 605; *State* v. *Bobbitt,* 228 Mo. 252, 128 S. W. 953; *State* v. *Copeman,* 186 Mo. 108, 84 S. W. 942; *Territory* v. *Campbell,* 9 Mont. 16, 22 Pac. 121; *State* v. *Hanlon,* 38 Mont. 557, 100 Pac. 1035; *Lamb* v. *State,* 69 Neb. 212, 95 N. W. 1050; *State* v. *Larkin,* 49 N. H. 39; *Territory* v. *Neatherlin,* 13 N. M. 491, 85 Pac. 1044; *Sturgis* v. *State,* 2 Okla. Crim. Rep. 362, 102 Pac. 57; *People* v. *McKane,* 80 Hun, 322, 30 N. Y. Supp. 95; *People* v. *Sharp,* 45 Hun, 460; *State* v. *Poll,* 8 N. C. (1 Hawks) 442, 9 Am. Dec. 655; *Goins* v. *State,* 46 Ohio St. 457, 21 N. E. 476, 8 Am. Crim. Rep. 19; *Fouts* v. *State,* 7 Ohio St. 471; *State* v. *Ryan,* 47 Or. 338, 1 L.R.A.(N.S.) 862, 82 Pac. 703; *Com.* v. *Eberle,* 3 Serg. & R. 9; *Com.* v. *Stambaugh,* 22 Pa. Super. Ct. 386; *State* v. *Ford,* 3 Strobh. L. 517, note; *State* v. *Kennedy,* 85 S. C. 146, 67 S. E. 152; *Owens* v. *State,* 16 Lea, 1. See *Standard Oil Co.* v. *State,* 117 Tenn. 618, 670, 10 L.R.A.(N.S.) 1015, 100 S. W. 705; *Myers* v. *State,* 6 Tex. App. 1; *Bowen* v. *State,* 47 Tex. Crim. Rep. 137, 82 S. W. 520; *State* v. *Thibeau,* 30 Vt. 100; *State* v. *Payne,* 10 Wash. 545, 39 Pac. 157; *State* v. *Dilley,* 44 Wash. 207, 87 Pac. 133; *State* v. *Cain,* 20 W. Va. 679; *Schultz* v. *State,* 125 Wis. 452, 104 N. W. 90.

See *Grunberg* v. *United States,* 76 C. C. A. 51, 145 Fed. 81; *State* v. *Roberts,* 201 Mo. 702, 729, 100 S. W. 484.

[2] *McIntosh* v. *Com.* 23 Ky. L. Rep. 1222, 64 S. W. 951. See *Green* v. *State,* 109 Ga. 536, 35 S. E. 97, 12 Am. Crim. Rep. 542; *Baptist* v. *State,* 109 Ga. 546, 35 S. E. 658; *McRae* v. *State,* 71 Ga. 96, 5 Am. Crim. Rep. 622; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *United States* v. *McKee,* 3 Dill. 546, Fed. Cas. No. 15,685; *Bonner* v. *State,* 107 Ala. 97, 18 So. 226; *Fort* v. *State,* 52 Ark. 180, 20 Am. St. Rep. 163, 11 S. W. 959; *People* v. *Cotta,* 49 Cal. 166; *State* v. *Grady,* 34 Conn. 118; *State* v. *Clark,* 9 Houst. (Del.) 536, 33 Atl. 310; *McKee* v. *State,* 111 Ind. 378, 12 N. E. 510; *State* v. *Grant,* 86 Iowa, 216, 53 N. W. 120; *Com.* v. *Brown,* 14 Gray, 419; *Farrell* v. *People,* 21 Hun, 485; *State* v. *Anderson,* 92 N. C. 732; *Goins* v. *State,* 46 Ohio St. 457, 21 N. E. 476, 8 Am. Crim. Rep. 19; *Rix* v. *State,* 33 Tex. Crim. Rep. 353, 26 S. W.

accused did not know of or concur with them at that time, if they are afterwards connected with the conspiracy by relevant evidence,[3] as the knowledge of one conspirator is imputed to all.[4] The relevancy of such testimony is not affected by the fact that the preparations made for the crime were not the means actually used in committing it,[5] nor is its relevancy affected by the particular time that the accused joined in the conspiracy.[6]

It is essential, however, to the relevancy of circumstances preceding and contemporaneous with the concerted action, that a conspiracy should have been formed or concerted action

505; *Sands* v. *Com.* 21 Gratt. 871; *State* v. *Thompson,* 69 Conn. 720, 38 Atl. 868; *Graff* v. *People,* 208 Ill. 312, 70 N. E. 299; *State* v. *Ottley,* 147 Iowa, 329, 126 N. W. 334; *State* v. *Caine,* 134 Iowa, 147, 111 N. W. 443; *Hall* v. *Com.* 31 Ky. L. Rep. 64, 101 S. W. 376; *People* v. *McGarry,* 136 Mich. 316, 99 N. W. 147; *State* v. *Bobbitt,* 228 Mo. 252, 128 S. W. 953; *State* v. *Darling,* 199 Mo. 168, 97 S. W. 592; *State* v. *Gatlin,* 170 Mo. 354, 70 S. W. 885; *State* v. *Miller,* 191 Mo. 587, 90 S. W. 767; *Long* v. *State,* 55 Tex. Crim. Rep. 55, 114 S. W. 632; *Smith* v. *State,* 48 Tex. Crim. Rep. 233, 89 S. W. 817; *State* v. *Erickson,* 54 Wash. 472, 103 Pac. 796; *State* v. *Grove,* 61 W. Va. 697, 57 S. E. 296.

[3] *Lamar* v. *State,* 63 Miss. 265.

See *Bowlin* v. *Com.* 17 Ky. L. Rep. 1319, 34 S. W. 709.

[4] *People* v. *Stokes,* 5 Cal. App. 205, 89 Pac. 997.

But it seems that the intent of one conspirator is not to be imputed to those afterwards joined with him unless it is shown that they have knowledge of such intent. *Miller* v. *United States,* 66 C. C. A. 399, 133 Fed. 337.

[5] *State* v. *Adams,* 20 Kan. 311.

[6] *Baker* v. *State,* 80 Wis. 416, 50 N. W. 518; *Stewart* v. *State,* 26 Ala. 44; *State* v. *Crab,* 121 Mo. 554, 26 S. W. 548; *Owens* v. *State,* 21 Tex. App. 579, 2 S. W. 808; *Smith* v. *State,* 21 Tex. App. 96, 17 S. W. 560; *Hudson* v. *State,* 43 Tex. Crim. Rep. 420, 66 S. W. 668; *Loggins* v. *State,* 8 Tex. App. 434; *Sands* v. *Com.* 21 Gratt. 871; *Holtz* v. *State,* 76 Wis. 99, 44 N. W. 1107; *McKee* v. *State,* 111 Ind. 378, 12 N. E. 510; *Moore* v. *People,* 31 Colo. 336, 73 Pac. 30; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Cooke* v. *People,* 231 Ill. 9, 82 N. E. 863; *Eacock* v. *State,* 169 Ind. 488, 82 N. E. 1039; *Driggers* v. *United States,* 7 Ind. Terr. 752, 104 S. W. 1166; *State* v. *Ryan,* 47 Or. 338, 1 L.R.A.(N.S.) 862, 82 Pac. 703; *Smith* v. *State,* 46 Tex. Crim. Rep. 267, 108 Am. St. Rep. 991, 81 S. W. 712, 936.

shown [7] otherwise the acts and declarations of one member is inadmissible against the others.[8] But when the concert of action is once established, all of the facts and circumstances, which precede and connectedly lead up to the homicide, are relevant.[9]

But the accused may show that the conspiracy and concerted action charged were in pursuance of a lawful purpose. Thus

[7] *Turner* v. *State,* 124 Ala. 59, 27 So. 272; *People* v. *Bentley,* 75 Cal. 407, 17 Pac. 436; *People* v. *Irwin,* 77 Cal. 494, 20 Pac. 56; *Powers* v. *Com.* 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735, 13 Am. Crim. Rep. 464; *Strange* v. *Com.* 23 Ky. L. Rep. 1234, 64 S. W. 980; *People* v. *Pitcher,* 15 Mich. 397; *State* v. *Weaver,* 165 Mo. 1, 88 Am. St. Rep. 406, 65 S. W. 308; *Com.* v. *Eberle,* 3 Serg. & R. 9; *Owens* v. *State,* 16 Lea, 1; *Young* v. *State,* — Tex. Crim. Rep. —, 69 S. W. 153; *Myers* v. *State,* 6 Tex. App. 1; *State* v. *Cain,* 20 W. Va. 679; *Baker* v. *State,* 80 Wis. 416, 50 N. W. 518; *Dolan* v. *United States,* 59 C. C. A. 176, 123 Fed. 52; *Cumnock* v. *State,* 87 Ark. 34, 112 S. W. 147; *Brennan* v. *People,* 113 Ill. App. 361; *Eacock* v. *State,* 169 Ind. 488, 82 N. E. 1040; *State* v. *Walker,* 124 Iowa, 414, 100 N. W. 354; *State* v. *Crofford,* 121 Iowa, 395, 96 N. W. 889; *State* v. *Wheeler,* 129 Iowa, 100, 105 N. W. 374; *Bowling* v. *Com.* — Ky. —, 126 S. W. 360; *Hines* v. *Com.* 23 Ky. L. Rep. 119, 62 S. W. 732; *Stovall* v. *Com.* 23 Ky. L. Rep. 103, 62 S. W. 536; *State* v. *Darling,* 199 Mo. 168, 97 S. W. 592; *State* v. *Roberts,* 201 Mo. 702, 727, 100 S. W. 484; *State* v. *Boatright,* 182 Mo. 33, 81 S. W. 450; *State* v. *Faulkner,* 175 Mo. 546, 75 S. W. 116; *Bauer* v. *State,* 3 Okla. Crim. Rep. 529, 107 Pac. 525; *State* v. *Quen,* 48 Or. 347, 86 Pac. 791; *Figaroa* v. *State,* 58 Tex. Crim. Rep. 611, 127 S. W. 193; *Smith* v. *State,* 46 Tex. Crim. 267, 284, 108 Am. St. Rep. 991, 81 S. W. 712, 936; *Wallace* v. *State,* 48 Tex. Crim. Rep. 318, 87 S. W. 1041; *Ripley* v. *State,* 51 Tex. Crim. Rep. 126, 100 S. W. 943; *Schutz* v. *State,* 125 Wis. 452, 104 N. W. 90; *Schultz* v. *State,* 133 Wis. 215, 113 N. W. 428.

[8] See *Jones* v. *Hurlburt,* 39 Barb. 403; *Wiley* v. *State,* 92 Ark. 586, 124 S. W. 249; *Driggers* v. *United States,* 21 Okla. 60, 95 Pac. 612, 17 A. & E. Ann. Cas. 66.

[9] *State* v. *McCahill,* 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599; *Bowlin* v. *Com.* 17 Ky. L. Rep. 1319, 34 S. W. 709; *State* v. *Donelon,* 45 La. Ann. 744, 12 So. 922; *State* v. *Swain,* 68 Mo. 605; *People* v. *Wilson,* 145 N. Y. 628, 40 N. E. 392; *Collins* v. *State,* 138 Ala. 57, 34 So. 993; *State* v. *Myers,* 198 Mo. 225, 94 S. W. 242; *Kipper* v. *State,* 45 Tex. Crim. Rep. 377, 77 S. W. 611; *Smith* v. *State,* 48 Tex. Crim. Rep. 233, 89 S. W. 817; *Wilson* v. *State,* 49 Tex. Crim. Rep. 50, 90 S. W. 312. See *Young* v. *State,* 49 Tex. Crim. Rep. 207, 92 S. W. 841; *Bass* v. *State,* 59 Tex. Crim. Rep. 186, 127 S. W. 1020; *Milo* v. *State,* 59 Tex Crim. Rep. 196, 127 S. W. 1025.

where the prosecution was for homicide by lynching, accused may show that a number of men had assembled the night before to plan to secure the arrest of the deceased in a lawful manner, and that the object of the meeting was to act according to law, and not for the purpose of killing the deceased.[10] He may show that the concerted action was for the purpose of taking legal proceedings against the accused to compel him to keep the peace,[11] and where there was no evidence of conspiracy it was irrelevant to offer evidence that persons who accompanied the accused at the time of the homicide were armed with sticks and that they were deadly weapons,[12] and conspiracy testimony is irrelevant where accused took no part in the conversations, made no response or assent of any sort, and was in no way connected with the subsequent acts that resulted in the homicide.[13]

§ 920. Offense connected with the crime charged; declarations of accused and of deceased connected therewith.—The well-settled rule, that evidence of collateral crimes cannot be introduced on the trial of the homicide charge, is subject to an exception where the collateral crime precedes, or is cotemporaneous with, or a part of, the charge on trial, and the circumstances surrounding the collateral crime are essential to proof of or to explain the crime charged.

Thus, where two burglaries preceded the homicide charge, and the evidence tended to show that the accused gained entrance to the house by means of tools taken at one of the burglaries and deceased was killed by a pistol taken at the other, the evidence was relevant to the charge on trial.[1] Where the

[10] *Carr* v. *State*, 43 Ark. 99, 5 Am. Crim. Rep. 438.

[11] *Delaney* v. *Com.* 15 Ky. L. Rep. 797, 25 S. W. 830.

[12] *Pulpus* v. *State*, 84 Miss. 49, 36 So. 190.

[13] *Com.* v. *Wilson*, 186 Pa. 1, 40 Atl. 283, 11 Am. Crim. Rep. 261.

[1] *People* v. *Rogers*, 71 Cal. 565, 12 Pac. 679.

evidence tended to show that the homicide was committed while a body of strikers, of which accused was one, were attempting to drive away new miners, it was relevant to show that, before the homicide, but at a distance therefrom, the strikers assaulted other new miners, as tending to show the nature and extent of the conspiracy and accused's connection with the homicide.[2] It is relevant to show that, shortly before the homicide, accused shot a third person, where the shooting and the homicide appeared to be parts of one transaction;[3] and the killing of third persons is always relevant where the different affrays were connected with and constituted but one transaction,[4] and this may extend to include what occurred subsequent to the homicide as well as prior thereto.[5] Evidence of the finding of other dead bodies at the same time and place is relevant on the trial of the accused, to negative the theory that they were parties to the homicide.[6] Where the accused killed deceased, a sheriff who was trying to arrest accused, and two days later, in another county, killed a second sheriff who was

[2] *State* v. *McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599.

[3] *Heath* v. *Com.* 1 Rob. (Va.) 735.

[4] *Hawes* v. *State*, 88 Ala. 37, 7 So. 302; *Doghead Glory* v. *State*, 13 Ark. 236; *People* v. *Chin Bing Quong*, 79 Cal. 553, 21 Pac. 951; *Piela* v. *People*, 6 Colo. 343; *Hickam* v. *People*, 137 Ill. 75, 27 N. E. 88; *Lyons* v. *People*, 137 Ill. 602, 27 N. E. 677; *Smart* v. *Com.* 10 Ky. L. Rep. 1035, 11 S. W. 431 (but it is error to admit the manner of the killing of such other person); *Green* v. *Com.* 17 Ky. L. Rep. 943, 33 S. W. 100; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *People* v. *Foley*, 64 Mich. 148, 31 N. W. 94; *Neal* v. *State*, 32 Neb. 120, 49 N. W. 174; *People* v. *Parker*, 137 N. Y. 535, 32 N. E. 1013; *People* v. *Pallister*, 138 N. Y. 601, 33 N. E. 741; *State* v. *Gooch*, 94 N. C. 987; *Brown* v. *Com.* 76 Pa. 319; *Fernandez* v. *State*, 4 Tex. App. 419; *Leeper* v. *State*, 29 Tex. App. 63, 14 S. W. 398; *Hargrove* v. *State*, 33 Tex. Crim. Rep. 431, 26 S. W. 993; *Crews* v. *State*, 34 Tex. Crim. Rep. 533, 31 S. W. 373; *People* v. *Coughlin*, 13 Utah, 58, 44 Pac. 94; *State* v. *Cracmer*, 12 Wash. 217, 40 Pac. 944; *People* v. *Lopez*, 135 Cal. 23, 66 Pac. 965. See *Helton* v. *Com.* 27 Ky. L. Rep. 137, 84 S. W. 574; *State* v. *Crump*, 116 La. 978, 41 So. 229.

[5] *People* v. *Marble*, 38 Mich. 117.

[6] *Logston* v. *State*, 3 Heisk, 414.

pursuing him, evidence of the first homicide was relevant on the trial of the second homicide to explain the conduct and motive of the officer.[7] Where accused conspired with another, and went after, got, and delivered to the one who did the killing a gun, this circumstance was relevant as showing aid and assistance.[8] On charge of manslaughter it was relevant to show that accused was violating the speed ordinance, as bearing upon the question of accused's negligence.[9] Where the evidence showed homicide resulting from a conspiracy to rob, it was relevant to show that there was money in the house before but not after the homicide, that deceased's wife was murdered and the house burned.[10] Where accused killed her stepdaughter, and her husband returned before she escaped, it was relevant to show that she assaulted her husband, as showing her demeanor and desire to conceal the crime,[11] even though it tended to prove guilt of another crime. On a homicide in connection with breaking and entering, it was relevant to show that the house had been entered previously, where there was evidence that accused had entered.[12]

Where two persons were jointly indicted for the murder of a police officer, the evidence tended to show that another officer was killed by accused, and at the time of the homicides the accused had been arrested on felony charges, it was relevant for the physicians attending the policemen after they were shot, to show the course of the bullet which killed the officer whose murder was not charged in the indictment, as the testimony tended to corroborate the theory of the prosecution

[7] *Cortez* v. *State,* 47 Tex. Crim. Rep. 10, 83 S. W. 812.

[8] *Collins* v. *State,* 138 Ala. 57, 34 So. 993.

[9] *State* v. *Moore,* 129 Iowa, 514, 106 N. W. 16.

See *People* v. *Thompson,* 122 Mich. 411, 81 N. W. 344.

[10] *Dean* v. *State,* 85 Miss. 40, 37 So. 501.

[11] *People* v. *Place,* 157 N. Y. 584, 52 N. E. 576.

[12] *State* v. *Cannon,* 52 S. C. 452, 30 S. E. 589.

that both of the accused committed the homicides with the intent of getting free from arrest.[13] On a charge of killing M, a policeman, it was relevant to show that accused and others, earlier the same night, had committed a burglary, and officers were in pursuit of the robbers, to explain the presence and conduct of M.[14]

Where the evidence shows that accused committed a felony, and death ensued, it is relevant to prove the felony not only to show the nature of the homicide, but as tending to establish the degree of guilt.[15]

Where the homicide charged relates to the killing of an officer, it is relevant to introduce the warrant of arrest in evidence,[16] or, if no warrant has been issued, to show the commission of a crime by accused that would justify an arrest.[17]

But it is irrelevant to permit a witness to testify that, shortly before the homicide, accused came to the witness and tried to raise a difficulty with him, which is not connected with the difficulty relating to deceased;[18] or on a prosecution for assault with intent to kill, where the evidence showed that the injured party was struck with an ax, it is irrelevant to admit testimony showing that accused carried concealed weapons

[13] *Miller* v. *State,* 130 Ala. 1, 30 So. 379.

[14] *Com.* v. *Major,* 198 Pa. 290, 82 Am. St. Rep. 803, 47 Atl. 741.

[15] *State* v. *Thibodeaux,* 48 La. Ann. 600, 19 So. 680; *Kennedy* v. *State,* 107 Ind. 144, 57 Am. Rep. 99, 6 N. E. 305, 7 Am. Crim. Rep. 422; *Blackwell* v. *State,* 29 Tex. App. 194, 15 S. W. 597; *Richards* v. *State,* 34 Tex. Crim. Rep. 277, 30 S. W. 229.

[16] *Boyd* v. *State,* 17 Ga. 194; *Palmer* v. *People,* 138 Ill. 356, 32 Am. St. Rep. 146, 28 N. E. 130; *Com.* v. *Moran,* 107 Mass. 239; *People* v. *Durfee,* 62 Mich. 487, 29 N. W. 109; *People* v. *Gosch,* 82 Mich. 22, 46 N. W. 101; *State* v. *Spaulding,* 34 Minn. 361, 25 N. W. 793.

See *People* v. *Johnson,* 110 N. Y. 134, 17 N. E. 684, 46 Hun, 667.

[17] *White* v. *State,* 70 Miss. 253, 11 So. 632; *State* v. *Grant,* 79 Mo. 113, 49 Am. Rep. 218; *People* v. *Wilson,* 141 N. Y. 185, 36 N. E. 230; *Miller* v. *State,* 32 Tex. Crim. Rep. 319, 20 S. W. 1103.

[18] *Woodard* v. *State,* — Tex. Crim. Rep. —, 51 S. W. 1122.

when arrested;[19] or upon a homicide charge committed in an attempt to rape, it is irrelevant to show a similar attempt upon another person some years previous.[20] Where accused killed deceased, who was attempting his arrest without a warrant, where there was no well-founded proof of accused complicity in certain burglaries, evidence that burglaries had been committed is irrelevant.[21] Where deceased was not in fact an officer and had no right to arrest accused without a warrant, it was error to admit evidence that deceased was dressed as, and wore the insignia of an officer, at the time of the homicide;[22] and on a trial for assault, with intent to kill, where it appears that the assault was made in an effort to escape from custody, it is error to reject evidence showing that the party arresting accused had no warrant or authority to make such arrest.[23]

The relevancy of attendant circumstances to the crime charged is not affected by remoteness, where the evidence shows them to be parts of a continuous transaction occurring within a brief space of time,[24] but where the evidence is that the collateral offense is so remote that it is not connected with the charge on trial, then evidence of it is irrelevant.[25]

Declarations of accused.

Declarations of the accused previous to the homicide are relevant to the issue where they tend to explain his conduct,

[19] *Riggins* v. *State,* 42 Tex. Crim. Rep. 472, 60 S. W. 877.

[20] *State* v. *Lapage,* 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506.

[21] *People* v. *Burt,* 51 Mich. 199, 16 N. W. 378.

[22] *Bates* v. *Com.* 14 Ky. L. Rep. 177, 19 S. W. 928.

[23] *Goodman* v. *State,* 4 Tex. App. 349.

[24] *Glass* v. *State,* 147 Ala. 50, 41 So. 727; *People* v. *Ebanks,* 117 Cal. 652, 40 L.R.A. 269, 49 Pac. 1049.

See *Nordgren* v. *People,* 211 Ill. 425, 71 N. E. 1042; *Stanley* v. *State,* — Tex. Crim. Rep. —, 44 S. W. 519; *Stephens* v. *People,* 19 N. Y. 549; *Jordan* v. *State,* 81 Ala. 20, 1 So. 577; *Ryan* v. *State,* 100 Ala. 105, 14 So. 766.

[25] *Fincher* v. *State,* 58 Ala. 215;

or they form a part of the transaction, although they are not shown to have any direct connection with the homicide. Thus, where an assault was committed by firing from ambush, the declarations of accused to the effect that if he should ever have a difficulty with the party injured, he would not fight a fair fight were relevant, as showing accused's connection with the crime,[26] and the declarations of accused with reference to deceased at or about the time of the homicide are relevant.[27] But where the declarations of accused are merely general in their character, or have no apparent relation to the homicide that follows them, they are irrelevant.[28]

Declarations of deceased.

Declarations of deceased, about the time of the homicide and so connected with it as to form a part of the transaction or to explain it, are relevant on the prosecution of the homicide charged. Thus where deceased, being aroused before

Andersen v. *United States,* 170 U. S. 481, 42 L. ed. 1116, 18 Sup. Ct. Rep. 689; *State* v. *Kohne,* 48 W. Va. 335, 37 S. E. 553; *Wakefield* v. *State,* 50 Tex. Crim. Rep. 124, 94 S. W. 1046.

[26] *Spraggins* v. *State,* 139 Ala. 93, 35 So. 1000; *Kennedy* v. *State,* 140 Ala. 1, 37 So. 90.

[27] *Morris* v. *State,* 146 Ala. 66, 41 So. 274; *State* v. *Crump,* 116 La. 978, 41 So. 229; *Thomas* v. *State,* 42 Tex. Crim. Rep. 386, 56 S. W. 70. See *Evans* v. *State,* 62 Ala. 6; *Armor* v. *State,* 63 Ala. 173. See *Monroe* v. *State,* 5 Ga. 85; *Price* v. *State,* 72 Ga. 441; *State* v. *Vallery,* 47 La. Ann. 182, 49 Am. St. Rep. 363, 16 So. 745; *State* v. *Ridgely,* 2 Harr. & McH. 120, 1 Am. Dec. 372; *State* v. *King,* 9 Mont. 445, 24 Pac. 265; *Nicholas* v. *Com.* 91 Va. 741, 21 S. E. 364; *Bell* v. *State,* — Ala. —, 54 So. 116.

[28] *Walker* v. *State,* 44 Tex. Crim. Rep. 569, 72 S. W. 997; *Yancey* v. *State,* 45 Tex. Crim. Rep. 366, 76 S. W. 571; *Shelton* v. *State,* 73 Ala. 5; *People* v. *Wyman,* 15 Cal. 70; *Kahlenbeck* v. *State,* 119 Ind. 118, 21 N. E. 460; *Terrell* v. *Com.* 13 Bush, 246.

See *Oder* v. *Com.* 80 Ky. 32; *Newcomb* v. *State,* 37 Miss. 383; *State* v. *Evans,* 65 Mo. 574; *State* v. *Swain,* 68 Mo. 605; *State* v. *Umfried,* 76 Mo. 404; *Deneaner* v. *State,* — Tex. Crim. Rep. —, 127 S. W. 201.

day, went out of his house and was heard to say, "Jake, what are you doing here?" the exclamation is relevant where the evidence shows that the accused is named Jake, and that shortly after making the declaration the deceased went into the house, and, on going out again, was killed.[29] It is relevant to show what deceased said to his wife, when leaving home on the morning of the homicide, as to where he was going;[30] where deceased declared that she was going to see the accused and inform him of her condition, and tell him that he must do something for her, the declaration made while in the act of going is competent to characterize the act, and when the declaration and act unite, the whole becomes a fact in the case.[31] Where a witness testifies that, on approaching deceased's house, he saw accused brandishing a chair and calling for someone to come on, and that, as he entered into the house, deceased jumped up and exclaimed, "Now we will see whether I am to be knocked down with a chair in my own house,"—such exclamation was relevant.[32] Where accused was the aggressor in a quarrel with deceased's brother, and shot deceased as he was running to the affray, a remark by deceased as he left the store is relevant.[33]

Declarations of third persons.

Declarations of third persons prior to the homicide are relevant where they are connected with the crime. Thus, on the

[29] *Wesley* v. *State,* 52 Ala. 182.

[30] *Martin* v. *State,* 77 Ala. 1. But see *Domingus* v. *State,* 94 Ala. 9, 11 So. 190.

See *Harris* v. *State,* 96 Ala. 24, 11 So. 255; *Kirby* v. *State,* 17 Yerg. 259; *Carroll* v. *State,* 3 Humph. 315.

[31] *State* v. *Hayden,* 1 Ky. L. Rep. 71.

See *United States* v. *Nardello,* 4 Mackey, 503; *Thomas* v. *State,* 67 Ga. 460; *State* v. *Dickinson,* 41 Wis. 299, 2 Am. Crim. Rep. 1.

[32] *State* v. *Porter,* 34 Iowa, 131.

[33] *Johnson* v. *State,* 72 Ga. 679. See *State* v. *Peffers,* 80 Iowa, 580, 46 N. W. 662; *State* v. *Biggerstaff,* 17 Mont. 510, 43 Pac. 709; *Means* v. *State,* 10 Tex. App. 16, 38 Am. Rep. 640.

trial of J for assault with intent to kill G, it is relevant to show that G ordered his daughter, who was the wife of J, to leave the room, and that she replied, "No, pa; if I do, J will shoot you." [34]

Where accused shot deceased, after deceased had ordered him not to come into his house, where there was a party, it is relevant to show that deceased's daughter, in the presence of accused, said that she would give a party at her house, and to show further that she said she could give the party, as accused was going to be away.[35] On a manslaughter charge, occurring after deceased and accused had left a dance hall, where the evidence was conflicting as to who was the aggressor, and where it showed that there were mutual threats to kill, it was error to exclude testimony that, while the accused was in the dance hall, before the homicide, a third party told accused that deceased was outside and had said he was going to kill him.[36]

§ 921. Contemporaneous circumstances in homicide.— Contemporaneous circumstances which tend to throw light on the homicide, or are a part of facts that are continuous in their nature, and have a connection with the homicide, are relevant on the prosecution. Such circumstances cover relatively the same facts as to acts, declarations, positions, physical and mental condition, as are embraced in preceding circumstances, and their relevancy is tested by the same rules and limitations as applied to preceding circumstances. Thus, soon after the homicide, accused appeared at a police station with a gun, and an officer testified that it contained four empty shells, it was relevant to permit witness to testify that he heard four shots

[34] *Jeffries* v. *State*, 9 Tex. App. 598. See *People* v. *Palmer*, 105 Mich. 568, 63 N. W. 656; *Fisher* v. *State*, 77 Ind. 42.

[35] *Davis* v. *State*, 92 Ala. 20, 9 So. 616.

[36] *Reeves* v. *State*, 34 Tex. Crim. Rep. 483, 31 S. W. 382.

about the time and in the direction in which deceased was killed.[1] Where several persons came to a house, and when accused came out a fight ensued, which resulted in a homicide, it was relevant to show by witness what conversations took place just before the fight with relation to an existing dispute between the accused on one side and the deceased or other persons, in relation to their purpose in going to the house.[2] Where deceased died from poison, and shortly afterwards accused took money from deceased's pocket, it is a relevant circumstance showing accused's connection with the crime.[3] It is always relevant to show the character of the place at which the homicide occurred as explaining the intent and presence of the parties.[4] Where the homicide occurred while accused was disputing with a third party as to the ownership of certain posts, which the third party asserted had been given to her by the owner, and which accused was attempting to take, when deceased interfered, the testimony of the owner that he gave the posts to such third party is relevant as showing a foundation for her claim.[5] Where it appeared that the parties who committed the crime were masked, that they broke open B's house, bound and tortured him and his wife to compel a disclosure of where they kept their money, and those accused of the crime set up an alibi, it was relevant to show that B's barn had been broken open, certain straps were taken, that they were used to bind B, that B's horses were found miles away near a road leading from B's house to that of the accused, and that during the night the horses had been ridden by the sup-

[1] *State* v. *Fitgerald,* 130 Mo. 407, 32 S. W. 1113. See *Miller* v. *State,* 130 Ala. 1, 30 So. 379.

[2] *Stewart* v. *State,* 19 Ohio, 302, 53 Am. Dec. 426.

[3] *State* v. *Moran,* 15 Or. 262, 14 Pac. 419.

[4] *Villareal* v. *State, 26* Tex. 107; *Gibson* v. *State,* 23 Tex. App. 414, 5 S. W. 314; *Tilley* v. *Com.* 89 Va. 136, 15 S. E. 526; *Brown* v. *State,* 88 Miss. 166, 40 So. 737; *Bailey* v. *State,* 133 Ala. 155, 32 So. 57.

[5] *People* v. *Rodawald,* 177 N. Y. 408, 70 N. E. 1.

posed robbers, and abandoned at the point where they were found.[6]

Where there was evidence that deceased was shot in the back while he was making no demonstration against accused, it was relevant to allow a witness who examined the body, to state that there was a wound in the back, and to indicate its location on the back of another person;[7] and it is always relevant to admit evidence showing the position and condition in which the body of the deceased was found;[8] and a witness who saw the shooting may show the relative positions in which deceased and accused were standing, and the distance between the two points.[9]

Where arsenic was found in the stomach of one who drank, in the company with deceased, some liquor given to both by accused, it is relevant to show that fact on the prosecution of accused for killing deceased.[10]

Physical conditions of the premises where the homicide is alleged to have occurred are generally relevant.[11] But evidence

[6] *Com.* v. *Roddy,* 184 Pa. 274, 39 Atl. 211.

[7] *Gunter* v. *State,* 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632.

[8] *People* v. *Majors,* 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486; *Davidson* v. *State,* 135 Ind. 254, 34 N. E. 972; *Com.* v. *Holmes,* 157 Mass. 233, 34 Am. St. Rep. 270, 32 N. E. 6; *State* v. *Fitzgerald,* 130 Mo. 407, 32 S. W. 1113; *Terry* v. *State,* 118 Ala. 79, 23 So. 776; *Com.* v. *Conroy,* 207 Pa. 212, 56 Atl. 427; *State* v. *McDaniel,* 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384; *Houston* v. *State,* — Tex. Crim. Rep. —, 47 S. W. 468; *Cole* v. *State,* 48 Tex. Crim. Rep. 439, 88 S. W. 341; *People* v. *Minisci,* 12 N. Y. S. R. 719; *Dinsmore* v. *State,* 61 Neb. 418, 85 N. W. 445; *Keeton* v. *State,* 59 Tex. Crim. Rep. 316, 128 S. W. 404.

[9] *Goodwin* v. *State,* 102 Ala. 87, 15 So. 571.

[10] *People* v. *Robinson,* 2 Park. Crim. Rep. 235.

[11] *Howard* v. *Com.* 24 Ky. L. Rep. 950, 70 S. W. 295; *Lillie* v. *State,* 72 Neb. 228, 100 N. W. 316; *State* v. *Bartmess,* 33 Or. 110, 54 Pac. 167; *State* v. *Davis,* 55 S. C. 339, 33 S. E. 449; *Smith* v. *State,* 46 Tex. Crim. Rep. 267, 108 Am. St. Rep. 991, 81 S. W. 712, 936; *McMahon* v. *People,* 189 Ill. 222, 59 N. E. 584; *State* v. *Donyes,* 14 Mont, 70, 35 Pac. 455.

of physical conditions that in no way explain or clear up the facts surrounding the homicide are irrelevant.[12]

§ 922. Subsequent circumstances in homicide.—Circumstances subsequent to the homicide are relevant where they serve to explain the transaction or point to the accused as the guilty agent. Hence, testimony as to conduct and appearance, the acts of the accused, and desire to elude discovery, attempts to conceal the crime, malice toward deceased, or motive for taking life, indifference to suffering or to the fact of the homicide, are relevant both as incriminatory and exculpatory circumstances. Thus, it is relevant to show that the accused and the wife of the deceased slept together the night after the homicide, and were heard talking together for a long time.[1] Evidence as to accused's conduct after a preliminary examination, and before his arrest on the charge, was held relevant.[2] Evidence that, after the disappearance of the deceased, for whose murder accused was indicted, accused collected money belonging to deceased, is relevant.[3] A witness may testify that immediately after the homicide, and when he entered the house of accused, accused was perspiring freely;[4] and the fact that, immediately after the homicide, accused's hands and knife were smeared with blood, is admissible without first showing a chemical analysis of the substance on the hands and knife.[5] The conduct, appearance, and

[12] *Davison* v. *People*, 90 Ill. 221; *Taylor* v. *State*, 41 Tex. Crim. Rep. 148, 51 S. W. 1106; *Smith* v. *State*, 61 Neb. 296, 85 N. W. 49; *Gregory* v. *State*, — Tex. Crim. Rep. —, 48 S. W. 577; *Darden* v. *State*, 73 Ark. 315, 84 S. W. 507; *Abernathy* v. *State*, 129 Ala. 85, 29 So. 844; *Vaughn* v. *State*, 130 Ala. 18, 30 So. 669. See *People* v. *Tansey*, 11 Cal. App. 220, 104 Pac. 582.

[1] *People* v. *Bemis*, 51 Mich. 422, 16 N. W 794; *Gardner* v. *United States*, 5 Ind. Terr. 150, 82 S. W. 704.

[2] *People* v. *Stewart*, 75 Mich. 21, 42 N. W. 662.

[3] *Jump* v. *State*, 27 Tex. App. 459, 11 S. W. 461.

[4] *Prince* v. *State*, 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409.

[5] *Barbour* v. *Com.* 80 Va. 287.

declaration of the accused at the time of the discovery of the homicide with which he was charged, are relevant against him.[6] Where the evidence showed a conspiracy to accomplish the homicide, and an offer of money by defendant to a witness to swear to an alibi if accused should be arrested, the fact that accused told the witness how he could make money was relevant.[7]

It is relevant to show flight, concealment, change of name by the accused, and all other attendant facts and circumstances on a homicide prosecution.[8] It is relevant to show any conversations or arrangements relative to leaving the place of trial.[9] It is relevant to show the conduct of accused on being arrested for burglary, on his trial for homicide, when the accused did not know which crime occasioned his arrest.[10] On an issue as to whether or not accused obtained money by committing the homicide, it is relevant to show that immediately thereafter he spent large sums of money, in connection with

[6] *Dillin* v. *People,* 8 Mich. 357; *Clough* v. *State,* 7 Neb. 320; *People* v. *Greenfield,* 23 Hun, 454; *People* v. *Buchanan,* 145 N. Y. 1, 39 N. E. 846; *State* v. *Adair,* 66 N. C. 298; *State* v. *Brabham,* 108 N. C. 793, 13 S. E. 217; *State* v. *Brooks,* 1 Ohio Dec. Reprint, 407; *Moore* v. *State,* 2 Ohio St. 500; *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 551; *Tooney* v. *State,* 8 Tex. App. 452; *Miller* v. *State,* 18 Tex. App. 232.

[7] *Allen* v. *Com.* 26 Ky. L. Rep. 808, 82 S. W. 589.

[8] *Funk* v. *United States,* 16 App. D. C. 478; *State* v. *Brown,* 168 Mo. 449, 68 S. W. 568; *State* v. *Myers,* 198 Mo. 225, 94 S. W. 242; *Patterson* v. *State,* — Tex. Crim. Rep. —, 60 S. W. 557; *Rocha* v. *State,* 43 Tex. Crim. Rep. 169, 63 S. W. 1018; *State* v. *Glasscock,* 232 Mo. 278, 134 S. W. 549; *Ridge* v. *State,* — Tex. Crim. Rep. —, 134 S. W. 732; *Wheeler* v. *State,* — Tex. Crim. Rep. —. 136 S. W. 68; *Jackson* v. *State,* 167 Ala. 44, 52 So. 835; *Canon* v. *State,* 59 Tex. Crim. Rep. 398, 128 S. W. 141; *Hardy* v. *Com.* 110 Va. 910, 67 S. E. 522; *Pope* v. *State,* 168 Ala. 33, 53 So. 292; *State* v. *Plyeer,* 153 N. C. 630, 69 S. E. 269; *State* v. *Lem Woom,* — Or. —, 112 Pac. 427; *State* v. *Gruber,* 19 Idaho, 692, 115 Pac. 1.

[9] *Collins* v. *Com.* 12 Bush. 271; *Ward* v. *Com.* 26 Ky. L. Rep. 1256, 83 S. W. 649.

[10] *People* v. *Higgins,* 127 Mich. 291, 86 N. W. 812.

testimony that he had no money before that time.[11] It is relevant to show that a few minutes after the homicide, witness advised accused to get away from the spot, and at the time accused was nervous and excited and pulled down the window shades so as to prevent his being seen in the house.[12] It is relevant to show that when deceased was killed, two men ran rapidly away in the same direction, and that one said to the other, "Will, you have killed him." [13] It is clear that whenever the subsequent circumstances, though apparently trivial, grow out of, or are natural sequence to, the homicide, they are relevant, as illustrated in the preceding cases.

But where such circumstances are disconnected from and have no obvious relation to the act, they are irrelevant. Thus, on a homicide charge, evidence that accused repented the next day, and the deceased forgave him, is irrelevant.[14] On a prosecution for assault with intent to kill, it is irrelevant to introduce evidence that the injured party is not the prosecuting witness, and that he did not wish to prosecute.[15] It is irrelevant to introduce testimony of subsequent improper relations between the accused and the wife of the deceased, where no evidence was offered of previous intimacy, or that accused's conduct had been such as to create jealousy.[16] It is irrelevant to introduce evidence showing that accused was admitted to bail.[17] It is irrelevant to show that accused, at the time of the funeral of his wife, looked on her dead body, touched it and kissed it, as showing the existence of love for her during her life.[18] And whenever the circumstances are disconnected,

[11] *State* v. *Magers,* 36 Or. 38, 58 Pac. 892.

[12] *Gray* v. *State,* 47 Tex. Crim. Rep. 375, 83 S. W. 705.

[13] *Briggs* v. *Com.* 82 Va. 554. See *Sims* v. *State,* 59 Fla. 38, 52 So. 198.

[14] *Murphy* v. *People,* 9 Colo. 435, 13 Pac. 528.

[15] *Harrell* v. *State,* 75 Ga. 842.

[16] *Messer* v. *Com.* 14 Ky. L. Rep. 492, 20 S. W. 702.

[17] *State* v. *Madison,* 47 La. Ann. 30, 16 So. 566.

[18] *State* v. *Leo,* — N. J. L. —, 77 Atl. 523

or do not in any way serve to explain the transaction, they are irrelevant.[19]

§ 923. Circumstances showing subsequent threats, possession of money or property, weapons, flight, or declarations.—Subsequent circumstances that show threats or acts by the accused, that tend to show a hostile spirit, or that tend to intimidate witnesses; or circumstances that show possession of money or other property by the accused, similar to that possessed by the deceased, or that accused had possession of weapons or other objects similar to those owned by deceased; or circumstances showing that accused fled from the place of crime or from the vicinity,—are relevant for the prosecution to show, where they are shown to be connected with, or to explain the details of, the crime. Thus, where the homicide was caused by a blow from a brickbat in a fight with the accused, it is relevant to show that accused returned to the scene after the fight, with a pistol in his hand, saying that he had come to kill deceased;[1] or to show that immediately after mortally wounding the deceased, accused pursued and shot at another person who took part in the fight;[2] or to show that accused had threatened the lives of persons sent to the jail to identify accused;[3] or to show that accused requested witness

[19] *Kirkland* v. *State*, 141 Ala. 45, 37 So. 352; *Cleveland* v. *State*, 86 Ala. 1, 5 So. 426; *Darden* v. *State*, 73 Ark. 315, 84 S. W. 507; *Kirkham* v. *People*, 170 Ill. 9, 48 N. E. 465; *Perteet* v. *People*, 70 Ill. 171; *Dunn* v. *State* (1903) — Ind. —, 67 N. E. 940; *State* v. *Usher*, 126 Iowa, 287, 102 N. W. 101; *State* v. *Dillon*, 74 Iowa, 653, 38 N. W. 525; *People* v. *Sweeney*, 55 Mich. 586, 22 N. W. 50; *State* v. *Punshon*, 133 Mo. 44, 34 S. W. 25; *State* v. *Moore*, 104 N. C. 743, 10 S. E. 183; *Teague* v. *State*, 144 Ala. 42, 40 So. 312; *Simmons* v. *State*, 158 Ala. 8, 48 So. 606; *Com.* v. *Rivet*, 205 Mass. 464, 91 N. E. 877; *Com.* v. *Johnson*, 213 Pa. 607, 63 Atl. 134; *Wallace* v. *State*, 48 Tex. Crim. Rep. 318, 87 S. W. 1041.

[1] *McManus* v. *State*, 36 Ala. 285.

[2] *Smith* v. *State*, 88 Ala. 73, 7 So. 52; *People* v. *Lane*, 100 Cal. 379, 34 Pac. 856.

[3] *People* v. *Chin Hane*, 108 Cal. 597, 41 Pac. 697.

to propose a settlement to deceased's family, where the homicide arose over the settlement of an estate, with threats in case the family did not comply;[4] or to show that accused, immediately after killing one officer, pointed his revolver at another who was present;[5] or to show that accused told deceased's sister immediately following the homicide, that if "you do not hold your mouth, I will blow your brains out;"[6] or to show that when the accused was seized by a by-stander, accused attempted to stab him in order to escape;[7] or to show that within a few minutes after the homicide, accused assaulted a witness to prevent the witness communicating the fact of the crime to deceased's family;[8] or to show that immediately after the homicide, accused fired at two persons with whom deceased had been walking;[9] or to show other circumstances that establish a knowledge of the crime, or show malice toward the deceased, or indifference to the fact of the crime.[10]

Where it occurred that robbery was the motive of the homicide, and the deceased had in his possession two bars of gold bullion, it was relevant to show that the accused had disposed of two bars of gold bullion of the same value as those possessed by the deceased;[11] and it is always relevant to show that after the homicide, the person accused had moneys similar in denomination and amount to that in the possession of the deceased, even though the money found is not identified as belonging to deceased.[12]

[4] *Jones* v. *State,* 64 Ind. 473.

[5] *State* v. *Gainor,* 84 Iowa, 209, 50 N. W. 947.

[6] *Mask* v. *State,* 32 Miss. 405.

[7] *State* v. *Sanders,* 76 Mo. 35.

[8] *State* v. *Mace,* 118 N. C. 1244, 24 S. E. 798.

[9] *Blanton* v. *State,* 1 Wash. 265, 24 Pac. 439. See *Wilkerson* v. *State,* 31 Tex. Crim. Rep. 86, 19 S. W. 903.

[10] *Perry* v. *State,* 110 Ga. 234, 36 S. E. 781; *Fitts* v. *State,* 102 Tenn. 141, 50 S. W. 756; *Scott* v. *State,* 49 Tex. Crim. Rep. 519, 93 S. W. 740; *Hardy* v. *Com.* 110 Va. 910, 67 S. E. 522; *State* v. *Glasscock,* 232 Mo. 278, 134 S. W. 549

[11] *People* v. *Collins,* 64 Cal. 293, 30 Pac. 847.

[12] *Betts* v. *State,* 66 Ga. 508; *Gates* v. *People,* 14 Ill. 433; *Lins-*

Where accused was brought into the presence of deceased, who was then mortally wounded, it was relevant to cause a witness to testify that a purse found on the accused belonged to deceased, and that accused did not deny the statement.[13] It is relevant to show that, where deceased had carried two watches just before the homicide, one of these was found, a few months after, in the possession of accused, the length of time going to the weight of the testimony, and not to its relevancy.[14]

Where it was shown that on the day of his arrest for homicide, accused had a similar roll of tin foil reasonably accounted for, and sometime afterward the roll was unwrapped and found to contain deceased's diamond ring, it was relevant to show the fact.[15]

Evidence of the possession of weapons and their condition, or clothing and its condition, or other physical objects found in the possession of or traced to the accused, is relevant on a homicide prosecution, but the accused must always be permitted opportunity of making full explanation of such possession. Thus, where the evidence tended to show that deceased was killed by a revolver, and the evidence on the part of accused excluded the probability that he could have concealed it elsewhere than on his father's premises, it was relevant to permit his father to testify that the morning after the homi-

day v. *People*, 67 Barb. 548; *State* v. *Davis*, 87 N. C. 514; *State* v. *Gallivan*, 75 Conn. 326, 96 Am. St. Rep. 203, 53 Atl. 731; *Musser* v. *State*, 157 Ind. 423, 61 N. E. 1; *Com.* v. *O'Neil*, 169 Mass. 394, 48 N. E. 134; *Com.* v. *Williams*, 171 Mass. 461, 50 N. E. 1035; *Com.* v. *Roddy*, 184 Pa. 274, 39 Atl. 211; *State* v. *Garrington*, 11 S. D. 178, 76 N. W. 326; *Garza* v. *State*, 39 Tex. Crim. Rep. 358, 73 Am. St. Rep. 927, 46 S. W. 242; *Chapman* v. *State*, 43 Tex. Crim. Rep. 328, 96 Am. St. Rep. 874, 65 S. W. 1098.

[13] *People* v. *Young*, 108 Cal. 8, 41 Pac. 281. See *Braham* v. *State*, 143 Ala. 28, 38 So. 919.

[14] *Linsday* v. *People*, 67 Barb. 548, 63 N. Y. 143.

[15] *State* v. *Barnes*, 47 Or. 592, 7 L.R.A.(N.S.) 181, 85 Pac. 998.

cide, he searched his premises without finding the revolver.[16] It was relevant for the sheriff who arrested accused, to testify that he found a pistol in the coat pocket of the accused, where such pistol had been identified as the one with which deceased was killed.[17] Where accused was charged with uxoricide, and there were circumstances to show that immediately after he went into a wood shed and threw articles out of the window, it was relevant to receive evidence of blood stains on the window sill.[18] Where an assault with intent to kill occurred after dark, and, if accused was guilty, he must have gone from his house, some 3 miles distant, and back very rapidly, it was relevant to show that his shirt was found in his room in a damp condition;[19] and on a homicide charge by shooting, where the evidence was wholly circumstantial, it was relevant to receive testimony as to finding a pistol belonging to accused's brother at the house where accused and his brother had passed the night after the homicide.[20] But where, on a prosecution for assault with intent to kill, evidence was admitted of the finding of a weapon on accused when arrested nearly a month after the assault, it was prejudicial error;[21] and where, the morning after the homicide, a key was found in accused's possession which fitted the lock on the door of the room where the homicide occurred, accused should have been permitted to prove that the key belonged to a man from whom he had rented the room, and who had given him the key.[22] And it was error to admit testimony concerning a pair

[16] *Burton* v. *State,* 115 Ala. 1, 22 So. 585.

[17] *Maxwell* v. *State,* 129 Ala. 48, 29 So. 981.

[18] *Hinshaw* v. *State,* 147 Ind. 334, 47 N. E. 157. See *Walker* v. *State,* 139 Ala. 56, 35 So. 1011.

[19] *Baines* v. *State.* 43 Tex. Crim. Rep. 490, 66 S. W. 847. See *Thompson* v. *State,* 33 Tex. Crim. Rep. 217, 26 S. W. 198; *State* v. *Moore,* 168 Mo. 432, 68 S. W. 358.

[20] *Murphy* v. *State,* 36 Tex. Crim. Rep. 24, 35 S. W. 174.

[21] *People* v. *Yee Fook Din,* 106 Cal. 163, 39 Pac. 530.

[22] *Radford* v. *State,* 33 Tex. Crim. Rep. 520, 27 S. W. 143.

of overalls said to have been found near accused's charcoal kiln after the crime, and to show blood stains with the appearance of having been washed, where such overalls were not produced or their nonproduction explained.[23]

The flight of a person suspected of crime is a circumstance for the jury as tending, in some degree, to prove a consciousness of guilt.[24] It has been held in one case that flight is to be regarded as an immediate evidence of crime, because it betrays consciousness of guilt;[25] but this is opposed to the weight of authority, which is that flight is a circumstance, with other testimony in the case, the significance or insignificance of which is to be determined by the jury.[26] The general rule is clearly established that flight is relevant as a circumstance on the prosecution, together with circumstances, showing efforts to elude arrest or attempts at concealment. Thus, flight and an attempt to sell the borrowed gun with which the homicide

[23] *Johnson* v. *State,* 80 Miss. 798, 32 So. 49.

[24] *People* v. *Ross,* 115 Cal. 233, 46 Pac. 1059.

[25] *Johnson* v. *State,* 17 Ala. 618. See *Sanders* v. *State,* 131 Ala. 1, 31 So. 564.

[26] *People* v. *Ross,* 115 Cal. 233, 46 Pac. 1059. See *Alberty* v. *United States,* 162 U. S. 499, 509, 40 L. ed. 1051, 1056, 16 Sup. Ct. Rep. 864.

"The breaking out of jail and escape of one under indictment for crime may arise from conscious guilt, and the fear of trial therefor, and the dread of the punishment to follow; or it may be that the defendant, conscious of innocence, may dread trial lest he be convicted; or again, with such consciousness of innocence, being confined in prison and unable to give bail, he would seek freedom in flight from the discomforts of such imprisonment. Different individuals might act differently under the same circumstances, owing to the difference in their minds, dispositions, and characters. Whether or not the motive for such an escape has its origin in the consciousness of guilt and the dread of being brought to justice, or whether it can be explained and attributed to some other innocent motive, are questions for the determination of the jury, under all the evidence in the cause. Of itself, such evidence would not warrant conviction, but it is relevant, and the weight to which it is entitled is for the jury under proper instructions from the court." *Elmore* v. *State,* 98 Ala. 12, 13 So. 427.

was committed are relevant.[27] It was relevant to show that accused had told certain parties that he had killed a man, and needed money to travel on, and when money was given him, he fled and was a fugitive until his arrest.[28] It is relevant to show that accused was under contract to begin work on a certain date, but immediately after the crime he fled.[29] It is relevant to show preparations for flight,[30] and that accused supplied the means of flight to an accomplice;[31] and it is proper to show all the circumstances that occurred after the homicide relative to the flight, pursuit, and arrest of accused.[32] But it is irrelevant to show that accused fled because of the unsanitary conditions of the jail in which he was to be confined;[33] or to show that although he had opportunities to escape from jail, he declined to avail himself of them.[34] But it is relevant for the accused to show facts or a condition that reasonably explains his flight.[35] Thus, it was relevant for the accused

[27] *People* v. *Sullivan,* 129 Cal. 557, 62 Pac. 101.

[28] *Washington* v. *State,* 19 Tex. App. 522, 53 Am. Rep. 387.

[29] *Welsh* v. *State,* 97 Ala. 1, 12 So. 275. See *McCann* v. *State,* 13 Smedes & M. 471, 495.

[30] *State* v. *Espinozei,* 20 Nev. 209, 19 Pac. 677; *Teague* v. *State,* 120 Ala. 309, 25 So. 209.

[31] *Jones* v. *State,* 64 Ind. 473; *State* v. *Hudson,* 50 Iowa, 157.

[32] *Batten* v. *State,* 80 Ind. 394; *Horn* v. *State,* 12 Wyo. 80, 73 Pac. 705; *State* v. *Shaw,* 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51; *Bell* v. *State,* 115 Ala. 25, 22 So. 526; *Nelson* v. *State,* 130 Ala. 83, 30 So. 728; *Deal* v. *State,* 136 Ala. 52, 34 So. 23; *Franklin* v. *State,* 145 Ala. 669, 39 So. 979; *Gray* v. *State,* 42 Fla. 174, 28 So. 53; *State* v. *Austin,* 104 La. 409, 29 So. 23; *State* v. *Nash,* 115 La. 719, 39 So. 854; *State* v. *Garrison,* 147 Mo. 548, 49 S. W. 508; *Bennett* v. *State,* 47 Tex. Crim. Rep. 52, 81 S. W. 30; *Campos* v. *State,* 50 Tex. Crim. Rep. 102, 95 S. W. 1042; *Anderson* v. *Com.* 100 Va. 860, 42 S. E. 865; *Powers* v. *State,* 23 Tex. App. 42, 5 S. W. 153; *Barron* v. *People,* 73 Ill. 256; *Gannon* v. *People,* 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525; *State* v. *Morgan,* 22 Utah, 162, 61 Pac. 527; *State* v. *Jackson,* 95 Mo. 623, 8 S. W. 749; *People* v. *Flannelly,* 128 Cal. 83, 60 Pac. 670; *State* v. *Lyons,* 7 Idaho, 530, 64 Pac. 236. But see *Brown* v. *State* 88 Miss. 166, 40 So. 737.

[33] *Kennedy* v. *Com.* 14 Bush, 34[illegible]

[34] *State* v. *Wilcox,* 132 N. C. 112[illegible] 44 S. E. 625.

[35] *Batten* v. *State,* 80 Ind. 394; *State* v. *Melton,* 37 La. Ann. 77,

to show that, immediately after the homicide, there was turbulence, violence, and rioting, as a reason why he sought safety in flight.[36]

It was relevant to permit accused to prove that immediately after he fled, he went to the house of a witness by whom he was delivered to the sheriff.[37] Declarations of the accused immediately after the homicide, where they arose out of the excitement caused by the act, or when they explain it, are generally relevant as *res gestæ*.[38] Declarations of accused at the time the homicide is discovered are generally admissible,[39] and declarations tending to show malice,[40] the fabrication of defense,[41] guilty agency,[42] and apprehension,[43] are generally relevant. Subsequent circumstances may take a range as wide as that of human action itself. Among others should be noticed *suppression of evidence*. Thus, it is relevant to show that accused concealed property unlawfully obtained;[44] it may be shown that he commanded his wife to tell nothing.[45] As *influencing witnesses*, it was relevant to show he urged prosecutrix to deny everything, to keep every promise, and not to write anything;[46] it may be shown that he attempted to get

See *People* v. *Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951.

[36] *Brown* v. *State*, 88 Miss. 166, 40 So. 737.

[37] *Allen* v. *State*, 146 Ala. 61, 41 So. 624; *Cole* v. *State*, 45 Tex. Crim. Rep. 225, 75 S. W. 527; *State* v. *Barham*, 82 Mo. 67.

[38] See supra, §§ 263–270.

[39] *Clough* v. *State*, 7 Neb. 320.

[40] *Taggart* v. *Com.* 104 Ky. 301, 46 S. W. 674; *Wright* v. *Com.* 109 Va. 847, 65 S. E. 19; *State* v. *Medley*, 66 W. Va. 216, 66 S. E. 358, 18 A. & E. Ann. Cas. 761.

[41] *Baines* v. *State*, 43 Tex. Crim. Rep. 490, 66 S. W. 847.

[42] *Somers* v. *State*, 116 Ga. 535, 42 S. E. 779; *Graham* v. *State*, 125 Ga. 48, 53 S. E. 816; *Foster* v. *Com.* 33 Ky. L. Rep. 975, 112 S. W. 563; *Rose* v. *State*, 144 Ala. 114, 42 So. 21; *People* v. *Swartz*, 118 Mich. 292, 76 N. W. 491; *Boyd* v. *State*, 84 Miss. 414, 36 So. 525; *Moore* v. *State*, 2 Ohio St. 500.

[43] *Tooney* v. *State*, 8 Tex. App. 452.

[44] *Com.* v. *Welch*, 163 Mass. 372, 40 N. E. 103; *Com.* v. *Wallace*, 123 Mass. 400; *State* v. *Bruce*, 24 Me. 72.

[45] *Liles* v. *State*, 30 Ala. 24, 68 Am. Dec. 108.

[46] *State* v. *Mahoney*, 24 Mont. 281, 61 Pac. 647.

the one who sold him the gun to keep still.[47] It is relevant to show *attempts to divert suspicion,* such as the writing of anonymous letters to officials;[48] that he accounted for the absence of deceased by spreading the report that deceased had stolen a horse and had gone to another state;[49] that he was found in the yard, pretending to be unconscious with self-inflicted wounds;[50] that after the homicide, to indicate the presence of another man, he leaped out of bed, seized his gun, and fired at a man supposed to be escaping;[51] it may be shown that he urged immediate burial of the body of deceased;[52] that as an afterthought, accused claimed that the homicide was accidental;[53] it may be shown that he set up a false claim of alibi,[54] and that he had fabricated testimony for the purpose of his defense.[55]

V. Circumstances Relevant in Self-Defense in Homicide.

§ 924. Definition of self-defense.—Homicide in self-defense, or justifiable or excusable homicide, is a homicide committed in defense of a man's own life or person, or that

[47] *People* v. *Burt,* 51 App. Div. 106, 64 N. Y. Supp. 417.

[48] *Com.* v. *Webster,* 5 Cush. 295, 318, 52 Am. Dec. 711.

[49] *Lancaster* v. *State,* 91 Tenn. 267, 18 S. W. 777.

[50] *State* v. *Tettaton,* 159 Mo. 354, 60 S. W. 743.

[51] *Butler* v. *State,* 69 Ark. 659, 63 S. W. 46.

[52] *State* v. *Edmonson,* 131 Mo. 348, 33 S. W. 17.

[53] *Foster* v. *State,* 6 Lea, 213; *State* v. *Sterrett,* 80 Iowa, 609, 45 N. W. 401.

[54] *People* v. *Durrant,* 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; *Com.* v. *Roddy,* 184 Pa. 274, 39 Atl. 211; *State* v. *Howard,* 118 Mo. 127, 24 S. W. 41; *White* v. *State,* 31 Ind. 262.

[55] *People* v. *Bassford,* 3 N. Y. Crim. Rep. 219; *Hickory* v. *United States,* 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327; *McMeen* v. *Com.* 114 Pa. 300, 9 Atl. 878; *State* v. *Williams,* 27 Vt. 726; *State* v. *Barron,* 37 Vt. 57; *State* v. *Nocton,* 121 Mo. 537, 26 S. W. 551; *State* v. *Frederic,* 69 Me. 400, 3 Am. Crim. Rep. 78; *State* v. *Palmer,* 65 N. H. 216, 20 Atl. 6, 8 Am. Crim. Rep. 196; *People* v. *Hamilton,* 137 N. Y. 531, 32 N. E. 1071; *Allen* v. *United States,* 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154.

of his family, relations, or dependents who come within the rule which permits the defense of others the same as defense of one's self.[1] It is defined by Mr. Greenleaf as follows: "Where one is assaulted in a sudden affray, and in the defense of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills the assailant."[2] Self-defense is the resistance of force, or seriously threatened force, either actually pending or reasonably apparent, by force sufficient to repel the actual or apparent danger, and no more,[3] and the right to oppose force by force, under such circumstances, is based upon the law of nature, and is not superseded by the law of society.[4] To make out a case of self-defense four essential conditions are necessary: First, the party assaulted or seriously threatened must be free from fault in bringing about the difficulty. Second, he must believe at the time and under the circumstances that the danger of death or of serious bodily harm at the hands of his assailant is such as to render it necessary to take his assailant's life to save his own life or to prevent serious bodily harm. Third, the circumstances must be such as to warrant such belief in the mind of an ordinarily prudent person. Fourth, there must exist a necessity to take life, of which necessity the jury are the judges.[5]

It is the right of the accused who justifies a homicide by the

[1] *Pond* v. *People*, 8 Mich. 150. See also statutory definitions in various states.

[2] 3 Greenl. Ev. 14th ed. § 116; *State* v. *Turner*, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891.

[3] *Springfield* v. *State*, 96 Ala. 81, 38 Am. St. Rep. 85, 11 So. 250.

[4] *Grainger* v. *State*, 5 Yerg. 459, 26 Am. Dec. 278.

[5] *State* v. *Symmes*, 40 S. C. 383, 19 S. E. 16; *Jackson* v. *State*, 77 Ala. 18. See *State* v. *Sullivan*, 43 S. C. 205, 21 S. E. 4; *De Arman* v. *State*, 77 Ala. 10; *State* v. *Wells*, 1 N. J. L. 424, 1 Am. Dec. 211; *Reed* v. *State*, 11 Tex. App. 509, 518, 40 Am. Rep. 795; *Jordan* v. *State*, 11 Tex. App. 435; *State* v. *Hutto*, 66 S. C. 449, 45 S. E. 13; *McCandless* v. *State*, 42 Tex. Crim. Rep. 58, 57 S. W. 672.

plea of self-defense, which the evidence tends to show, to have the jury instructed on the law of self-defense,[6] and to have the instructions in an affirmative, as distinguished from a negative, manner.[7]

The clearly settled rule is that the accused is justified in acting upon the apparent necessity, and not the real necessity, and in such case he has the right to act on the appearance of things as they appear to an ordinarily reasonable and prudent person.[8]

§ 925. Necessity of showing that the homicide was in self-defense.—As the accused is justified in acting upon apparent necessity, what constitutes a sufficient overt hostile act must vary with the circumstances of the concrete case. No exact definition can be given.[1] Such overt act need not consist of an actual attack upon accused,[2] but may consist of an

[6] *Domingus* v. *State*, 94 Ala. 9, 11 So. 190.

[7] *Bonner* v. *State*, 29 Tex. App. 223, 15 S. W. 821; *Young* v. *People*, 47 Colo. 352, 107 Pac. 274; *May* v. *People*, 8 Colo. 210, 6 Pac. 816; *Crawford* v. *People*, 12 Colo. 290, 20 Pac. 769; *Boykin* v. *People*, 22 Colo. 496, 45 Pac. 419; *McLeroy* v. *State*, 120 Ala. 274, 25 So. 247; *Milrainey* v. *State*, 33 Tex. Crim. Rep. 577, 28 S. W. 537; Wharton, Homicide Bowlby's ed. § 222.

[8] *People* v. *Gonzales*, 71 Cal. 569, 12 Pac. 783; *Hubbard* v. *State*, 37 Fla. 156, 20 So. 235; *Heard* v. *State*, 114 Ga. 90, 39 S. E. 909; *Campbell* v. *People*, 16 Ill. 17, 61 Am. Dec. 49; *Watkins* v. *United States*, 1 Ind. Terr. 364, 41 S. W. 1044; *State* v. *Donahoe*, 78 Iowa, 486, 43 N. W. 297; *State* v. *Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *Finney* v. *Com.* 26 Ky. L. Rep. 785, 82 S. W. 636; *Thacker* v. *Com.* 24 Ky. L. Rep. 1584, 71 S. W. 931; *Com.* v. *O'Malley*, 131 Mass. 423; *Scott* v. *State*, 56 Miss. 287; *State* v. *Eaton*, 75 Mo. 591; *Uhl* v. *People*, 5 Park. Crim. Rep. 410; *State* v. *Snelbaker*, 8 Ohio Dec. Reprint, 466; *Barnard* v. *State*, 88 Tenn. 183, 12 S. W. 431; *Jordan* v. *State*, 11 Tex. App. 435; *Stoneman* v. *Com.* 25 Gratt. 887; *State* v. *Crawford*, 31 Wash. 260, 71 Pac. 1030; *Holmes* v. *State*, 124 Wis. 133, 102 N. W. 321; *Owens* v. *United States*, 64 C. C. A. 525, 130 Fed. 279. And see *State* v. *Symmes*, 40 S. C. 383, 19 S. E. 16; *Voght* v. *State*, 145 Ind. 12, 43 N. E. 1049.

[1] *Holly* v. *State*, 55 Miss. 424.

[2] *Nix* v. *State*, — Tex. Crim. Rep. —, 74 S. W. 764.

act which evinces a present design to take life or to do great bodily harm to the person threatened.[3] Thus, if a person aims a rifle at another, and the latter, to save his own life, fires first and kills, the plea of self-defense is sustained;[4] and one person coming angrily and insultingly toward another, and putting his hand in the direction of his pistol, in such a manner as to indicate to a reasonable mind that his purpose is to draw and fire his gun, the person so threatened is warranted in anticipating the assault by firing first,[5] even though as a matter of fact his assailant was unarmed;[6] and where he approaches accused with a deadly weapon in his hands, it is sufficient to warrant accused in firing first.[7]

Hence, where the plea is self-defense, it is relevant to sustain that plea by giving in evidence all circumstances under which the homicide occurred, and which could have affected the accused in his actions or in his apprehensions of danger, or which tend to show the attitude of the deceased.[8] Such circumstances involve the character and habits of the deceased. Thus, it is relevant for the accused, in support of the plea of self-defense, to show that deceased was intoxicated,

[3] *Hood* v. *State*, — Miss. —, 27 So. 643; *Holly* v. *State*, 55 Miss. 424; *State* v. *Clark*, 134 N. C. 698, 47 S. E. 36.

[4] *Martin* v. *Com.* 93 Ky. 189, 19 S. W. 580.

[5] *De Arman* v. *State*, 71 Ala. 351; *Williams* v. *United States*, 4 Ind. Terr. 269, 69 S. W. 871; *Massie* v. *Com.* 15 Ky. L. Rep. 562, 24 S. W. 611; *Newman* v. *State*, — Tex. Crim. Rep. —, 70 S. W. 951; *Poole* v. *State*, 45 Tex. Crim. Rep. 348, 76 S. W. 565; *Bartay* v. *State*, — Tex. Crim. Rep. —, 67 S. W. 416. And see *Nix* v. *State*, 45 Tex. Crim. Rep. 504, 78 S. W. 227.

[6] *De Arman* v. *State*, 71 Ala. 351; *Williams* v. *United States*, 4 Ind. Terr. 269, 69 S. W. 871.

[7] *Territory* v. *Burgess*, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558; *Teel* v. *State*, — Tex. Crim. Rep. —, 69 S. W. 531; *Bartay* v. *State*, — Tex. Crim. Rep. —, 67 S. W. 416. See *Koller* v. *State*, 36 Tex. Crim. Rep. 496, 38 S. W. 44.

[8] *Alexander* v. *Com.* 105 Pa. 1; *Gedye* v. *People*, 170 Ill. 284, 48 N. E. 987; *State* v. *Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *Derrick* v. *State*, 92 Ark. 237, 122 S. W. 506; *People* v. *Governale*, 193 N. Y. 581, 86 N. E. 554; *State* v. *Stockman*, 82

and the extent of such intoxication, at the time of the affray;[9] to show that deceased was a dangerous character, where a peace officer was endeavoring in good faith to arrest him for violating an ordinance;[10] where deceased had attempted to kill accused, and entered the sleeping room of accused and was killed as he entered, it was relevant to show his dangerous character;[11] and where the homicide occurs under circumstances that raise a reasonable doubt of whether or not the act was committed maliciously, or because the accused apprehended that he would be killed or suffer great bodily harm, testimony as to the violent and desperate character of the deceased is relevant.[12] An act by a quick, impulsive, bloodthirsty, and abandoned man may afford much stronger evidence that the life of the accused was in imminent peril than if done by a man of peaceable character, and reasonably justifies a resort to more prompt measures in self-defense.[13]

S. C. 388, 129 Am. St. Rep. 888, 64 S. E. 595; *Gardner* v. *State*, 121 Tenn. 684, 120 S. W. 816.

[9] *Neilson* v. *State*, 146 Ala. 683, 40 So. 221.

[10] *Hammond* v. *State*, 147 Ala. 79, 41 So. 761. See *Hart* v. *State*, 38 Fla. 39, 20 So. 805; *Allen* v. *State*, 38 Fla. 44, 20 So. 807.

[11] *State* v. *Rideau*, 116 La. 245, 40 So. 691. See *State* v. *Thrailkill*, 71 S. C. 136, 50 S. E. 551.

[12] *Storey* v. *State*, 71 Ala. 329; *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *State* v. *Graham*, 61 Iowa, 608, 16 N. W. 743; *State* v. *Keene*, 50 Mo. 357; *State* v. *Bryant*, 55 Mo. 75; *State* v. *Elkins*, 63 Mo. 159; *State* v. *Brown*, 63 Mo. 439, *State* v. *Freeman*, 3 Mo. App. 591; *State* v. *Hayden*, 83 Mo. 198; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; *Basye* v. *State*, 45 Neb. 261, 63 N. W. 811; *Nichols* v. *People*, 23 Hun, 165; *Marts* v. *State*, 26 Ohio St. 162; *Moore* v. *State*, 15 Tex. App. 1.

[13] *Pritchett* v. *State*, 22 Ala. 39, 58 Am. Dec. 250; *Franklin* v. *State*, 29 Ala. 14; *Perry* v. *State*, 94 Ala. 25, 10 So. 650; *State* v. *Scott*, 24 Kan. 68; *State* v. *Keefe*, 54 Kan. 197, 38 Pac. 302; *Brownell* v. *People*, 38 Mich. 732; *Pfomer* v. *People*, 4 Park. Crim. Rep. 558; *State* v. *Floyd*, 51 N. C. (6 Jones, L.) 392; *Upthegrove* v. *State*, 37 Ohio St. 662; *Com.* v. *Lenox*, 3 Brewst. (Pa.) 249; *Rippy* v. *State*, 2 Head, 217; *Williams* v. *State*, 14 Tex. App. 102, 46 Am. Rep. 237.

§ 926. Accused's knowledge of deceased's character.— It is stated generally that as a preliminary to the testimony of the dangerous and violent character of deceased, it should be shown that his character was known to the accused.[1] But this is not an exclusive or well-settled rule. It is self-evident that if a man is of a dangerous and violent character, this characteristic would appear immediately upon the occurrence of a dispute or a difficulty, so that a stranger becoming suddenly involved would see at once evidences of the dangerous character of his opponent. Hence, if the general character of the deceased was bad, it would be revealed to the accused by the manner and conduct of the deceased; and the fact that it appeared suddenly would not in the least degree take from him his right to act promptly when that characteristic was revealed, even though it had never been communicated to him prior to the difficulty.[2] And as further supporting this view, it is held that even if the violent character of the deceased was not known to accused, still it is admissible as tending to show the natural probabilities that would surround an encounter with a dangerous man.[3] But where the accused has a knowl-

[1] *People* v. *Powell*, 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481. See also *People* v. *Anderson*, 39 Cal. 703; *Redus* v. *People*, 10 Colo. 208, 14 Pac. 323; *State* v. *Middleham*, 62 Iowa, 150, 17 N. W. 446. See also *State* v. *Sale*, 119 Iowa, 1, 92 N. W. 680, 95 N. W. 193; *State* v. *Nash*, 45 La. Ann. 1137, 13 So. 732, 734; *State* v. *Robertson*, 30 La. Ann. 340; *People* v. *Rodawald*, 177 N. Y. 408, 70 N. E. 1; *State* v. *Byrd*, 121 N. C. 684, 28 S. E. 353; *State* v. *Rollins*, 113 N. C. 722, 18 S. E. 394; *State* v. *Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *Marts* v. *State*, 26 Ohio St. 162; *State* v. *Smith*, 12 Rich. L. 430; *Patterson* v. *State*, — Tex. Crim. Rep. —, 56 S. W. 59; *Hudson* v. *State*, 6 Tex. App. 565, 32 Am. Rep. 593; *Spangler* v. *State*, 41 Tex. Crim. Rep. 424, 55 S. W. 326; *State* v. *Nett*, 50 Wis. 524, 7 N. W. 344; *Trabune* v. *Com.* 13 Ky. L. Rep. 343, 17 S. W. 186.

[2] *State* v. *Turner*, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891; *Mulkey* v. *State*, — Okla. Crim. Rep. —. 113 Pac. 532. See also *Williams* v. *State*, — Tex. Crim. Rep. —, 136 S. W. 771.

[3] *State* v. *Byrd*, 121 N. C. 684, 28 S. E. 353; *State* v. *Turpin*, 77

edge of the deceased's dangerous character, such circumstance is always relevant on a plea of self-defense.[4] But the rule is clear that where there is no showing of self-defense, or where it is shown that the accused was the aggressor, or that he could have safely retreated while the danger was imminent, or that there was no assault or hostile demonstrations by the deceased, or where the evidence shows that the accused provoked the difficulty that brought about the fatal termination, or where the killing is shown to have been premeditated, the reputation of the deceased as a dangerous man is wholly irrelevant.[5]

N. C. 473, 24 Am. Rep. 455; *Monroe* v. *State,* 5 Ga. 85.

It has been held, however, that when evidence of a specific offense previously committed by deceased, indicating a quarrelsome disposition, but of which fact the accused had no personal knowledge, is offered, such testimony is irrelevant on a plea of self-defense. See *State* v. *Ronk,* 91 Minn. 419, 98 N. W. 334; *Chaplin* v. *Com.* 142 Ky. 782, 135 S. W. 298; *Lucas* v. *Com.* 141 Ky. 281, 132 S. W. 416.

[4] *Hurd* v. *People,* 25 Mich. 405; *Smith* v. *State,* 132 Ind. 145, 31 N. E. 807; *People* v. *Rodawald,* 177 N. Y. 408, 70 N. E. 1; *State* v. *Dill,* 48 S. C. 249, 26 S. E. 567; *Harrell* v. *State,* 39 Tex. Crim. Rep. 204, 45 S. W. 581. See *Stell* v. *State,* — Tex. Crim. Rep. —, 58 S. W. 75; *Glenewinkel* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 123; *People* v. *Powell,* 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481; *Smith* v. *United States,* 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; *State* v. *Robertson,* 30 La. Ann. 340; *Marts* v. *State,* 26 Ohio St. 162; *State* v. *Nett,* 50 Wis. 524, 7 N. W. 344; *Young* v. *State,* 59 Tex. Crim. Rep. 137, 127 S. W. 1058.

[5] *Bowles* v. *State,* 58 Ala. 335; *State* v. *Claude,* 35 La. Ann. 71; *State* v. *Harris,* 59 Mo. 550; *People* v. *Hess,* 8 App. Div. 143, 40 N. Y. Supp. 486; *Bond* v. *State,* 21 Fla. 738; *Steele* v. *State,* 33 Fla. 348, 354, 14 So. 841; *State* v. *Watson,* 36 La. Ann. 148; *Quesenberry* v. *State,* 3 Stew. & P. (Ala.) 308; *Eiland* v. *State,* 52 Ala. 322; *People* v. *Murray,* 10 Cal. 309; *People* v. *Edwards,* 41 Cal. 640; *Jones* v. *People,* 6 Colo. 452, 45 Am. Rep. 526; *Monroe* v. *State,* 5 Ga. 85; *Gardner* v. *State,* 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; *People* v. *Garbutt,* 17 Mich. 9, 97 Am. Dec. 162; *Wesley* v. *State,* 37 Miss. 327, 75 Am. Dec. 62; *Abbott* v. *People,* 86 N. Y. 460; *Com.* v. *Kern,* 1 Brewst. (Pa.) 350; *Com.* v. *Flanigan,* 8 Phila. 430; *Com.* v. *Straesser,* 153 Pa. 451, 26 Atl. 17; *Creswell* v. *State,* 14 Tex. App. 1; *Walker* v. *State,* 28 Tex.

But where a doubt is raised as to whether or not the accused acted in self-defense, then the character of the deceased is relevant to the issue.[6] Thus, where the accused claimed that he acted in self-defense, and the circumstances were in doubt, accused was entitled to prove the reputation of deceased as a dangerous man when he was intoxicated, and that he was intoxicated on this occasion.[7] Where the accused's claim of self-defense is supported by testimony that the deceased first struck the defendant, and leveled a gun at him, even though the testimony is that of the accused himself, evidence of the bad character of the deceased is admissible.[8]

Where accused testified that he shot deceased because he was afraid that deceased was going to kill him, evidence of the character of deceased as a dangerous and quarrelsome man when drinking was relevant.[9] Where accused had been

App. 503, 13 S. W. 860; *Evers* v. *State,* 31 Tex. Crim. Rep. 318, 18 L.R.A. 421, 37 Am. St. Rep. 811, 20 S. W. 744; *Smith* v. *State,* — Tex. Crim. Rep. —, 20 S. W. 831; *Manning* v. *State,* 79 Wis. 178, 48 N. W. 209; *Teague* v. *State,* 120 Ala. 309, 25 So. 209; *Winter* v. *State,* 123 Ala. 1, 26 So. 949; *Morrell* v. *State,* 136 Ala. 44, 34 So. 208; *Gregory* v. *State,* 140 Ala. 16, 37 So. 259; *State* v. *Faino,* 1 Marv. (Del.) 492, 41 Atl. 134; *Travers* v. *United States,* 6 App. D. C. 450; *Carle* v. *People,* 200 Ill. 494, 93 Am. St. Rep. 208, 66 N. E. 32; *Morrison* v. *Com.* 24 Ky. L. Rep. 2493, 67 L.R.A. 529, 74 S. W. 277; *State* v. *Baum,* 51 La. Ann. 1112, 26 So. 67; *State* v. *Napoleon,* 104 La. 164, 28 So. 972; *State* v. *Haab,* 105 La. 230, 29 So. 725; *State* v. *Shafer,* 22 Mont. 17, 55 Pac. 526; *State* v. *McIver,* 125 N. C. 645, 34 S. E. 439; *Harrison* v. *Com.* 79 Va. 374, 52 Am. Rep. 634; *Jackson* v. *Com.* 98 Va. 845, 36 S. E. 487; *State* v. *Madison,* 49 W. Va. 96, 38 S. E. 492.

[6] *Territory* v. *Harper,* 1 Ariz. 399, 25 Pac. 528; *People* v. *Stock,* 1 Idaho, 218; *State* v. *Pearce,* 15 Nev. 188; *Garner* v. *State,* 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *State* v. *Benham,* 23 Iowa, 154, 92 Am. Dec. 417; *State* v. *Vaughan,* 22 Nev. 285, 39 Pac. 733; *State* v. *Matthews,* 78 N. C. 523; *Abernathy* v. *Com.* 101 Pa. 322; *State* v. *Turner,* 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891; *Dorsey* v. *State,* 34 Tex. 651; *People* v. *Lamar,* 148 Cal. 564, 83 Pac. 993; *Kipley* v. *People,* 215 Ill. 358, 74 N. E. 379.

[7] *People* v. *Lamar,* 148 Cal. 564, 83 Pac. 993.

[8] *Smith* v. *State,* 75 Miss. 542, 23 So. 260.

[9] *State* v. *Feeley,* 194 Mo. 300,

informed that the deceased was a violent man, who would ask a man for his right hand, and then stick a knife in him with his left hand, and it appears that, after abusing the accused, the deceased said, "Give me your hand," at the same time putting his left hand in his left pocket, and that thereupon the accused shot in self-defense, to exclude testimony of the reputation of deceased as a man who would represent himself as a friend, to get the advantage of another, and then do him harm, was error.[10]

§ 927. Deceased's habit of carrying weapons.—On a plea of self-defense, it is always relevant for the accused to show that the deceased was in the habit of carrying weapons, or that he had the reputation of habitually being armed.[1] The rule is that such habit or such reputation must be known to the accused, as otherwise it could have had no influence in determining his conduct.[2] But if such habit and reputation is general, it is held that it is reasonable to assume that the accused knew of that habit.[3]

3 L.R.A.(N.S.) 351, 112 Am. St. Rep. 511, 92 S. W. 663.

[10] *State* v. *Sumner,* 130 N. C. 718, 41 S. E. 803, 13 Am. Crim. Rep. 385.

[1] *Naugher* v. *State,* 116 Ala. 463, 23 So. 26; *Daniel* v. *State,* 103 Ga. 202, 29 S. E. 767; *State* v. *Graham,* 61 Iowa, 608, 16 N. W. 743; *Riley* v. *Com.* 94 Ky. 266, 22 S. W. 222; *King* v. *State,* 65 Miss. 576, 7 Am. St. Rep. 681, 5 So. 97; *State* v. *Yokum,* 14 S. D. 84, 84 N. W. 389, 11 S. D. 544, 79 N. W. 835; *Glenewinkel* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 123; *State* v. *Crawford,* 31 Wash. 260, 71 Pac. 1030.

[2] *Sims* v. *State,* 139 Ala. 74, 101 Am. St. Rep. 17, 36 So. 138; *Long* v. *State,* 72 Ark. 427, 81 S. W. 387; *Garner* v. *State,* 31 Fla. 170, 12 So. 638. See also *McDonnall* v. *People,* 168 Ill. 93, 48 N. E. 86; *Wiley* v. *State,* 99 Ala. 146, 13 So. 424; *King* v. *State,* 65 Miss. 576, 7 Am. St. Rep. 681, 5 So. 97; *Glenewinkel* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 123; *Rodgers* v. *State,* 144 Ala. 32, 40 So. 572; *Warrick* v. *State,* 125 Ga. 133, 53 S. E. 1027; *Jackson* v. *State,* 147 Ala. 699, 41 So. 178; *State* v. *Ellis,* 30 Wash. 369, 70 Pac. 963; *State* v. *Crawford,* 31 Wash. 260, 71 Pac. 1030; *State* v. *Wiggins,* — Del. —, 76 Atl. 632.

[3] *State* v. *Yokum,* 14 S. D. 84, 84 N. W. 389.

However, the fact that the deceased was in the habit of going armed, or bore the reputation of being habitually armed, should be admitted in evidence, even though the fact was not known to the accused, as it would tend to corroborate his story, as the fact of habitually carrying weapons would lend probability to that story.[4] Thus, it has been held that evidence tending to show that deceased was armed with a pistol at the time of the homicide is relevant in corroboration of accused's testimony that deceased made a motion as though to draw a weapon.[5]

As relevant to the plea that the accused acted under a well-grounded apprehension that he was about to lose his life or to suffer serious bodily injury from the deceased, testimony is admissible to show that deceased was armed, or that he attempted to use deadly weapons. Thus, where the deceased said to the accused, "Damn you, now I'll get you," while his right hand was in or near his pocket, it is relevant for accused to testify that deceased was in the habit of carrying a pistol in that pocket.[6] It was relevant for accused to show that deceased was usually armed, and that the nickname of the deceased was "Draws," owing to his readiness to draw weapons.[7] Where the evidence showed that deceased had threatened accused, and had sought him out in anger, although the prosecution proved that deceased was unarmed when shot, evidence of a well-known habit of carrying a pistol, and of his reputation as a man of violent temper, was relevant on the part of the accused.[8]

[4] *Lilly* v. *State*, 20 Tex. App. 1; *Ellison* v. *State*, 12 Tex. App. 557. See *Domingus* v. *State*, 94 Ala. 9, 11 So. 190; *Reynolds* v. *State*, 1 Ga. 222; *State* v. *Lee*, — Del. —, 74 Atl. 4; *State* v. *Cather*, 121 Iowa, 106, 96 N. W. 722; *Jay* v. *State*, 56 Tex. Crim. Rep. 111, 120 S. W. 449.

[5] *Lilly* v. *State*, 20 Tex. App. 1.

[6] *Naugher* v. *State*, 116 Ala. 463, 23 So. 26; *Cawley* v. *State*, 133 Ala. 128, 32 So. 227.

[7] *State* v. *Thompson*, 109 La. 296, 33 So. 320.

[8] *Riley* v. *Com.* 94 Ky. 266, 22 S. W. 222; *Branch* v. *State*, 15 Tex. App. 96.

And as further corroboration of the plea of self-defense, it is relevant to show that weapons such as accused claims that the deceased carried were found at the scene of the crime or near the body of the deceased.[9] It is also relevant for the accused to show that during the affray he was cut or injured, as evidence that the deceased was armed with something.[10] And to show the extent of his injuries and the time and place where they were inflicted.[11] Where it was shown that just before deceased left his house, he fired two pistols, put them in his pocket, came to the public square, where he was killed, it is relevant to show that when he arrived there, he had a loaded pistol similar to the one found by his side on the ground where he fell; and this is true without first showing that the accused had knowledge of that fact.[12] Where the evidence showed the possession of a knife by deceased a short time before the homicide, it is a relevant circumstance for the consideration of the jury.[13]

The general rule is that the prosecution cannot show that the weapon was not in condition for use, unless it also shows that the accused knew of its ineffective condition; and this is based upon the rule in self-defense that the accused is justified in acting upon apparent necessity, as the possession and attempted use of the weapon, or reputation for carrying weapons, is the fact that raises apprehension in the mind of the accused, and not the particular condition of the weapon. Thus, where the testimony showed that the pistol which deceased attempted to draw was a center-fire pistol, but loaded with rim-fire cartridges, and therefore could not be discharged,

[9] *State* v. *Cather*, 121 Iowa, 106, 96 N. W. 722; *Godwin* v. *State*, 39 Tex. Crim. Rep. 404, 46 S. W. 226.

[10] *Atkins* v. *State*, 16 Ark. 568.

[11] *People* v. *Hall*, 57 Cal. 569; *Roma* v. *State*, 55 Tex. Crim. Rep. 344, 116 S. W. 598.

[12] *Reynolds* v. *State*, 1 Ga. 222.

[13] *Holler* v. *State*, 37 Ind. 57, 10 Am. Rep. 74.

it was irrelevant.[14] The prosecution cannot show that the weapon of the deceased was not loaded.[15]

But testimony as to the weapon, its condition, and place where found, should be rigidly scrutinized. Testimony of this character is easily fabricated. Thus, where accused claimed that he killed deceased only after deceased attempted to stab him, and this was corroborated by two persons near the body of the deceased, who called attention to the fact that there was a knife beside the body, it was relevant to show that after the homicide those two persons approached the body, and drove others away, and removed articles near the body, as going to disprove the testimony of accused.[16] Where accused's testimony tended to show that deceased's gun had been fired, it was relevant for the prosecution to show that it had been handled by several persons after the homicide, and before it was seen by the witness testifying as to its condition.[17]

In rebuttal of accused's testimony that as deceased fell, he threw a pistol over into a field, it is relevant to show that the morning after the homicide the witness went into the field, but did not find a pistol.[18] Where it is material to inquire whether or not accused fired his pistol in the affray, it is relevant to show that deceased carried the hammer of his pistol on an empty cartridge, that being the condition of the pistol after the encounter.[19] Where an examination was made of the body of the deceased immediately following the homicide, and no weapon was found on deceased, the fact is admissible

[14] *Everett* v. *State*, 30 Tex. App. 682, 18 S. W. 674; *People* v. *Wright*, 144 Cal. 161, 77 Pac. 877; *Carr* v. *State*, 41 Tex. Crim. Rep. 380, 55 S. W. 51. Contra, *State* v. *Chevallier*, 36 La. Ann. 81.

[15] *Roberts* v. *State*, 48 Tex. Crim. Rep. 378, 88 S. W. 221.

[16] *Eggleston* v. *State*, 59 Tex. Crim. Rep. 542, 128 S. W. 1105.

[17] *State* v. *Shaw*, 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51.

[18] *Gregory* v. *State*, 140 Ala. 16, 37 So. 259.

[19] *White* v. *State*, 100 Ga. 659, 28 S. E. 423.

to show that deceased was not armed during the difficulty;[20] and generally the prosecution on rebuttal may introduce testimony showing that the deceased was not armed at the time of the affray, that he did not have the kind of weapon that the accused claimed, and that he did not use any weapon which he had.[21]

§ 928. Circumstances causing apprehension of and showing imminence of danger.—To sustain a plea of self-defense, the accused must show that he actually apprehended danger,[1] and that he acted upon such apprehension.[2] The word "apprehend," as used in this connection, is not synonymous with fear, but with belief. The party assaulted need not fear the threatened danger; it is sufficient if he believes in good faith that there is actual danger, and that he will suffer bodily

[20] *Jackson* v. *State,* 147 Ala. 699, 41 So. 178. See *People* v. *Adams,* 137 Cal. 580, 70 Pac. 662; *James* v. *State,* — Ala. —, 52 So. 840.

[21] *People* v. *Sehorn,* 116 Cal. 508, 48 Pac. 495; *People* v. *Powell,* 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481; *State* v. *Reed,* 137 Mo. 135, 38 S. W. 574; *Moore* v. *State,* 96 Tenn. 209, 33 S. W. 1046; *Pettis* v. *State,* 47 Tex. Crim. Rep. 66, 81 S. W. 312; *Williams* v. *State,* 30 Tex. App. 429, 17 S. W. 1071: *Jackson* v. *State,* 147 Ala. 699, 41 So. 178; *Hill* v. *State,* 146 Ala. 51, 41 So. 621; *Janes* v. *State,* — Ala. —, 52 So. 840; *Dougherty* v. *State,* 59 Tex. Crim. Rep. 464, 128 S. W. 398; *State* v. *Crawford,* 31 Wash. 260, 71 Pac. 1030; *State* v. *Churchill,* 52 Wash. 210, 100 Pac. 309; *Ross* v. *State,* 8 Wyo. 351. 57 Pac. 924; *Lillard* v. *State,* 151 Ind. 322, 50 N. E. 383; *State* v. *McLaughlin,* 149 Mo. 19, 50 S. W. 315; *Thomas* v. *State,* 45 Tex. Crim. Rep. 111, 74 S. W. 36; *State* v. *Lattin,* 19 Wash. 57, 52 Pac. 314; *White* v. *State,* 100 Ga. 659, 28 S. E. 423. See *Watson* v. *State,* 52 Tex. Crim. Rep. 85, 105 S. W. 509; *Moore* v. *State,* 86 Miss. 160, 38 So. 504; *Baysinger* v. *Territory,* 15 Okla. 386, 82 Pac. 728.

[1] *State* v. *Matthews,* 78 N. C. 534; *State* v. *Gentry,* 125 N. C. 733, 34 S. E. 706.

[2] *People* v. *Gonzales,* 71 Cal. 569, 12 Pac. 783; *People* v. *Ye Park,* 62 Cal. 204; *Pugh* v. *State,* 132 Ala. 1, 31 So. 727; *Lovett* v. *State,* 30 Fla. 142, 17 L.R.A. 705, 11 So. 550; *Ballard* v. *State,* 31 Fla. 266, 12 So. 865; *Stiles* v. *State,* 57 Ga. 183; *Gainey* v. *People,* 97 Ill. 270, 37 Am. Rep. 109; *McKinney* v. *Com.* 26 Ky. L. Rep. 565, 82 S. W. 263.

harm if he does not resist and meet force with force.[3] The imminent danger which justifies homicide in self-defense is immediate danger, such as must be instantly met or guarded against, and such as cannot be met by calling on others for assistance, or for protection of the law.[4] The danger must be a present one, as distinguished from a past one or a danger of future injury.[5] The right of self-defense commences when the necessity, real or apparent, begins, and ends when it ceases.[6]

To determine the existence of these facts, testimony is relevant showing the presence and acts of others, the character of the place, its surroundings, and those circumstances which tend to explain the transaction.[7]

Thus, where the accused pleaded self-defense, and the evidence raised a doubt as to who was the aggressor, it was relevant to show that deceased had threatened accused, and to show improper relations between the deceased and the sister of accused, as showing a motive for the deceased being the aggressor and the reasonableness of accused's apprehension.[8] Where accused had killed the son of his lessee, while accused was unlawfully attempting to obtain possession of the leased

[3] *Trogdon* v. *State,* 133 Ind. 1, 32 N. E. 725.

[4] *United States* v. *Outerbridge,* 5 Sawy. 620, Fed. Cas. No. 15,978; *United States* v. *Wiltberger,* 3 Wash. C. C. 515, Fed. Cas. No. 16,738; *Johnson* v. *State,* 58 Ark. 57, 23 S. W. 7; *Jackson* v. *State,* 91 Ga. 271, 44 Am. St. Rep. 22, 18 S. E. 298. And see *Smith* v. *State,* 119 Ga. 564, 46 S. E. 846.

[5] *Acers* v. *United States,* 164 U. S. 388, 41 L. ed. 481, 17 Sup. Ct. Rep. 91; *Dolan* v. *State,* 81 Ala. 11, 1 So. 707; *Golden* v. *State,* 25 Ga. 527; *Kennedy* v. *Com.* 14 Bush. 340; *Com.* v. *Rudert,* 109 Ky. 653, 60 S. W. 489; *Draper* v. *State,* 4 Baxt. 246; *Bush* v. *State,* 40 Tex. Crim. Rep. 539, 51 S. W. 238; *Carleton* v. *State,* 43 Neb. 373, 61 N. W. 699; *Holt* v. *State,* 9 Tex. App. 571. And see *Juley* v. *State,* 45 Tex. Crim. Rep. 391, 76 S. W. 468.

[6] *Brendendick* v. *State.* — Tex. Crim. Rep. —, 34 S. W. 115; *Hobbs* v. *State,* 16 Tex. App. 517.

[7] See *State* v. *Snelbaker,* 8 Ohio Dec. Reprint, 466.

[8] *Gafford* v. *State,* 122 Ala. 54, 25 So. 10.

premises, it is relevant to show the condition under which accused endeavored to dismantle the house and smoke the family out, to determine whether or not a reasonable man would anticipate danger as a probable consequence of his acts.[9] Where accused had been whitecapped sometime previous, and later engaged in a quarrel with persons whom he believed were members of the mob that whitecapped him, and the quarrel led to an assault and prosecution, it was relevant for the accused to cross-examine the prosecuting witness as to the whitecap mob, as tending to show accused's apprehension of danger at the time he was assaulted, and it was error to refuse such permission.[10] Where a witness testified that a gang of fellows were following accused, it was relevant to ask witness if he noticed whether or not a member of the gang had a revolver, and to allow accused to prove that such member, with a gang of men, was searching for accused to do violence to him, and accused had knowledge of this fact when he shot; and the exclusion of such evidence was error.[11] To determine accused's state of mind at the time of the homicide, and whether or not he was induced to believe in good faith that he was in imminent danger of death or great bodily harm from the deceased, it was relevant to show that the deceased was a violent man, and habitually armed; and this is true whether accused gathered such knowledge from general reputation or from personal observation.[12] Where a homicide ensued from a blow, in support of his plea of self-defense, accused may show that at the time he struck the blow, he had

[9] *Gedye* v. *People,* 170 Ill. 284, 48 N. E. 987.

[10] *Davids* v. *People,* 192 Ill. 176, 61 N. E. 537.

[11] *State* v. *Evans,* 122 Iowa, 174, 97 N. W. 1008; *Williams* v. *People,* 54 Ill. 422. See *Com.* v. *Crowley,* 165 Mass. 569, 43 N. E. 509.

[12] *State* v. *Burton,* 63 Kan. 602, 66 Pac. 633; *State* v. *Rochester,* 72 S. C. 194, 51 S. E. 685; *Spangler* v. *State,* 41 Tex. Crim. Rep. 424, 55 S. W. 326; *Glenewinkel* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 123.

Letters to third persons containing threats against accused are relevant. *Ball* v. *State,* 29 Tex. App. 107, 14 S. W. 1012.

reasonable cause to apprehend an attack upon and serious bodily harm to himself; and he may also testify that at that time he actually apprehended such an attack.[13] Where the evidence showed that accused's hat was brought out to him, after he had been put out of the house, before the homicide, it was relevant for him to show that he was afraid to re-enter the house himself, for fear that deceased would kill him.[14] Accused was a convict guard. In attempting to discipline a convict, convict attacked him, and he claimed that he shot the convict in self-defense; on the prosecution it was relevant for accused to show that the convict said to him that he had already served a term for murder, as making clear to the accused the animus of the attack then made on him.[15] To sustain the plea of self-defense, it is relevant to show that deceased had said, "I would have gotten him if he had not been too quick for me." [16] Where the accused had been attacked and seriously maimed and permanently disfigured, and after such attack he had carried a weapon, it was relevant for him to show in support of the plea of self-defense for killing another, that when the deceased started toward him with his fists, together with the acts and conduct and size of the one who had formerly attacked him, it made him fear and believe that he was in danger of being maimed in a similar manner, and of suffering great bodily harm at the hands of the deceased; and the fact that he was carrying a weapon contrary to the statute did not deprive him of the right to use such weapon in self-defense.[17] And as the accused's right of self-defense is tested by the ap-

[13] *Com.* v. *Woodward,* 102 Mass. 155; *Duncan* v. *State,* 84 Ind. 204. Contra, *State* v. *Gance,* 87 Mo. 627.

[14] *Gregory* v. *State,* — Tex. Crim. Rep. —, 48 S. W. 577. See *Mott* v. *State,* — Tex. Crim. Rep. —, 51 S. W. 368; *Poole* v. *State,* 45 Tex. Crim. Rep. 348, 76 S. W. 565.

[15] *Dodson* v. *State,* 44 Tex. Crim. Rep. 200, 70 S. W. 969; *Boyle* v. *State,* 97 Ind. 322. See *Williams* v. *Com.* 90 Ky. 596, 14 S. W. 595.

[16] *Brown* v. *State,* 74 Ala. 478.

[17] *State* v. *Doris,* 51 Or. 136, 16 L.R.A.(N.S.) 660, 94 Pac. 44.

parent necessity shown to him by the acts of his assailant, it is relevant for him to give testimony of any fact tending to prove the honesty of his belief; he is entitled to show the character of his victim and any other circumstance from which he might reasonably have apprehended that he was in imminent danger of his life or of great bodily harm.[18]

§ 929. Apprehensions of third parties; testimony as to intent of deceased.—The rule is clearly settled that apprehensions or opinions of third parties, that the accused is in imminent danger, are not relevant.[1] But facts from which apprehension might reasonably be inferred, as distinct from opinion, are relevant when stated or shown by third parties. Thus, it was relevant for a witness to testify that he said to accused, just before the homicide, "Yonder comes John Anderson," but it was irrelevant to admit the words, "And he will kill you," such being the mere opinion of the witness as to the intention of the deceased.[2] Where accused was attacked on his own premises, by deceased, who was a large and powerful man, it is relevant to show by third parties that deceased's conduct was so violent as to alarm them, and also to state the facts of his behavior on the way to the scene of the homicide.[3] It was relevant for accused to show that a few days before the homicide, two men pointed out deceased, and in-

[18] *People* v. *Fitchpatrick*, 106 Cal. 286, 39 Pac. 605; *State* v. *Collins*, 32 Iowa, 36; *Cole* v. *State*, 48 Tex. Crim. Rep. 439, 88 S. W. 341; *Prichett* v. *State*, 22 Ala. 39, 58 Am. Dec. 250.

[1] *State* v. *Rhoads*, 29 Ohio St. 171; *State* v. *Summers*, 36 S. C. 479, 15 S. E. 369; *Phipps* v. *State*, 36 Tex. Crim. Rep. 216, 36 S. W. 753; *Holmes* v. *State*, 136 Ala. 80, 34 So. 180; *People* v. *Reed*, — Cal. —, 52 Pac. 835; *Hawkins* v. *State*, 25 Ga. 207, 71 Am. Dec. 166; *State* v. *Scott*, 26 N. C. (4 Ired. L.) 409, 42 Am. Dec. 148; *Gardner* v. *State*, 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; *State* v. *Brooks*, 39 La. Ann. 817, 2 So. 498; *Lowman* v. *State*, 109 Ga. 501, 34 S. E. 1019, 13 Am. Crim. Rep. 389; *Smith* v. *Com.* 113 Ky. 19, 67 S. W. 32.

[2] *Hudgins* v. *State*, 2 Ga. 173.

[3] *People* v. *Lilly*, 38 Mich. 270.

formed him of his dangerous character, as explaining his motives and the reasonableness of his belief that the deceased was a dangerous man.[4]

While accused cannot support his plea of self-defense by the testimony of third persons expressing their opinions of the intent of the deceased, it is relevant to show the effect of the deceased's conduct on the mind of a by-stander, as such conduct would illustrate the effect likely to be produced on the mind of the accused himself;[5] and it is relevant for the accused to ask a witness who was present at the affray, why he seized the arm of the person assaulted, as tending to show the effect that such person's acts would have on the accused;[6] and accused may ask a witness who was present when the deceased rushed upon the accused, whether or not there was time enough to escape and get out of the way before the deceased rushed upon him.[7]

It is relevant for the accused himself to testify directly as to his apprehension that he was in imminent danger at the time of the homicide, at the hands of the deceased,[8] and he may give his reasons therefor,[9] and also what he thought the deceased intended to do, where the evidence also shows that the accused made some hostile demonstrations.[10]

[4] *Childers* v. *State,* 30 Tex. App. 160, 28 Am. St. Rep. 889, 16 S. W. 903.

[5] *Cochran* v. *State,* 28 Tex. App. 422, 13 S. W. 651, 8 Am. Crim. Rep. 496.

[6] *Thomas* v. *State,* 40 Tex. 36.

[7] *Stewart* v. *State,* 19 Ohio, 302, 53 Am. Dec. 426.

[8] *Com* v. *Woodward,* 102 Mass. 155; *Duncan* v. *State,* 84 Ind. 204; *State* v. *Austin,* 104 La. 409, 29 So. 23; *Williams* v. *Com.* 90 Ky. 596, 14 S. W. 595; *Upthegrove* v. *State,* 37 Ohio St. 662.

[9] *Upthegrove* v. *State,* 37 Ohio St. 662; *State* v. *Austin,* 104 La. 409, 29 So. 23.

[10] *Wallace* v. *United States,* 162 U. S. 466, 40 L. ed. 1039, 16 Sup. Ct. Rep. 859; *State* v. *Bouvy,* 124 La. 1054, 50 So. 849; *Price* v. *State,* 1 Okla. Crim. Rep. 358, 98 Pac. 447; *Ewing* v. *Com.* 129 Ky. 237, 111 S. W. 352; *Taylor* v. *People,* 21 Colo. 426, 42 Pac. 652; *State* v. *Hall,* 132 N. C. 1094, 44 S. E. 553; *State* v. *Wright,* 40 La. Ann. 589, 4 So. 486.

And where the prosecution had given in evidence a threat by the accused against the deceased, it is relevant for accused to testify directly as to his intent or his feeling toward the deceased when he made the threat, for the purpose of rebutting evidence tending to show the motive predicated on the threat.[11] It is the right of the accused on a homicide prosecution to give testimony in his own behalf, based on facts and circumstances of the case, that it was necessary to kill the deceased to save his own life, or to protect himself from great personal injury;[12] and if there is any testimony which would warrant the jury in finding that there was a reasonable cause for such apprehension, though it comes from the accused's testimony alone, and conflicts with the other evidence in the case, it is sufficient of itself to entitle the accused to testify that he acted under such apprehension.[13]

§ 930. Apprehension from disparity in physical strength of the parties.—On the issue of self-defense, it is relevant to give testimony as to the relative size, strength, and other physical characteristics showing the disparity between the accused and the deceased, as ground for apprehension, and also upon the question as to which party was the aggressor.[1]

[11] *Emery* v. *State,* 92 Wis. 146, 65 N. W. 849; *Pratt* v. *State,* 50 Tex. Crim. Rep. 227, 96 S. W. 8.

[12] *Lane* v. *State,* 44 Fla. 105, 32 So. 896; *State* v. *Harrington,* 12 Nev. 126.

[13] *Com.* v. *Woodward,* 102 Mass. 155.

[1] *Smith* v. *United States,* 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; *Wilkins* v. *State,* 98 Ala. 1, 13 So. 312; *Hinch* v. *State,* 25 Ga. 699; *Stephenson* v. *State,* 110 Ind. 358, 59 Am. Rep. 216, 11 N. E. 360; *State* v. *Collins,* 32 Iowa, 36; *State* v. *Benham,* 23 Iowa, 154, 92 Am. Dec. 417; *Wise* v. *State,* 2 Kan. 419, 85 Am. Dec. 595; *Com.* v. *Barnacle,* 134 Mass. 215, 45 Am. Rep. 319; *Brownell* v. *People,* 38 Mich. 732; *People* v. *Harris,* 95 Mich. 87, 54 N. W. 648; *State* v. *Shafer,* 22 Mont. 17, 55 Pac. 526; *Alexander* v. *Com.* 105 Pa. 1; *Boyd* v. *State,* 14 Lea, 161; *State* v. *Nett,* 50 Wis. 524, 7 N. W. 344; *Mann* v. *State,* 134 Ala. 1, 32 So. 704; *Gunter* v. *State,* 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632; *People* v. *Smith,* 151 Cal. 619, 91 Pac. 511;

The relative size of accused and deceased may be shown by a photograph;[2] and a correct likeness of deceased is relevant evidence of his physical characteristics, as tending to strengthen or rebut accused's apprehension that he was in danger;[3] but to be relevant such testimony must be limited to the physical condition of the parties at or about the time of the homicide.[4]

On the issue of self-defense, evidence that deceased was a large and more powerful man than accused is relevant.[5] In a prosecution for assault, it was relevant for the injured party to testify that accused was a professional pugilist and an ex-champion of his class, and much larger and stronger than the injured party, and that he drew a gun in self-defense, and not for the purpose of provoking a difficulty.[6] And it is held generally that instances and results of physical tests, known to the accused, are relevant on the question of the relative physical strength of the parties;[7] and it seems that witnesses personally familiar with both parties, as to their relative physical strength and temperaments, may express an opinion as to such differences, where they are not capable of description except by opinion.[8]

State v. *Lee*, — Del. —, 74 Atl. 4; *State* v. *Rutledge*, 135 Iowa, 581, 113 N. W. 461; *Humber* v. *Com.* 31 Ky. L. Rep. 606, 102 S. W. 1179; *Stevens* v. *State*, 84 Neb. 759, 122 N. W. 58, 19 A. & E. Ann. Cas. 121; *Bryant* v. *State*, 51 Tex. Crim. Rep. 66, 100 S. W. 371; *Newcomb* v. *State*, 49 Tex. Crim. Rep. 550, 95 S. W. 1048. See *State* v. *Hough*, 138 N. C. 663, 50 S. E. 709; *State* v. *Doris*, 51 Or. 136, 16 L.R.A.(N. S.) 660, 94 Pac. 44.

[2] *Com.* v. *Keller*, 191 Pa. 122, 43 Atl. 198.

[3] *People* v. *Webster*, 139 N. Y. 73, 34 N. E. 730.

[4] *State* v. *Crea*, 10 Idaho, 88, 76 Pac. 1013.

[5] *Smith* v. *United States*, 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; supra, note 1, this section.

[6] *Warren* v. *State*, 31 Tex. Crim. Rep. 573, 21 S. W. 680.

[7] *Stephenson* v. *State*, 110 Ind. 358, 59 Am. Rep. 216, 11 N. E. 360. See *State* v. *Knapp*, 45 N. H. 148; *State* v. *Cushing*, 17 Wash. 544, 50 Pac. 512.

[8] *Brownell* v. *People*, 38 Mich. 732.

§ 931. Circumstances surrounding the homicidal act.—Where a plea of self-defense is interposed, it is relevant for the accused to give in evidence testimony showing all the circumstances surrounding the homicidal act, and the details, acts, conduct, and occurrences that are connected with or have a bearing upon the main fact; and a like relevancy applies to the nature of the act and its circumstances on the part of the prosecution. Thus, on a prosecution for assault with intent to kill, brought about by the accused in resisting an arrest by a private party, it was relevant to show that accused had stolen goods which he had on his person at the time of the attempted arrest.[1] Where the evidence showed that persons, on reaching the scene of the affray, found deceased on top of the accused, whose back was on the ground, with a knife in his left and a pistol in his right hand, and that they pulled deceased away and grabbed accused's hands to disarm him, and that, while so doing, accused tried to cut such persons with his knife, the evidence was relevant to show the state of mind of the accused, and to rebut his plea of necessary self-defense.[2] Where accused claimed that during the homicide he was wounded in the head, it is relevant for the prosecution to show that he had received a wound in the head in a fight in which he had engaged sometime prior to the homicide.[3] On a prosecution for assault with intent to kill, it was relevant for the prosecuting witness to show that he had been acting as a deputy sheriff, that he had a warrant against accused, who carried a concealed weapon, and that he had been appointed a special constable to serve such warrant, in explanation of his purpose in seeking accused.[4] Where accused alleged self-defense on a prosecution for assault with intent to

[1] *Dryer* v. *State*, 139 Ala. 117, 36 So. 38.

[2] *Powers* v. *Com.* 29 Ky. L. Rep. 277, 92 S. W. 975.

[3] *State* v. *Mitchell*, 130 Iowa, 697, 107 N. W. 804.

[4] *Shields* v. *State*, 87 Miss. 429, 39 So. 1010.

kill, and relied upon the fact that the party injured came to his house armed with a rifle, and inquired for him, it was relevant for the prosecution to show that there had been a difficulty between accused and his wife the day before, and that it was concerning this fact that the injured party called to inquire.[5] On the part of the accused it was error, on a homicide prosecution, to reject evidence that accused was behind the bar in a saloon, and could not retreat, so as to escape an assault by the deceased.[6] Where the evidence showed that deceased was armed with a knife when accused struck him, it was error, on a plea of self-defense, to refuse evidence that accused had his shirt cut in front during the affray.[7] Where the prosecution had shown that accused went to a certain place with the purpose of killing deceased, and the evidence left a doubt as to which of the two was the aggressor, it was relevant for accused to show that he refused to go to the place when he was first asked to do so, the reason that he gave for such refusal, and the circumstances under which he afterwards did go to the place.[8] Where deceased was killed in an affray resulting from accused's interference in a quarrel between deceased and another person, the nature of the quarrel is relevant.[9] Where self-defense is the plea, the circumstances of the rencounter, the situation of the parties, threats, relative strength and power, are all relevant circumstances for consideration of the jury.[10] Where accused was a tax collector on trial for the murder of a Chinaman, and he offered to show that the Chinese resisted the collection of this tax by force, that they frequently attacked the collectors without a provocation, and that such collectors usually went armed, and took others with them for the sake of safety,

[5] *Gaines* v. *State*, — Tex. Crim. Rep. —, 37 S. W. 331.

[6] *State* v. *Crea*, 10 Idaho, 88, 76 Pac. 1013. See *Stewart* v. *State*, 19 Ohio, 302, 53 Am. Dec. 426.

[7] *Ellzey* v. *State*, — Miss. —, 37 So. 837.

[8] *Tesney* v. *State*, 77 Ala. 33.

[9] *Prior* v. *State*, 77 Ala. 56.

[10] *Palmore* v. *State*, 29 Ark. 248.

these facts were relevant to explain the conduct of accused, but should be rejected if they were offered to sustain the conclusions or opinions of a witness.[11] Where the prosecution attempted to rebut accused's plea of self-defense by showing previous threats against deceased, it was relevant for the accused to show, in explanation of the threats, that deceased had previously attacked him with a hatchet, and that he had deceased bound over to keep the peace.[12] Where the evidence showed that, as deceased was about to attack accused with an ax, accused threw stones at him, one of which killed him, it was relevant to prove by a witness who was working near the place, that he heard the difficulty, that he heard accused warn deceased not to approach, that deceased replied he was coming, and thereupon the rocks were thrown.[13] Where the principal question was whether or not the deceased was attempting to draw a pistol when accused fired, the statements of all the persons engaged in the affray in which the shooting occurred, and made while it was continuing, are relevant to show the nature of the affray and the attitude of the parties toward each other.[14] Where the parties had had a previous difficulty at which the witness was present, and accused attempted to show that the witness came to the place of the former difficulty for the purpose of getting cartridges which deceased had taken from witness's store, such circumstances were wholly irrelevant.[15] Where accused pleaded self-defense, the actions of others who, without conspiring with him, and without his knowledge or that of the deceased, took part in the affray, are not relevant as circumstances that can in any

[11] *People* v. *Williams,* 17 Cal. 142.

[12] *Bolzer* v. *People,* 129 Ill. 112, 4 L.R.A. 579, 21 N. E. 818.

[13] *Costigan* v. *Com.* 11 Ky. L. Rep. 617, 12 S. W. 629.

[14] *Ferrel* v. *Com.* 15 Ky. L. Rep. 321, 23 S. W. 344. See *Goins* v. *State,* 46 Ohio St. 457, 21 N. E. 476, 8 Am. Crim. Rep. 19; *Wicks* v. *State,* 28 Tex. App. 448, 13 S. W. 748.

[15] *Gordon* v. *State,* 140 Ala. 29, 36 So. 1009.

way effect the degree of the accused's guilt.[16] Where the accused sought to prove a conspiracy by deceased and others at the time of the killing, it was irrelevant to receive evidence that after accused had fired the first shot, one of those with the deceased struck him and another shot at him, where no prior evidence of conspiracy had been offered.[17]

§ 932. Homicide in defense of another.—Where a homicide is committed in defense of another, every circumstance that would be relevant to a plea of self-defense is relevant to show justification to the same extent as if the homicide had been committed in self-defense;[1] but the person interfering in the defense of another is governed by the status of the original combatant; he is not allowed the benefit of a plea of self-defense, unless the person whose part he took could avail himself of that plea, if such person had committed the homicide himself.[2] Thus, if the person sought to be protected was the aggressor, to make a plea of self-defense available,

[16] *Whitaker* v. *State*, 106 Ala. 30, 17 So. 456.

[17] *Simmons* v. *State*, 79 Ga. 696, 4 S. E. 894.

[1] *State* v. *Felker*, 27 Mont. 451, 71 Pac. 668; *Wood* v. *State*, 128 Ala. 27, 86 Am. St. Rep. 71, 29 So. 557; *People* v. *Curtis*, 52 Mich. 616, 18 N. W. 385; *People* v. *M'Kay*, 122 Cal. 628, 55 Pac. 594; *King* v. *State*, 55 Ark. 604, 19 S. W. 110; *State* v. *Austin*, 104 La. 409, 29 So. 23; *Foster* v. *State*, 102 Tenn. 33, 73 Am. St. Rep. 855, 49 S. W. 747; *Tudor* v. *Com.* 19 Ky. L. Rep. 1039, 43 S. W. 187; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; *Wheat* v. *Com.* — Ky. —, 118 S. W. 264; *Sanford* v. *State*, 143 Ala. 78, 39 So. 370; *Untreinor* v. *State*, 146 Ala. 26, 41 So. 285; *State* v. *Hennessy*, 29 Nev. 320, 90 Pac. 221, 13 A. & E. Ann. Cas. 1122; *Morris* v. *State*, — Ala —, 39 So. 608. See *Sherill* v. *State*, 138 Ala. 3, 35 So. 129.

[2] *Bush* v. *People*, 10 Colo. 566, 16 Pac. 290; *Gibson* v. *State*, 91 Ala. 64, 9 So. 171; *Whatley* v. *State*, 91 Ala. 110, 9 So. 236; *Bostic* v. *State*, 94 Ala. 45, 10 So. 602; *Karr* v. *State*, 106 Ala. 1, 17 So. 328; *Mitchell* v. *State*, 129 Ala. 23, 30 So. 348; *Mitchell* v. *State*, 22 Ga. 211, 68 Am. Dec. 493; *Spaulding* v. *State*, 162 Ind. 297, 70 N. E. 243; *Caskey* v. *Com.* 15 Ky. L. Rep. 257, 23 S. W. 368; *Stanley* v. *Com.* 86 Ky. 440, 9 Am. St. Rep. 305, 6 S. W. 155; *State* v. *Melton*, 102 Mo. 683, 15 S. W. 139; *Martinez* v.

he must have manifested a desire to withdraw from the conflict, and even then the interference is not justifiable if the fatal blow was given pursuant to a previous design to assist in the event of difficulty.[3]

So, where a son fights in defense of his father, if the father was the aggressor, and could not plead self-defense, such plea could not avail the son;[4] and the converse applies where the son brought on the difficulty, and the father committed the homicide;[5] and the same rule applies where a brother interferes in behalf of a brother.[6] Thus, in homicide in defense of another, the same principles determine the relevancy of the preceding, contemporaneous, and the subsequent circumstances, as though the act had occurred between the original parties to the difficulty. Thus, on a trial for assault with intent to kill, where accused had intervened in behalf of his brother, it was relevant for the prosecution to show that accused's brother approached the injured party with his hand in his pocket and apparently on a pistol, saying, "I have come to see you about what you did to me yesterday," although the

State, — Tex. Crim. Rep. —, 88 S. W. 234. And see *Stevens* v. *State*, 133 Ala. 28, 32 So. 270; *Garza* v. *State*, 48 Tex. Crim. Rep. 382, 88 S. W. 231; *State* v. *Hays*, 67 Mo. 692.

[3] *Bostic* v. *State*, 94 Ala. 45, 10 So. 602; *Whatley* v. *State*, 91 Ala. 110, 9 So. 236.

[4] *State* v. *Brittain*, 89 N. C. 481; *Karr* v. *State*, 106 Ala. 1, 17 So. 328; *Morris* v. *State*, — Ala. —, 39 So. 608; *Obier* v. *Neal*, 1 Houst. (Del.) 449; *People* v. *Miller*, 49 Mich 23, 12 N. W. 895; *Crowder* v. *State*, 8 Lea, 669; *Pinson* v. *State*, 23 Tex. 579; *Waddell* v. *State*, 1 Tex. App. 720.

[5] *State* v. *Linney*, 52 Mo. 40; *Mitchell* v. *State*, 129 Ala. 23, 30 So. 348; *Bush* v. *People*, 10 Colo. 566, 16 Pac. 290.

[6] *Gibson* v. *State*, 91 Ala. 64, 9 So. 171; *Wood* v. *State*, 128 Ala. 27, 86 Am. St. Rep. 71, 29 So. 557; *People* v. *Travis*, 56 Cal. 251; *Crockett* v. *Com.* 100 Ky. 382, 38 S. W. 674; *Ross* v. *Com.* 21 Ky. L. Rep. 1344, 55 S. W. 4, 13 Am. Crim. Rep. 294; *State* v. *Melton*, 102 Mo. 683, 15 S. W. 139; *Smith* v. *State*, 105 Tenn. 305, 60 S. W. 145. And see *Stevens* v. *State*, 133 Ala. 28, 32 So. 270; *Smurr* v. *State*, 105 Ind. 125, 4 N. E. 445, 7 Am. Crim. Rep. 545.

accused himself did not hear the remark, or know that his brother was at fault.[7] Where the evidence showed that just prior to the homicide, the deceased was in trouble and had threatened third persons, and accused interfered to prevent the killing of such third persons, the facts and circumstances of the difficulty with such third persons were relevant to determine whether or not the accused could justify on the ground claimed.[8] Where A and B were indicted for the homicide of C, previous threats of C against B were not relevant on the trial of A;[9] and the general rule is that deceased's threats against the accused, who interfered, are not relevant, either on his own trial or that of his coindictee.[10]

But the mere act of interference is not of itself an act of aggression, and whether or not the subsequent acts of the one who interferes are to be regarded as aggression depends upon their character and the motive that produced them;[11] nor does the mere fact of aggression deprive a near relative of the right to defend the aggressor, unless it is reasonably apparent that such aggressor intended to kill or do great bodily harm to the deceased.[12] And if the act of the person in whose behalf another interferes is lawful, the act of the interferer would also be lawful.[13]

It is stated as a general rule that the question of whether or not an interferer in behalf of an aggressor can justify the

[7] *Wood* v. *State*, 128 Ala. 27, 86 Am. St. Rep. 71, 29 So. 557.

[8] *Sanford* v. *State*, 143 Ala. 78, 39 So. 370.

[9] *State* v. *Dumphey*, 4 Minn. 438, Gil. 340.

[10] *State* v. *Marshall*, 35 Or. 265, 57 Pac. 902; *Mealer* v. *State*, 32 Tex. Crim. Rep. 102, 22 S. W. 142; *Moriarty* v. *State*, 62 Miss. 654.

[11] *State* v. *Hickam*, 95 Mo. 323, 6 Am St. Rep. 54, 8 S. W. 252.

See *State* v. *Harper*, 149 Mo. 514, 51 S. W. 89.

[12] *Little* v. *State*, 87 Miss. 512, 40 So. 165.

[13] *Bush* v. *People*, 10 Colo. 566, 16 Pac. 290; *Tubbs* v. *Com.* 22 Ky. L. Rep. 481, 57 S. W. 623; *Cornelius* v. *Com.* 23 Ky. L. Rep. 771, 64 S. W. 412.

homicide upon the ground of apprehension of death or fear of great bodily harm depends upon his knowledge of the antecedent facts, and that the question of his guilt rests upon his guilty knowledge and his guilty intent,[14] and his culpability is measured by the intent with which he himself acted, and not that by which the other party was actuated, unless he himself knew, or might reasonably have known, such intent.[15]

§ 933. Homicide in defense of the family relation.— Homicide in defense of the family relation, as a question of substantive law, is fully treated in another work.[1] But there are certain defenses, arising out of the family relation, that effect the relevancy of circumstances relating to the homicidal act that should be noticed here.

A person is always justified in defending his family, according to the circumstances as they appear to him, even to the extent of taking human life if necessary, or apparently necessary, to save them from death or great bodily harm.[2] A man who finds another violating or attempting to violate his wife, and kills him, is justified in the act as fully as the

[14] *Foster* v. *State,* 8 Tex. App. 248; *Guffee* v. *State,* 8 Tex. App. 187; *Karr* v. *State,* 106 Ala. 1, 17 So. 328; *Bush* v. *People,* 10 Colo. 566, 16 Pac. 290; *State* v. *Linney,* 52 Mo. 40.

And see *Johnson* v. *State,* — Tex. Crim. Rep. —, 59 S. W. 269.

[15] *Monson* v. *State,* — Tex. Crim. Rep. —, 63 S. W. 647; *State* v. *Harper,* 149 Mo. 514, 51 S. W. 89.

See *Alexander* v. *State,* 118 Ga. 26, 44 S. E. 851; *Chambers* v. *State,* 46 Tex. Crim. Rep. 61, 79 S. W. 572.

[1] Wharton, Homicide, Bowlby's ed. 773–778.

[2] *Richardson* v. *State,* 7 Tex. App. 486; *Waybright* v. *State,* 56 Ind. 122; *Dukes* v. *State,* 11 Ind. 557, 71 Am. Dec. 370; *Morrison* v. *Com.* 24 Ky. L. Rep. 2493, 67 L.R.A. 529, 74 S. W. 277. And see *Pratt* v. *State,* 75 Ark. 350, 87 S. W. 651; *Cheek* v. *State,* 35 Ind. 492; *Pond* v. *People,* 8 Mich. 150; *Sharp* v. *State,* 19 Ohio, 387; *Connaughty* v. *State,* 1 Wis. 165, 60 Am. Dec. 370; *Handcock* v. *Baker,* 2 Bos. & P. 260, 5 Revised Rep. 587; *Reg.* v. *Harrington,* 10 Cox, C. C. 370; *Thacker* v. *Com.* 24 Ky. L. Rep. 1584, 71 S. W. 931.

wife herself would be,[3] and he has the right to use force, where necessary to take his wife from the possession of one in whose company he finds her, where he has reason to believe that they have committed or were about to commit a criminal act.[4] So one who sees his brother or sister assaulted by another has the same right to resist the assault, and is entitled to the same justification, as the person assaulted.[5] Where a father commits a homicide to prevent the abduction of his children, the issue is whether or not the circumstances were such as to raise a belief in the mind of a reasonable person as to the apparent necessity for taking the life of the assailant;[6] and a father has the right to kill where necessary to prevent the seduction of his minor daughter.[7] A son who committed homicide on one about to burn the house of his mother, or to commit some other known felony with reference to her, where the danger was imminent and the design was being carried into effect, is justified.[8] And where a son killed his father upon an honest belief that the homicide was necessary to protect his mother from death or serious bodily injury, he is justified.[9] A son's right to defend his father

[3] *State* v. *Neville*, 51 N. C. (6 Jones, L.) 432; *Staten* v. *State*, 30 Miss. 619; *Sherrill* v. *State*, 138 Ala. 3, 35 So. 129.

See *Biggs* v. *State*, 29 Ga. 723, 76 Am. Dec. 630.

[4] *State* v. *Craton*, 28 N. C. (6 Ired. L.) 164.

[5] *Palmer* v. *State*, 47 Tex. Crim. Rep. 268, 83 S. W. 202; *Snell* v. *State*, 29 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722; *Dyson* v. *State*, 14 Tex. App. 454; *Chambers* v. *State*, 46 Tex. Crim. Rep. 61, 79 S. W. 572; *Guffee* v. *State*, 8 Tex. App. 187; *Smurr* v. *State*, 105 Ind. 125, 4 N. E. 445, 7 Am. Crim. Rep. 545; *McQueen* v. *Com.* 28 Ky. L. Rep. 20, 88 S. W. 1047; *Ross* v. *Com.* 21 Ky. L. Rep. 1344, 55 S. W. 4, 13 Am. Crim. Rep. 294; *State* v. *Greer*, 22 W. Va. 800.

And see *Whatley* v. *State*, 91 Ala. 108, 9 So. 236; *Mitchell* v. *State*, 43 Fla. 188, 30 So. 803; *Delaney* v. *Com.* 18 Ky. L. Rep. 212, 35 S. W. 1037; *Richard* v. *State*, 42 Fla. 528, 29 So. 413; *Shumate* v. *State*, 38 Tex. Crim. Rep. 266, 42 S. W. 600.

[6] *Oliver* v. *State*, 17 Ala. 587.

[7] *Gossett* v. *State*, 123 Ga. 431, 51 S. E. 394.

[8] *Parrish* v. *Com.* 81 Va. 1; *State* v. *Pollard*, 139 Mo. 220, 40 S. W. 949.

[9] *Reg.* v. *Rose*, 15 Cox, C. C. 540.

is coextensive with the father's right to defend himself, and whatever the father could lawfully do, the son who defends him may also lawfully do.[10] The right to interfere, arising out of the family relation, includes persons connected by the relation of the family, as guardian and ward, master and servant, host and guest.[11]

The nephew and uncle may interfere to prevent death or grevious bodily harm to one another, and each may use such force to avert the danger as is reasonably necessary, and neither is bound to measure the exact force that may be necessary.[12]

The rule is clear that a relative interfering to protect a relative is, under the law, made one with the original combatant, and hence subject to the same rights and liabilities, and his acts and conduct are to be construed as the acts and conduct of the relative to protect whom he interferes.[13]

[10] *Karr* v. *State,* 106 Ala. 1, 17 So. 328; *Pratt* v. *State,* 75 Ark. 350, 87 S. W. 651; *Benge* v. *Com.* 24 Ky. L. Rep. 1466, 71 S. W. 648.

[11] *Waybright* v. *State,* 56 Ind. 122; *Dukes* v. *State,* 11 Ind. 557, 71 Am. Dec. 370; *Cooper's Case,* Cro. Car. 544; *Semayne's Case,* 5 Coke, 92; *Curtis* v. *Hubbard,* 1 Hill, 336, 4 Hill, 437, 40 Am. Dec. 292; *De Forest* v. *State,* 21 Ind. 23.

[12] *Carroll* v. *Com.* 26 Ky. L. Rep. 1083, 83 S. W. 552; *Tubbs* v. *Com.* 22 Ky. L. Rep. 481, 57 S. W. 623. See *Roe* v. *Com.* 6 Ky. L. Rep. 364.

[13] *Mitchell* v. *State,* 129 Ala. 23, 30 So. 349; *Crockett* v. *Com.* 100 Ky. 382, 38 S. W. 674; *Untreinor* v. *State,* 146 Ala. 26, 41 So. 285; *Cornelius* v. *Com.* 23 Ky. L. Rep. 771, 64 S. W. 412; *Wood* v. *State,* 128 Ala. 27, 86 Am. St. Rep. 71, 29 So. 557; *Warnack* v. *State,* 3 Ga. App. 590, 60 S. E. 288; *Bush* v. *People,* 10 Colo. 566, 16 Pac. 290; *Gibson* v. *State,* 91 Ala. 64, 9 So. 171; *Whatley* v. *State,* 91 Ala. 110, 9 So. 236; *Karr* v. *State,* 106 Ala. 1, 17 So. 328; *Caskey* v. *Com.* 15 Ky. L. Rep. 257, 23 S. W. 368; *Stanley* v. *Com.* 86 Ky. 440, 9 Am. St. Rep. 305, 6 S. W. 155; *Pinson* v. *State,* 23 Tex. 579; *State* v. *Brittain,* 89 N. C. 481; *Obier* v. *Neal,* 1 Houst. (Del.) 449; *Waddell* v. *State,* 1 Tex. App. 720; *State* v. *Linney,* 52 Mo. 40; *State* v. *Hays,* 67 Mo. 692.

See *Smurr* v. *State,* 105 Ind. 125, 4 N. E. 445, 7 Am. Crim. Rep. 545; *People* v. *Travis,* 56 Cal. 251; *State* v. *Melton,* 102 Mo. 683, 15 S. W. 139; *People* v. *Curtis,* 52 Mich. 616, 18 N. W. 385; *Foster* v. *State,* 8 Tex. App. 248; *Guffee* v. *State,* 8 Tex. App. 187; *Deal* v. *State,* 140

Thus, where accused defended the homicide on the ground that it was committed in defense of his father, evidence that his father, about ten minutes before the affray, asked where deceased was, was relevant to the question as to who provoked the difficulty, although the accused did not hear his father ask that question.[14] Where a father claimed that he shot deceased in defense of his son, he was excusable or not according as the son would have been excusable or not had he fired the shot in his own defense.[15] Where a son sought to justify an assault in the defense of his father, he would be justified or not according as to whether or not the father was in the wrong. If the father wantonly made the first assault, and this circumstance appears in evidence, the son could not avail himself of his relationship as justification, if it was also shown by the evidence that he came into the affray for the purpose of aiding the unlawful assault.[16]

Where accused was on trial for shooting his father's assailant, it was relevant to show that on a former occasion, in the presence of accused, the deceased attacked accused's father, who was a cripple, and a much weaker man than deceased,

Ind. 354, 39 N. E. 930; *Surginer* v. *State,* 134 Ala. 120, 32 So. 277.

But see contra, *State* v. *Harper,* 149 Mo. 514, 51 S. W. 89; *Chambers* v. *State,* 46 Tex. Crim. Rep. 61, 79 S. W. 572; *Parnell* v. *State,* 50 Tex. Crim. Rep. 419, 98 S. W. 269.

It is clear, however, that where a father should interfere to protect his minor child, or a son should interfere to protect his father, who might be infirm from age or illness, or whenever a disparity in age or condition is such that the person interfering and the person protected would not be on an equality, the rule that the interfering relative occupies the same position as the original combatant must necessarily be modified to meet that condition.

[14] *Morris* v. *State,* — Ala. —, 39 So. 608.

See *Sherrill* v. *State,* 138 Ala. 3, 35 So. 129.

[15] *Utterback* v. *Com.* 105 Ky. 723, 88 Am. St. Rep. 328, 49 S. W. 479.

[16] *Sharp* v. *State,* 19 Ohio, 389.

See *Mitchell* v. *State,* 129 Ala. 23, 30 So. 349; *Johnson* v. *State,* — Tex. Crim. Rep. —, 59 S. W. 269.

and threatened to kill him, as circumstances showing accused's well-grounded apprehension for his father's life.[17]

And where the defense is that the homicide was necessary to save the life of another person, it is relevant to prove the relationship existing between the accused and the person protected, in connection with the other circumstances of the homicide, to determine whether or not such homicide is equivalent to a homicide in self-defense.[18]

It seems clear that where accused attempts to justify on the ground of protection of a relative, the character of the person sought to be protected is relevant. Thus, where a father defended a homicide on the ground that he was seeking to protect his daughter from seduction, it was relevant for the prosecution, on rebuttal, to introduce evidence of the daughter's reputation.[19]

Where accused seeks to justify the homicide on the ground of the conduct of deceased towards accused's wife, of which accused was informed by his wife, it is relevant to introduce testimony as to the reputation of deceased as an unchaste man, to determine whether or not accused relied upon the facts told him by his wife;[20] and where accused killed deceased believing that deceased was about to assault his wife, it is relevant to show that deceased had made prior assaults on his wife, and that accused had knowledge of these facts.[21]

VI. Identification of Persons in Homicide.

§ 934. Identification generally.—Equally essential as the proof of the *corpus delicti* in every crime, is the identifi-

[17] *Foster* v. *State*, 102 Tenn. 33, 73 Am. St. Rep. 855, 49 S. W. 747.

[18] *Gillis* v. *State*, 8 Ga. App. 696, 70 S. E. 53.

[19] *Gossett* v. *State*, 123 Ga. 431, 51 S. E. 394.

[20] *Jones* v. *State*, 38 Tex. Crim. Rep. 87, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638.

But see *Pence* v. *Com.* 21 Ky. L. Rep. 500, 51 S. W. 801.

[21] *State* v. *Felker*, 27 Mont. 451, 71 Pac. 668.

cation of the accused as the guilty agent.[1] Personal identification can be shown through any means by which the individuality sought to be established can be differentiated from that of every other individuality. Under normal conditions, this distinction is so marked by the laws of nature that no one individual, of whatever race or nation, can be wholly and permanently mistaken for another. But under conditions that generally surround crime, where concealment is often attempted and effacement frequent, where testimony is often destroyed or simulated, identification is not only difficult, but sometimes impossible.

Again, a predisposition to connect an accused with a crime often leads to fancied resemblances, and witnesses give color to their testimony according to the force of such prejudgment.

The clearest impressions of our senses are often deluding and deceptive to a degree that renders them worthless when tested by the actual facts. Not only do we suffer from our own errors, but frequently inflict grevious and irreparable wrongs by reliance upon impressions, that are frequently so valueless as to demand their complete rejection as a basis of scientific accuracy.[2]

[1] *Booker* v. *State*, 76 Ala. 22; *People* v. *Nelson*, 85 Cal. 421, 24 Pac. 1006; *Patton* v. *State*, 117 Ga. 230, 43 S. E. 533; *Glover* v. *State*, 114 Ga. 828, 40 S. E. 998, 15 Am. Crim. Rep. 425; *State* v. *Crabtree*, 170 Mo. 642, 71 S. W. 127; *Garcia* v. *State*, 23 Tex. App. 712, 5 S. W. 186; *Griffith* v. *State*, 9 Tex. App. 372; *State* v. *Powers*, 72 Vt. 168, 47 Atl. 830.

[2] *Glover* v. *State*, 114 Ga. 828, 40 S. E. 998, 15 Am. Crim. Rep. 425.

The following cases illustrate the frequency with which errors occur, as well as the sometimes trival circumstances that lead to a complete and accurate identification:

Two men were convicted before Mr. Justice Grose of a murder, and executed; and the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder; but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which these persons were executed. *Rex* v. *Clinch and*

§ 935. Basis of personal identification.—Permanency of the individuality is the basis from which we infer identity

Mackley, Paris & Fonblanque, Medical Jurisprudence, vol. III. p. 144 (note), and Sess. Papers, 1797.

A young man was tried at the Old Bailey, July, 1824, on five indictments for different acts of theft. It appeared that a person resembling the prisoner in size and general appearance had called at various shops in the metropolis for the purpose of looking at books, jewelry, and other articles, with the pretended intention of making purchases, but made off with the property placed before him while the shopkeepers were engaged in looking for other articles. In each of these cases the prisoner was positively identified by several persons, while in the majority of them an alibi was as clearly and positively established, and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the prisoner, and those persons deposed that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. He was convicted upon one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases expressed their conviction that the witnesses had been mistaken, and that the prosecutor had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which the conviction had taken place. *Rex.* v. *Robinson*, O. B. Sessions Papers, 1824.

A few months before the last-mentioned case, a respectable young man was tried for a highway robbery committed at Bethnal Green, in which neighborhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. A young woman to whom the prisoner paid his addresses gave evidence which proved a complete alibi. The prosecutor was then ordered out of court, and in the interval another young man who awaited his trial on a capital charge was introduced and placed by the side of the prisoner. The prosecutor was again put into the witness box, and addressed by the prisoner's counsel thus: "Remember, the life of this young man depends upon your reply to the question I am about to put, Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head toward the dock, when, beholding two men so nearly alike, he dropped his hat, became speechless with astonishment for a time, and at length declined swearing to either. The prisoner was of course acquitted. The other young man was tried for another offense and executed; and before his death he acknowledged that he had com-

of person. This not only relates to the physical contour, but includes as well carriage, manner, voice, action, temperament,

mitted the robbery in question. Paris & Fonblanque, Medical Jurisprudence, vol. III. p. 143 (note b); Amos's Great Oyer of Poisoning (the trial of the Earl of Somerset), at p. 265.

Upon a trial for burglary, where there was conflicting evidence as to the identity of the prisoner, Mr. Baron Bolland, after remarking upon the risk incurred in pronouncing on evidence of identity exposed to such doubt, said that when at the bar he had prosecuted a woman for child stealing, tracing her buying ribbons and other articles at various places in London, and at last into a coach at Bishopsgate, by eleven witnesses, whose evidence was contradicted by a host of other witnesses, and she was acquitted; and that he had afterwards prosecuted the very woman who really stole the child, and traced her by thirteen witnesses. "These contradictions," said the learned judge, "make one tremble at the consequences of relying on evidence of this nature, unsupported by other proof." *Rex* v. *Sawyer*, Reading Assizes.

As incidental to the establishment of identity, the quantity of light necessary to enable a witness to form a satisfactory opinion has occasionally become the subject of discussion. A man was tried in January, 1799, for shooting at three Bow street officers who, in consequence of several robberies having been committed near Hounslow, were employed to scour that neighborhood. They were attacked in a post chaise by two persons on horseback, one of whom stationed himself at the head of the horses, and the other went to the side of the chaise. One of the officers stated that the night was dark, but that, from the flash of the pistols, he could distinctly see that one of the robbers rode a dark brown horse, between thirteen and fourteen hands high, of a very remarkable shape, having a square head and thick shoulders; that he could select him out of fifty horses, and had seen him since at a stable in Long Acre; and that he also perceived that the person at the side glass had on a rough shag greatcoat. *Rex* v. *Haines*, Paris & Fonblanque, Medical Jurisprudence, vol. III. p. 144 (note).

Similar evidence was given on a trial for high treason. Byrne's Trial, 28 How. St. Tr. 819. And in a case of burglary before the special commission at York, January, 1813, a witness stated that a man came into his room in the night, and caused a light by striking on the stone floor with something like a sword, which produced a flash near his face, and enabled him to observe that his forehead and cheeks were blacked over in streaks, that he had on a dark-colored topcoat and a dark-colored handkerchief, and a large man, from which circumstances and from his voice, he believed the prisoner to

and every physical and mental characteristic. Each element may coincide exactly with that of some one or more individ-

be the same man. *Rex* v. *Brook,* 31 How. St. Tr. 1135, 1137.

In another case a gentleman who was shot at while driving home in his gig, and wounded in the elbow, stated that when he observed the flash of the gun, he saw that it was leveled towards him, and that the light enabled him to recognize at once the features of the accused. On cross-examination he stated that he was quite sure he could see him, and that he was not mistaken as to his identity; but the prisoner was acquitted. *Reg. v. White,* Croydon Autumn Assizes, 1839, mentioned in Taylor's Medical Jurisprudence, 4th ed. 1894, vol. I. p. 729.

A great deal of the value of direct evidence of identification must depend upon the personal appearance of the subject of identification. There are some men with peculiarities and characteristics so marked that only a very careless observer (of whom, however, there are a great number) could well be wrong about them. There are others—and a far greater number—whose features and persons are of the very commonest types, and who are hardly distinguishable by a casual observer from hundreds to be met everyday in the streets. The physical characteristics of the subject of identification may be of the one category or the other, or may belong to any one of the infinite gradations between the two extremes. Fortunately, the tribunal has the advantage of seeing the person sought to be identified, and the foregoing considerations can always be brought home to the minds of the jurors.

It may not be out of place to mention a remarkable case which illustrates the difficulties surrounding the determination of personal identity. A man was tried at Manchester for housebreaking. He was convicted. A part of the indictment alleged that he had been previously convicted of a similar offense. A warder from the convict prison from which it was alleged that the prisoner had been discharged on completing his former sentence deposed that the prisoner was the same man, and that he had served his former sentence as James Williams. The prisoner, who vehemently protested that a mistake had been made, elicited from the warder that, upon the discharge of James Williams, a list had been made of the marks of identification upon him. The list was produced, and the jail surgeon was requested to take the prisoner to the cells and report what marks he had upon him. He returned with a list which differed very materially from the warder's list, containing some obvious marks which were not in the warder's list, and not containing others which were in that list. In particular, the prisoner had upon his stomach a large mark of discoloration ("probably congenital," said the surgeon) which was not in the warder's list. Photographs of

James Williams were produced by the warder, and at the request of the jury the prisoner was placed in various positions, and under various lights, for the purpose of comparison. In the end the jury found that the prisoner was not James Williams, and he received the mitigated sentence due to a first conviction for an offense of this kind. When in prison he memorialized the home secretary, complaining of some action on the part of the prison authorities. This led to an investigation, in the course of which a petition from James Williams, dated from Chatham convict prison, was found in the archives of the home office, and both petitions were sent by the home secretary to the judge who tried the case. There was not then room for the smallest doubt as to the identity of the prisoner with James Williams. Not only were the two handwritings identical, but there was a peculiar vein of thought and character running through both petitions, which could hardly by any possibility have been common to two different persons. The man was of the kind known to seamen as "sea lawyers," and with a very peculiar vein of querulousness eminently characteristic. There is not the slightest doubt that the warder was right in his identification. *R.* v. *Henry Evans,* Manchester Winter Assizes, 27th January, 1885, *coram* Wills, J.

Sir Alfred Wills, of the English high court of justice, says (Wills on Circumstantial Evidence, 5th ed. p. 163), that during his experience of between seventeen and eighteen years on the bench, he met with but one instance of mistake upon the question of previous conviction. *R.* v. *Helsham,* Liverpool Autumn Assizes, 12th November, 1885. Upon his sending for the offending witness, and speaking to him of the great gravity of such a mistake, the man (a warder from one of the large London prisons) said in extenuation, "My lord, I identify 3,000 a year!"

The liability to mistake must necessarily be greater where the question of identity is matter of deduction and inference than where it is the subject of direct evidence. The circumstances from which identity may be thus inferred are innumerable, and admit of only a very general classification.

Family likeness has often been insisted upon as a reason for inferring parentage and identity. In the Douglas Case Lord Mansfield said: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals; a man may survey 10,000 people before he sees two faces perfectly alike, and in an army of a hundred thousand men, every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude, and action." 2 Collectanea Juridica,

402; Beck's Medical Jurisprudence, 7th ed. p. 402.

But in a case in Scotland, where the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant, as being too much a matter of fancy and loose opinion to form a material article of evidence. *Rutledge* v. *Carruthers,* Tait, Ev. 2d ed. p. 441.

In another Scotch case, however, —a trial for child murder,—it was permitted (after proof that the child had six toes) to ask a witness whether any member of the prisoner's family had supernumerary fingers and toes; though the inference to be deduced was evidently only matter of opinion. 1 Dickson, Ev. in Scotland, § 19, p. 14.

A case of capital conviction occurred a few years ago, where the prisoner had given his portrait to a youth, which enabled the police, after watching a month in London, to recognize and apprehend him. *Rex* v. *Arden,* 8 London Medical Gazette, 36. Photographic likenesses frequently lead to the identification of offenders, but identification by photograph alone is regarded with suspicion, and the court will not act upon it except in very exceptional circumstances. *Frith* v. *Frith* [1896], p. 74, 65 L. J. Prob. N. S. 53. It is well known that shepherds readily identify their sheep, however intermingled with others. *Rex* v. *Oliver,* Syme's Justiciary Report (Scotch), p. 224. And offenders are not infrequently recognized by the voice. *Rex* v. *Brook,* 31 How. St. Tr. 1124, 1129, 1137.

Circumstances frequently contribute to identification by confining suspicion and limiting the range of inquiry to a class of persons; as where crimes have been committed by left-handed persons. *Rex* v. *Okeman,* 14 How. St. Tr. 1324; *Rex.* v. *Richardson,* cited in Burnett, Crim. Law. 524. Or where, notwithstanding simulated appearances of external violence and infraction, the offenders must have been domestics; as in a case of two persons convicted of murder, who created an alarm from within the house, but upon whom, nevertheless, suspicion fell from the circumstance that the dew on the grass surrounding the house had not been disturbed on the morning of the murder, which must have been the case had it been committed by any other than inmates. *Swan's Case,* 18 How. St. Tr. 1194; and see Mascardus, De Probationibus, Concl. cclxxii.

On the trial of a gentleman's valet for the murder of his master, it appeared that there were marks on the back door of the house as if it had been broken into, but the force had been applied from within, as the only way by which this door could be approached from the back was over a wall covered with dust, which lay undisturbed, or over some tiling so old and perished that it would not have borne the weight of a man; so that the appearance of burglarious entry must have been contrived by a domestic. Other facts conclusively fixed the prisoner

as the murderer. *Reg* v. *Courvoisier,* see p. 398, Wills, Circumstantial Ev. 5th Eng. ed.

Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise related to the *corpus delicti.* See Marscardus, De Probationibus, Concl. DCCCXXXI. Or by means of wounds or marks inflicted upon the person of the offender.

A colored man named Allen was charged at Cardiff assizes, in 1889, with the murder of George Kent. He was identified and convicted upon the following evidence: The dead man's wife saw that her husband's assailant was a black man, and fired a revolver at him. He fell; but afterwards escaped. A few hours later the prisoner was arrested, and a bullet extracted from his thigh which fitted the empty cartridge case. *Reg* v. *Allen,* see The Times, March 19th, 1889.

A woman who was tried for setting the prosecutor's ricks on fire had been met near the ricks about two hours after midnight, and a tinder box was found near the spot, containing some unburnt cotton rag; also a piece of a woman's neckerchief was found in one of the ricks where the fire had been extinguished. The piece of cotton in the tinder box was examined with a lens, and the witness deposed that it was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box at her lodgings; that a neckerchief taken from a bundle belonging to the prisoner, found in her lodgings, corresponded with the color, pattern, and fabric of the piece found in the rick, and that they had both belonged to the same square; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing silk of the same quality (whereas articles of that description were generally sewed with cotton), he inferred that they were the work of the same person. The prisoner was capitally convicted, but, there being reason to believe that she was of unsound mind, she was reprived. *Rex* v. *Hodges,* Warwick Spring Assizes, 1818, *coram* Garrow, B.

A man was connected with the robbery of a bank by the fragment of a key found in the lock of one of the safes, which an ironmonger proved that he had shortly before made for the prisoner. *Rex.* v. *Heath,* Alison's Principles of the Criminal Law of Scotland, vol. i. p. 318. And a servant man was connected with the larceny of a number of sovereigns, by the discovery, in the lock of a bureau which had been broken open, of a small piece of steel which had formed part of the blade of a knife belonging to him. *Reg.* v. *Crump,* Stafford Summer Assizes, 1851 *coram* Erle, J.

A young woman was tried at Warwick summer assizes, 1887, for the murder of her illegitimate female child. She had been staying

at the house of her mother, Charlotte Dodd, at Wellesbourne, a few miles from Warwick. She had the child, then about six weeks old, with her. On the 26th of April, carrying her child, she walked with her mother to Warwick, where they stayed some little time at an inn. Not long afterwards the prisoner was seen standing near a bridge over a little watercourse on the Kenilworth road, about 2 miles from Warwick. Later in the day she was in Warwick again without the baby. Her account was that she had taken it to Kenilworth, where "the young man" lived; that the grandparents had taken the child, and the father had driven her back to Warwick in his trap. "The young man" did live at Kenilworth, but all the other statements were false. On the 28th of April the body of a female child was found in the watercourse, and under the bridge. It was not known whose child it was, and, although an inquest was held, the child was buried without being identified, and when afterwards exhumed, on the 12th of May, it was very much decomposed. The child's skull was fractured in such a way as to render it improbable that death was accidental. There were many circumstances tending to incriminate the prisoner, if the child found was hers. The evidence to show that it was her child was as follows: The child was wrapped in a piece of brown paper, and tied round with very fine braid. In the mother's house was found a piece of brown paper corresponding in quality and appearance with that in which the child was wrapped. On both pieces of paper were a number of stitches of black thread, which had been cut. On the paper in which the child was wrapped was written, "Dodd, passenger to Milverton,"—faint, but distinctly visible. Some braid was found in the mother's house, discolored, but in all other respects corresponding with the braid with which the child's body was tied up. No clothes were found with the child. The prisoner had brought the clothes back to Warwick, saying that the grandparents would not have them, as they had plenty; which was false. Baby's clothes were found in the mother's house. The prisoner was convicted. The mother was tried with her, but acquitted. *R.* v. *Fanny Goldsby and Charlotte Dodd,* August 2d, 1887, *coram* Willis, J.

An attempt to murder by sending to the prosecutor a parcel consisting of a tin case containing several pounds of gunpowder so packed as to explode by the ignition of detonating powder inclosed between two pieces of paper, connected with a match fastened to the lid and bottom of the box, was brought home to the prisoner by the circumstance that underneath the outer covering of brown paper was found a portion of the Leeds Intelligencer of the 5th of July, 1832, the remaining portion of which identical paper was found in his house. *Rex* v. *Mountford,* reported on a point of law in 1 Moody, C. C. 441, 7 Car. & P. 242.

In other cases identification has been established by the correspondence of the wadding of a pistol, which stuck in a wound, and was

part of a ballad, with another part found in the prisoner's possession. *Ex relatione Lord Eldon,* when lord chancellor, in the house of lords, November 10th, 1820. See Hansard Parliamentary Debates, New Series, vol. iii. at col. 1740. Probably Lord Eldon was referring to the case of John Toms tried at Lancaster assizes, 23d March, 1784, for the murder of Edward Culshaw, at Prescot. And by the like correspondence of the wadding of firearms with part of a newspaper, the remainder of which was found in the possession of the prisoner. *Reg.* v. *Courtnage,* see p. 223, Wills, Circumstantial Ev. 5th Eng. ed.

A Spaniard was convicted of having occasioned a grievous injury to an officer of the postoffice, by means of several packets containing fulminating powder, put by him into the postoffice, one of which exploded in the act of stamping. The letters, which were in Spanish, and one of them subscribed with the prisoner's name, were addressed to persons at Havana and Matanzas, who appeared to be the object of the writer's malignant intentions. There was no proof that the letters were in the prisoner's handwriting, but he was proved to have landed at Liverpool on the 20th of September, and to have put several letters into the postoffice on the evening of the 22d, the explosion having occurred on the 24th; and there was found upon his person a seal which corresponded with the impression upon the letters, which circumstance (though there were other strong facts) was considered as conclusive of his guilt; and he was accordingly convicted and sentenced to two years' imprisonment. *Rex* v. *Palayo,* Liverpool Midsummer Quarter Sessions, 1836.

On a trial for forgery of a document, the impression of a seal attached to it corresponded with another impression upon a packet of papers produced in evidence by the prisoner, and both impressions were taken from a seal in the possession of a member of his family. *Reg.* v. *Humphreys,* see pp. 198–201, Wills, Circumstantial Ev. 5th Eng. ed.

The impressions of shoes, or of shoenails, or of other articles of apparel, or of patches, abrasions, or other peculiarities discovered in the soil or clay or snow, at or near the scene of crime, recently after its commission, frequently lead to the identification and conviction of the guilty parties. Menochius, De Præsumptionibus, lib. v. Præs. 31; Mascardus, De Probationibus, Concl. Dcccxxxi; Traité de la preuve, par Mittermaier, c. 57.

The presumption founded on these circumstances has been appealed to by mankind in all ages, and in inquiries of every kind, and is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance. The following remarkable cases illustrate the weight of such mechanical facts, when connected with other concurring circumstances leading to the same result.

A farm laborer was tried for the murder of a young woman, a domestic servant in the same service. A little before seven in the evening, she went on an errand to take

some barm to a neighboring house about 200 yards distant, but as it was not wanted, she did not leave it, and set out about seven o'clock on her way back. Being about to leave her situation that evening, she had requested the prisoner to carry her box to the gardener's house, about a quarter of a mile distant. Soon after she set out on her errand, the prisoner followed her, carrying her box, but did not reach the gardener's cottage until after eight. On the following morning she was found, lying on her back, drowned in a shallow pit near a footpath leading from her master's house to the gardener's cottage. There were marks of violence on her person, and one of her shoes and the jug in which she had carried the barm were found near the pit. Barm was also found spilt near the spot, and there were marks of much trampling; and chaff and grains of wheat were scattered about, which were material facts, the prisoner having been engaged the day before in threshing wheat. Impressions were found in the soil, which was stiff and retentive, of the knee of a man who had worn breeches made of a striped corduroy, and patched with the same material, but the patch not set on straight, the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the prisoner's dress. The prisoner denied that he had seen the deceased after she left the house on her errand, and stated that he had been, in the interval before his arrival at the gardener's house, in company with an acquaintance whom he had met on the road; but it was proved that the person referred to, at the time in question, was at work 30 miles off. He was convicted and executed. *Rex* v. *Brindley*, Warwick Spring Assizes, 1816.

A man was tried at Stafford summer assizes, 1844, for the murder of an elderly woman, the housekeeper of an old gentleman at Wednesbury. The only inmates of the house were the old gentleman, a manservant, and the deceased woman. Her master went from home on a Saturday morning, about half past 9 o'clock, as he was accustomed to do on that day of the week, leaving the deceased in the house alone. Upon his return, a quarter before 2, he found her dead body in the brewhouse, her throat having been cut and the house plundered. The murder had probably been committed about a quarter past 10 o'clock, as the butcher called at that time and was unable to obtain admittance, and about the same time a scream was heard. Traces were found of a man's right and left footsteps leading from a stable in a small plantation near the front of the house, from which any person leaving the house by the front door could be seen; and similar footsteps were found at the back of the house leading from thence across a ploughed field for a considerable distance in a sequestered direction, until they reached a canal bank, where they were lost on the hard ground. From the distance between the steps at the back of the house and in the ploughed field, the per-

son whose footsteps they were must have been running; the impressions were those of right and left boots, and were very distinct, there having been snow and rain, and the ground being very moist. The right footprints had the mark of a tip round the heel, and the left footprints had the impression of a patch fastened to the sole itself, and altogether there were four different sorts of nails on the patch and soles, and in some places the nails were missing. Suspicion fell upon the prisoner, who had formerly lived as fellow servant with the deceased, and who had been seen by several persons in the vicinity of the house a little before 10 o'clock. Upon his apprehension on the following morning, his boots, trousers, shirt, and other garments were found to be stained with blood, and the trousers had been rubbed or scraped, as if to obliterate strains. The prisoner wore right and left boots, which were carefully compared with the footprints, by making impressions of the soles in the soil about 6 inches from the original footmarks; which exactly corresponded as to the patch, the tip, and the number, shape, sizes, and arrangement of the nails. The boots were then placed lightly upon the original impressions, and here again the correspondence was exact. There could therefore be no doubt that the impressions of all these footsteps had been made by the prisoner's boots. He had been seen about a quarter before 11 on the morning of the murder with something bulky under his coat, near the place where the footsteps were lost on the hard ground, and proceeding thence toward the town of Wednesbury. At about 11 o'clock he called at the "Pack Horse" in that place, not far from the house, where he took something to drink and immediately left, and at a little after 12 he called at another public house, which was also near the scene of the murder, where he stayed some time smoking and drinking. In the interval between the times when the prisoner had called at these public houses, he was seen at some distance from them, near an old whimsy; and he was subsequently seen returning in the opposite direction towards Wednesbury. Five days afterwards, upon further search, the same footprints were discovered on a footpath leading in a direction from the "Pack Horse" towards the whimsy, where two bricks appeared to have been placed to stand upon, close to which was found an impression of a right foot corresponding with the impressions which had been before discovered; and in the flue was concealed a handkerchief in which were tied up a pair of trousers and waistcoat, part of the property stolen from the house. The prisoner must have availed himself of the interval between the times when he was seen at the two public houses, to secrete the stolen garments in the whimsy, and thus to divest himself of the bulky articles which had been observed under his coat on his arrival at the "Pack Horse." The jury, after deliberating several hours, returned a verdict of guilty, and he was executed pursuant to his sentence, having previously

uals, but the combined elements mark with certainty the distinction. Because of these elements identity often becomes a matter of opinion.[1]

§ 936. Identification from footprints and tracks.—The character of footprints and tracks found at the scene of the crime and discovered about the time it was committed may always be shown by witnesses who have examined them, and made a comparison that shows a correspondence with those made by the accused, upon a question of identity.[1] And while this is the general rule, its application has led to a very

made a confession of his guilt. *Reg.* v. *Beards, coram* Atcherley, Serjt.

A young man was tried at Taunton for the murder of a little girl. It was a murder of the kind known some years ago as of the "Jack the Ripper" order. The child was last seen going in the direction of her home. Her way was through a field, across which lay a footpath. On the further side of the field was a ditch, the soil being of clay. In this ditch her body was found, cruelly mutilated. About the time when the murder must have been committed, a man was seen in the ditch. From a variety of circumstances, suspicion fell upon the prisoner. Casts were taken of the footprints in the ditch and close to the child's body. They were not of the best; but the prisoner's boots had a few individual peculiarities, consisting chiefly of the absence of nails in one place or another from several of the rows on each foot. Careful measurements were made with a pair of compasses, and there was such a mass of correspondences between existing nails and absent nails in boot and footmarks, and such exact equality in the distances between nails which had been worn so as to present peculiarities and the places where nails were absent from both boots and casts, that it was impossible to believe that the correspondences were accidental. The prisoner was convicted and executed, having confessed his guilt. *Reg.* v. *Reyland,* Taunton Winter Assizes, February 20th 1889, *coram* Wills, J.

[1] Supra, § 807; *Jones* v. *White,* 11 Humph. 268.

[1] *Young* v. *State,* 68 Ala. 569; *Davis* v. *State,* 126 Ala. 44, 28 So. 617; *State* v. *Fuller,* 34 Mont. 12, 8 L.R.A.(N.S.) 762, 85 Pac. 369, 9 A. & E. Ann. Cas. 648; *State* v. *Daniels,* 134 N. C. 641, 46 S E. 743; *State* v. *Morris,* 84 N. C. 756; *Johnson* v. *State;* 59 N. J. L. 535, 38 L.R.A. 373, 37 Atl. 949, 39 Atl. 646. See *People* v. *Mead,* 50 Mich. 228, 15 N. W. 95; *Meyers* v. *State,* 14 Tex. App. 35; *Myers* v. *State,* 97 Ga. 76, 25 S. E. 252; *Gilmore* v. *State,*

great conflict of opinion as to the relevancy of inferences made by the witness when attempting to testify to the fact. Thus, it was held that it was for the jury to say whether or not a particular shoe which witness had seen on accused's foot "would have made" such a track as the one found at the place of the crime.[2] But in another case, it was held relevant for the state to show that certain shoes exhibited to the witness "would make" the same kind of tracks as those found, and this too where such tracks were not shown to have been made by accused.[3] Again, it was held relevant to permit a witness who had measured tracks at the place of crime, and compared them with tracks made by accused on the next day, to state that they "corresponded."[4] While in another case, it was held error to allow the witness to state that the tracks at the scene of the crime, in his opinion, "corresponded" with those of accused.[5] Again, it was held relevant for a witness to identify footprints by certain peculiarities and characteristics, where he also had the means of forming a correct conclusion regarding them.[6] But where the witness had shown the pecu-

99 Ala. 154, 13 So. 536; *Clark* v. *State*, — Tex. Crim. Rep. —, 26 S. W. 68; *Potter* v. *State*, 92 Ala. 37, 9 So. 402; *Whetston* v. *State*, 31 Fla. 240, 12 So. 661; *People* v. *Searcey*, 121 Cal. 1, 41 L.R.A. 157, 53 Pac. 359; *Com.* v. *Pope*, 103 Mass. 440; *State* v. *Reitz*, 83 N. C. 634; *Porch* v. *State*, 50 Tex. Crim. Rep. 335, 99 S. W. 102.

[2] *Busby* v. *State*, 77 Ala. 66.

[3] *Turner* v. *State*, 48 Tex. Crim. Rep. 585, 89 S. W. 975.

But see *Bluitt* v. *State*, 12 Tex. App. 39, 41 Am. Rep. 666.

[4] *Busby* v. *State*, 77 Ala. 66; *State* v. *Moelchen*, 53 Iowa, 310, 5 N. W. 186; *State* v. *Morris*, 84 N. C. 756; *Clark* v. *State*, 28 Tex. App. 189, 19 Am. St. Rep. 817, 12 S. W. 729; *State* v. *Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. Crim. Rep. 207; *Crumes* v. *State*, 28 Tex. App. 516, 19 Am. St. Rep. 853, 13 S. W. 868; *Rippey* v. *State*, 29 Tex. App. 37, 14 S. W. 448; *McLain* v. *State*, 30 Tex. App. 482, 28 Am. St. Rep. 934, 17 S. W. 1092; *Clark* v. *State*, — Tex. Crim. Rep. —, 26 S. W. 68.

[5] *Livingston* v. *State*, 105 Ala. 127, 16 So. 801. See *Riley* v. *State*, 88 Ala. 193, 7 So. 149; *Hodge* v. *State*, 97 Ala. 37, 38 Am. St. Rep. 145, 12 So. 164; *Collins* v. *Com.* 15 Ky. L. Rep. 691, 25 S. W. 743.

[6] *James* v. *State*, 104 Ala. 20, 16 So. 94.

liarities of accused's foot to the jury, and had shown how such peculiarities were reproduced in the track, it was error for him to state that in his opinion the track which he saw was made by the accused.[7] Again, where witness testifies as to comparison made between a boot of the accused and a bloody footprint found at the scene of crime, he should not be allowed, if an objection is made, to state his opinion as to whether or not the boot made the track.[8] It is relevant on a homicide prosecution for witness to testify that he saw a track after the homicide, which led from accused's barn along a field toward his house, and where it left the barn, it looked like a track made by a man running, and in the field like a track made by a man walking, such statement being descriptive of the facts, and not matters of opinion.[9]

The weight of authority sustains the rule that the witness may always testify to the facts and the circumstances of the footprints or tracks, but the courts are about equally divided upon the question of whether or not the witness may express an opinion as to their identity. A great conflict of opinion exists as to the relevancy of compulsory comparison obtained from the accused prior to or during the trial in court.

Thus, where a pan of mud was brought into the court, and the prosecution requested accused to put his foot into it, for the purpose of comparing the track with tracks found near the scene of the crime, even though the court told the accused that he need not comply unless he wished to do so, and also told the jury that the accused's refusal to comply was not to be taken as evidence against him, nevertheless, such act was held reversible error, on the ground that it was compelling the accused, in the presence of the jury, to make evidence against himself, and the error in permitting irrelevant testimony to

[7] *State* v. *Green*, 40 S. C. 328, 42 Am. St. Rep. 872, 18 S. E. 933.

[8] *Clough* v. *State*, 7 Neb. 320.

[9] *Smith* v. *State*, 137 Ala. 22, 34 So. 396, 13 Am. Crim. Rep. 410.

go before the jury, and then withdrawing it and telling the jury not to be influenced thereby, was not cured by such perfunctory directions;[10] and where accused was forced to put his foot into tracks found near the scene of the crime, evidence that his shoe fitted the track was held irrelevant, and to constitute reversible error, as compelling the accused to give testimony that tended to criminate him.[11] But where accused consented to the use of his shoes for comparison with footprints, he cannot claim that his constitutional right against self-crimination has been violated; also where his shoes were forcibly taken from him for the purpose of comparison with the footprints, his constitutional right against unreasonable search and seizure does not prevent the introduction of evidence of a comparison of footprints with shoes forcibly taken from him.[12]

The principles then that underlie the rule as to compulsory comparison or examination are: First, incriminating articles found upon the person, or obtained by search and seizure, even though such search and seizure is illegal, are, nevertheless, relevant on the issue of identity; second, where the evidence is obtained from the accused himself, without placing him upon his testimonial responsibility, it is relevant. From these principles follows the rule that the evidence obtained

[10] *Stokes* v. *State,* 5 Baxt. 619, 30 Am. Rep. 72.

But see *Johnson* v. *State,* 59 N. J. L. 535, 38 L.R.A. 373, 37 Atl. 949, 39 Atl. 646.

[11] *Day* v. *State,* 63 Ga. 667. Contra, *State* v. *Graham,* 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182; *Walker* v. *State,* 7 Tex. App. 245, 32 Am. Rep. 595.

See *Bouldin* v. *State,* 8 Tex. App. 332 (a new trial was granted in this case); *People* v. *McCurdy,* 68 Cal. 576, 10 Pac. 207; *Cicely* v. *State,* 13 Smedes & M. 202; *Murphy* v. *People,* 63 N. Y. 590; *Cooper* v. *State,* 86 Ala. 610, 4 L.R.A. 766, 11 Am. St. Rep. 84, 6 So. 110.

[12] *State* v. *Fuller,* 34 Mont. 12, 8 L.R.A.(N.S.) 762, 85 Pac. 369, 9 A. & E. Ann. Cas. 648; *Moss* v. *State,* 146 Ala. 686, 40 So. 340; *State* v. *Arthur,* 129 Iowa, 235, 105 N. W. 422; *State* v. *Graham,* 116 La. 779, 41 So. 90; *Krens* v. *State,* 75 Neb. 294, 106 N. W. 27; *State* v. *Sanders,* 75 S. C. 409, 56 S. E. 35.

from the accused by another is relevant,[13] but where the accused is himself made to produce the incriminating evidence, it is irrelevant.[14]

It is clear, however, that the correspondence of footprints and tracks at the place of crime, with those made by the accused, where nothing more is shown, is wholly insufficient to warrant a conviction.[15]

§ 937. Identification from the inspection of the person. —In identification from physical inspection or bodily exhibition, the general rule is that the accused is properly compelled to make any reasonable exhibition of his person. As observed by Mr. Abbott:[1] "It has not been sufficiently considered that the power to bring one accused to the bar includes the power to say he is, and to prove his identity;" and Mr. Wigmore[2] puts the matter with great clearness and cogency when he says: "An inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, *i. e.*, upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial, unless all bodily action were synonymous with testimonial

[13] *Evans* v. *State*, 106 Ga. 519, 71 Am. St. Rep. 276, 32 S. E. 659, 11 Am. Crim. Rep. 695; *State* v. *Edwards*, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429.

[14] *Duren* v. *Thomasville*, 125 Ga. 1, 53 S. E. 814. See *State* v. *Pence*, 173 Ind. 99, 25 L.R.A.(N.S.) 818, 140 Am. St. Rep. 240, 89 N. E. 488, 20 A. & E. Ann. Cas. 1180; *State* v. *Turner*, 32 L.R.A.(N.S.) 772, and note, 82 Kan. 787, 136 Am. St. Rep. 129, 109 Pac. 654.

[15] *Cummings* v. *State*, 110 Ga. 293, 35 S. E. 117; *Shannon* v. *State*, 57 Ga. 482, 2 Am. Crim. Rep. 56; *McDaniel* v. *State*, 53 Ga. 253; *Cooper* v. *State*, 88 Ala. 107, 7 So. 47.

See *State* v. *Melick*, 65 Iowa, 614, 22 N. W. 895, 5 Am. Crim. Rep. 52.

[1] Abbott, Crim. Trial Brief, 2d ed. p. 507.

[2] Wigmore, Ev. § 2265.

utterance; for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself. Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed, as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. Both principle and practical good sense forbid any larger interpretation of the privilege in this application; and healthy judicial opinion has frequently pointed this out with force."

While the cases are conflicting, the prevailing weight of authority favors the relevancy of testimony obtained either by bodily exhibition or examinations of accused.[3]

[3] *United States* v. *Cross,* 9 Mackey, 365 (admitting physical measurements of accused); *Vaughan's Trial,* 13 How. St. Tr. 517; *State* v. *Miller,* 71 N. J. L. 527, 60 Atl. 202 (accused called upon to place hand upon a bloody mark for comparison). See *People* v. *McCoy,* 45 How. Pr. 216 (identification from scars on person); *State* v. *Ah Chuey,* 14 Nev. 79, 33 Am. Rep. 530 (accused compelled to show tattoo marks); *Powell* v. *State,* 50 Tex. Crim. Rep. 592, 99 S. W. 1005 (photograph of accused's hand admitted); *Gordon* v. *State,* 68 Ga. 814 (scars shown voluntarily admitted); *O'Brien* v. *State,* 125 Ind. 38, 9 L.R.A. 323, 25 N. E. 137 (evidence of scars obtained by an examination against accused's will); *State* v. *Prudhomme,* 25 La. Ann. 522 (compelling accused to place his feet where they could be seen); *People* v. *Glover,* 71 Mich. 303, 38 N. W. 874 (testimony obtained by examination in jail admitted); *State* v. *Tettaton,* 159 Mo. 354, 60 S. W. 743 (testimony obtained by examination in jail admitted); *State* v. *Johnson,* 67 N. C. 55 (allowing witness to point out accused); *State* v. *Garrett,* 71 N. C. 85, 17 Am. Rep. 1 (unwrapping hand to show a burn); *Lipes* v. *State,* 15 Lea, 125, 54 Am. Rep. 402 (examination of accused's feet); *State* v. *Nordstrom,* 7 Wash. 506, 35 Pac. 382 (measuring accused's feet to rebut testimony that he could not wear certain boots); *State* v. *Ruck,* 194 Mo. 416, 92 S. W. 706, 5 A. & E. Ann. Cas. 976 (accused compelled to stand up); *People* v. *Goldenson,* 76 Cal. 328, 19 Pac. 161 (compelling accused to stand up for identification); *People* v. *Oliveria,* 127 Cal. 376, 59 Pac. 772 (accused compelled to stand up for comparison for

§ 938. Identification from physical peculiarities.—In identification from physical peculiarities, a very great latitude is allowed in receiving testimony that tends to connect the accused with the crime charged. The variety of circumstances cannot be limited, but depends, to a large extent, upon the nature of the concrete case. It does not affect the relevancy of such circumstances that the characteristics sought to be established may also tend to show that accused is guilty of a collateral offense, as where it was shown that other houses were broken into on the same night, and that tracks found near such houses corresponded with those of the accused,[1] and where the testimony showed that the accused employed a similar device in accomplishing several similar crimes.[2] Where the identifying characteristics in issue admit of description, the witness should be limited to a statement of the facts, and not allowed to express an opinion, because the fact of identification is a fact for the jury to determine from all

size); *State* v. *Reasby,* 100 Iowa, 231, 69 N. W. 451 (accused compelled to stand up); *People* v. *Gardner,* 144 N. Y. 119, 28 L.R.A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003, 9 Am. Crim. Rep. 82 (accused compelled to stand up).

In the following cases such exhibitions were held improperly admitted: *Agnew* v. *Jobson,* 13 Cox, C. C. 625 (physical examination of accused); *Williams* v. *State,* 98 Ala. 52, 13 So. 333 (requiring accused to stand facing the jury to determine her age); *Blackwell* v. *State,* 67 Ga. 76, 44 Am. Rep. 717, 4 Am. Crim. Rep. 183 (ordering accused to stand up for identification); *People* v. *Mead,* 50 Mich. 228, 15 N. W. 95 (compelling accused to try on or measure a shoe in court); *People* v. *McCoy,* 45 How. Pr. 216 (admitting facts obtained by examination of accused in jail); *State* v. *Jacobs,* 50 N. C. (5 Jones, L.) 259 (compelling accused to show himself to the jury as being of the colored race within a certain degree). See *State* v. *Nordstrom,* 7 Wash. 506, 35 Pac. 382 (portions of body usually covered); *Turman* v. *State,* 50 Tex. Crim. Rep. 7, 95 S. W. 533 (compelling accused to place a cap on his head for the purpose of identification by prosecutrix).

[1] *Frazier* v. *State,* 135 Ind. 38, 34 N. E. 817; supra, §§ 27 and 32, cases cited.

[2] *Com.* v. *Choate,* 105 Mass. 451; supra, §§ 27 and 32, cases cited.

the circumstances, under instructions of the court. But in matters such as voice, age, and temperament, identifications must rest largely upon opinion.

In emotions that find expression through the countenance, it is relevant for the witness to testify to the appearance of the accused at the time in question. Thus, a witness may testify that accused "appeared like he was mad," [3] that accused "looked cross" when he slapped deceased,[4] that accused "looked paler than usual," [5] that accused, just before the homicide, "appeared angry," [6] that accused appeared "kinder worried," [7] and that accused seemed more excited and appeared strangely the evening of the homicide,[8] such expressions being descriptive of appearance rather than matters of opinion. And any conduct or demeanor that indicates consciousness of guilt is relevant.[9]

It has also been held relevant to admit testimony of a witness that he recognized a person by his walk,[10] and it is a matter

[3] *Jenkins* v. *State,* 82 Ala. 25, 2 So. 150.

[4] *State* v. *Crafton,* 89 Iowa, 109, 56 N. W. 257.

[5] *Burton* v. *State,* 107 Ala. 108, 18 So. 284.

[6] *Miller* v. *State,* 107 Ala. 40, 19 So. 37.

[7] *State* v. *Bradley,* 64 Vt. 466, 24 Atl. 1053.

[8] *Williams* v. *State,* — Ark. —, 16 S. W. 816.

[9] See supra, § 751; *Nicely* v. *Com.* 22 Ky. L. Rep. 900, 58 S. W. 995; *People* v. *Hawkins,* 127 Cal. 372, 59 Pac. 697; *People* v. *Higgins,* 127 Mich. 291, 86 N. W. 812; *Beavers* v. *State,* 58 Ind. 530; *State* v. *Nash,* 7 Iowa, 347; *State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *Basham* v. *Com.* 87 Ky. 440, 9 S. W. 284; *State* v. *Bruce,* 24 Me. 71; *Com.* v. *Trefethen,* 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; *People* v. *Moore,* 26 Misc. 168, 56 N. Y. Supp. 802; *People* v. *Rowell,* 133 Cal. 39, 65 Pac. 127; *People* v. *Wolcott,* 51 Mich. 612, 17 N. W. 78; *People* v. *O'Neill,* 112 N. Y. 355, 19 N. E. 796, 6 N. Y. Crim. Rep. 284; *State* v. *Garrett,* 71 N. C. 85, 17 Am. Rep. 1; *Handline* v. *State,* 6 Tex. App. 347; *Holt* v. *State,* 39 Tex. Crim. Rep. 282, 45 S. W. 1016, 46 S. W. 829; *Davis* v. *State,* 126 Ala. 44, 28 So. 617; *Moore* v. *State,* 2 Ohio St. 500; *Dean* v. *Com.* 32 Gratt. 912.

[10] *Beale* v. *Posey,* 72 Ala. 323. See *State* v. *Hopkirk,* 84 Mo. 278; *Holder* v. *State,* 119 Tenn. 178, 104 S. W. 225; *Com.* v. *Best,* 180 Mass. 492, 62 N. E. 748.

of common observation that the manner of walking and the sound of the footsteps under normal conditions are as individualized as peculiarities of the voice or other physical distinctions.[11]

The sound of the voice is a relevant circumstance to be considered on the question of identity,[12] and it is further said that such evidence is not a statement of opinion, but of a conclusion reached directly and primarily from the sense of hearing; that such evidence is not to be considered as circumstantial, but as direct and positive proof of a fact, the evidentiary value of which is a question for the jury.[13] But in criminal cases it is unquestioned that the value of such testimony depends first, upon some peculiarities of the voice, and second, the acquaintance of witness with the voice.[14] But the previous acquaintance required to render such testimony relevant varies from hearing the voice but once, to that knowledge of it which is derived from an intimate acquaintance with the accused.[15] It is now unquestioned that a witness may testify that statements made over a telephone were statements of the accused, where the witness is able to recognize the

[11] See 1 Southern L. J. p. 395.

[12] *Rex* v. *Brook,* 31 How. St. Tr. 1124; *Cicero* v. *State,* 54 Ga. 156; *Ogden* v. *People,* 134 Ill. 599, 25 N. E. 755; *Deal* v. *State,* 140 Ind. 354, 39 N. E. 930; *State* v. *Kepper,* 65 Iowa, 745, 23 N. W. 304, 5 Am. Crim. Rep. 594; *Com.* v. *Hayes,* 2 Lanc. L. Rev. 48; *Price* v. *State,* 35 Tex. Crim. Rep. 501, 34 S. W. 622.

[13] *Mack* v. *State,* 54 Fla. 55, 13 L.R.A.(N.S.) 373, 44 So. 706, 14 A. & E. Ann. Cas. 78.

[14] *Com.* v. *Williams,* 105 Mass. 62; *Andrews* v. *Com.* 100 Va. 801, 40 S. E. 935; *Givens* v. *State,* 35 Tex. Crim. Rep. 563, 34 S. W. 626; *Com.* v. *Hayes,* 138 Mass. 185, 5 Am. Crim. Rep. 215; *Patton* v. *State,* 117 Ga. 230, 43 S. E. 533.

But see *Walker* v. *State,* 50 Tex. Crim. Rep. 221, 96 S. W. 35.

[15] *Pritchett* v. *Johnson,* 5 Neb. (Unof.) 49, 97 N. W. 223; *State* v. *Hopkirk,* 84 Mo. 278; *State* v. *Shinborn,* 46 N. H. 497, 88 Am. Dec. 224; *Com.* v. *Williams,* 105 Mass. 62; *Com.* v. *Hayes,* 138 Mass. 185, 5 Am. Crim. Rep. 215; *Patton* v. *State,* 117 Ga. 230, 43 S. E. 533; *Andrews* v. *Com.* 100 Va. 801, 40 S. E. 935; *Givens* v. *State,* 35 Tex. Crim. Rep. 563, 34 S. W. 626.

voice.[16] The witness may also describe the tone of voice used, as to whether it was angry or pleasant, where the conversation taking place between the accused and the deceased is overheard by the witness.[17]

§ 939. Identification from presence of accused at scene of crime.—While the mere fact that accused was present at the scene of the crime at or about the time of its commission, with nothing more shown, would be of very little weight, nevertheless, circumstances showing his presence are relevant upon the issue of identity. Thus, a memorandum book with a piece of lead pencil, found at the place of the homicide, was shown to belong to accused. It was relevant for a witness to testify that on the day preceding he had given a pencil of the same kind to accused.[1] Where the testimony showed that the tracks of two persons were discovered near the body, and that one of such tracks was apparently made by shoes without heels or soles, it was relevant to show that the shoes worn by accused on the day of the homicide had no heels or soles, and that the tracks near the body were made by shoes of about the size of those worn by accused.[2]

Where, on a prosecution for the murder of one of two police officers killed by two men whom the officers had arrested for robbery and assault committed on the same night two or three hours before the arrest, the question of the identity of the defendants with the two men who killed the officers

[16] *People* v. *Ward*, 3 N. Y. Crim. Rep. 483; *Stepp* v. *State*, 31 Tex. Crim. Rep. 349, 20 S. W. 753; *State* v. *Usher*, 136 Iowa, 606, 111 N. W. 811; *People* v. *Strollo*, 191 N. Y. 42, 83 N. E. 573; *Com.* v. *Scott*, 123 Mass. 222, 25 Am. Rep. 81.

[17] *Campos* v. *State*, 50 Tex. Crim. Rep. 289, 97 S. W. 100.

[1] *Thornton* v. *State*, 113 Ala. 43, 59 Am. St. Rep. 97, 21 So. 356; *Spraggins* v. *Stote*, 139 Ala. 93, 35 So. 1000.

See *People* v. *Moran*, 144 Cal. 48, 77 Pac. 777.

[2] *Davis* v. *State*, 126 Ala. 44, 28 So. 617; *Parker* v. *State*, 46 Tex. Crim. Rep. 461, 108 Am. St. Rep. 1021, 80 S. W. 1008, 3 A. & E. Ann. Cas. 893.

was a prominent issue, any testimony of what occurred at the scene of the robbery tending to show that the defendants were at that place on the night of, and two or three hours before, the shooting, is competent.[3] Where deceased, in her dying declaration, spoke of the accused as the negro who had passed her house the day previous, and stopped to oil his gun, and further stated that the man who assailed her had worked for one L, a year before, and another witness testified that the negro who oiled his gun in front of deceased's house was the accused, all such circumstances were relevant upon the issue of identity.[4] Where a posse surprised escaped convicts at a camp, some one of whom killed deceased, it was relevant to introduce evidence of articles found at the camp, such articles having been previously identified as being in the possession of accused, to show that accused was present when the homicide occurred.[5] Where the evidence showed that accused was in a certain city from June until September, and a pawnbroker identified him as the one who purchased a pistol in August of the same year, and also described accused's clothing at the time of the sale of the gun to him, it was relevant to give evidence of the style of the clothes which accused wore in the city during those months, to corroborate the pawnbroker's identification.[6] Where the homicide occurred during a burglary, it was relevant to introduce evidence of other burglaries by accused just before the homicide, to identify the party guilty of the burglary as the slayer.[7] Where the evidence tended to show that accused passed on a certain road between certain hours, to the scene of the crime, and returned along the same road, it was relevant to introduce testimony

[3] *Miller* v. *State,* 130 Ala. 1, 30 So. 379.

[4] *Walker* v. *State,* 139 Ala. 56, 35 So. 1011.

[5] *People* v. *Wood,* 145 Cal. 659, 79 Pac. 367.

[6] *People* v. *Weber,* 149 Cal. 325, 86 Pac. 671.

[7] *Whitney* v. *Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257, 12 Am. Crim. Rep. 170.

of those who saw a man going in the direction and about the hours claimed, and to describe his characteristics, as bearing on the issue of identity, although the witnesses themselves could not identify such man as the accused.[8] Deceased stated that certain men came to his room at night, tortured him by burning his feet, to make him disclose where he concealed his money; they were in his room a long time; they went to the cellar, brought up things to eat and ate them; then they left his house; afterwards the two men were brought into the presence of their victim, and deceased said, after looking at them, "Yes, I am satisfied that they are the same men. My mind is at rest on the subject. I have no doubt." This was held a distinct and relevant identification.[9] A witness saw a young man and woman pass on the street just beneath her window, and noticed that the woman was reading a letter with prominent headlines; at the corner the woman returned the letter to the man, who put it in his pocket. On the afternoon of the next day the body of the young woman was found in a secluded park. It was relevant for the witness to testify that the printing on a letter found on accused at the time of his arrest was similar to that on the one she saw the young woman reading, and that, to the best of witness's knowledge, it was the same letter, for the purpose of identifying accused.[10] On the afternoon preceding the discovery of a crime, deceased had stated that he was going to accused's place, where his body was afterwards found; to identify the accused, it was relevant to show deceased's statement, and that afterwards he was seen going in the direction indicated.[11]

[8] *People* v. *Burt*, 170 N. Y. 561, 62 N. E. 1099.

[9] *Com.* v. *Roddy*, 184 Pa. 274, 39 Atl. 211.

[10] *State* v. *McDaniel*, 39 Or. 161, 65 Pac. 520.

[11] *State* v. *Garrington*, 11 S. D. 178, 76 N. W. 326; *Territory* v. *Couk*, 2 Dak. 188, 47 N. W. 395. But see *People* v. *Carkhuff*, 24 Cal. 640; *Kirby* v. *State*, 9 Yerg. 383, 30 Am. Dec. 420; *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63.

Where identity was the vital issue in a homicide committed during a burglary, and the evidence also showed that accused was the husband of a woman who was with the robbers when they fled, as a circumstance tending to identify accused, it was relevant to show that the woman was seen in a town toward which the robbers had fled, and at the dead body of one of them three weeks after the robbery.[12] On a prosecution for assault on a woman, with intent to murder, where a witness testified that while she and prosecutrix were sleeping together, some time prior to the assault, accused entered the room, his identity as the man who entered the room is sufficiently established where the witness identified him by the fact that his arm was in a sling, and it appears that at that time accused had a broken arm, which he carried in a sling.[13] Deceased was found dead from gunshot wounds on the range where he was accustomed to herd his horses. There was no witness to the homicide. As identifying the accused, it was held relevant for a witness who resembled the deceased to testify that on the day preceding the homicide, he was suddenly confronted by a leveled gun in the hands of accused, and that on recognizing witness, accused exclaimed, "You like to have been a lost child," and then passed on.[14] And testimony of the outcries of deceased during the assault which resulted in his death, or outcries as accused approached him;[15] the sound of shots followed by the appearance of accused;[16] identification after arrest of accused, by witness, as the person whom he saw commit the crime;[17] description of a person seen in the vicinity of the crime, as to color, height, weight,

[12] *Nite* v. *State*, 41 Tex. Crim. Rep. 340, 54 S. W. 763.

[13] *Baines* v. *State*, 43 Tex. Crim. Rep. 490, 66 S. W. 847.

[14] *Howard* v. *State*, 8 Tex. App. 53.

[15] *State* v. *Wagner*, 61 Me. 178.

[16] *Collins* v. *State*, 2 Shannon Cas. 412.

[17] *Beavers* v. *State*, 103 Ala. 36, 15 So. 616; *Yarbrough* v. *State*, 105 Ala. 43, 16 So. 758, 10 Am. Crim. Rep. 57.

and other physical appearance, and this description compared with that of the accused by the jury;[18] and any other facts which are of a descriptive character, and which show a correspondence between the description and the appearance of the accused, are relevant upon the question of identity.[19] But identification from comparison of appearance should be rigidly scrutinized, and the witness testifying to the facts should be exhaustively cross-examined; and such identification may be controverted by experiments showing its unreliability, or that the identification has been fabricated.[20]

And where the identification comes through a third person, it is hearsay and irrelevant. Thus, on the trial of a homicide committed by shooting the deceased at a certain place in the state, in order to show that accused was waiting at such place just before the homicide, a witness testified that as he passed the place he saw a heavy-set man standing there, but he did not recognize him as the accused, nor was he able to describe the man so that he could be identified as the accused; he was allowed to state that he told a friend of his, on hearing that accused had shot deceased, that he believed that accused was standing at the place when witness passed. This was held reversible error.[21] Nor is it relevant for a witness to state that another person pointed out the accused to him, and declared that he had committed the crime.[22] Where the evidence

[18] *Andrews* v. *State*, — Tex. Crim. Rep. —, 83 S. W. 188.

See *Ruston* v. *State*, 4 Tex. App. 432.

[19] See *McInerney* v. *United States*, 74 C. C. A. 655, 143 Fed. 729.

[20] *Richardson* v. *State*, 90 Md. 109, 44 Atl. 999, 15 Am. Crim. Rep. 222.

[21] *State* v. *Olds*, 19 Or. 397, 24 Pac. 394; *People* v. *Wallin*, 55 Mich. 497, 22 N. W. 15, 6 Am. Crim. Rep. 212; *Hopt* v. *Utah*, 110 U. S. 574, 581, 582, 28 L. ed. 262, 265, 266, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *People* v. *Mead*, 50 Mich. 228, 15 N. W. 95; *Rose* v. *State*, 13 Ohio C. C. 342, 7 Ohio Dec. 226; *Elsworth* v. *State*, 52 Tex. Crim. Rep. 1, 104 S. W. 903; *State* v. *Hoover*, 134 Iowa, 17, 111 N. W. 323.

[22] *Felder* v. *State*, 23 Tex. App. 477, 485–488, 59 Am. Rep. 777, 5

shows that a crime had been committed by someone, so that identity becomes the sole fact in issue, the jury should be instructed by the court to acquit the accused, unless such identification is established beyond a reasonable doubt.[23]

§ 940. Identification from opinion evidence.—As we have already shown, when opinion is the mere shorthand rendering of the facts, then the opinion can be given, subject to cross-examination as to the facts on which it is based.[1] Where the facts are stated by the witness, and at the same time he draws an inference or expresses an opinion, it seems reasonable to assume that the court would instruct the jury to disregard the inference so drawn or the opinion so expressed, and rely upon the facts presented to them. But courts have not always been cautious in this respect, and very frequently indeed inference and opinion have been substituted for the facts. We now find, in cases of identification, that where the witness is unable positively to identify the accuesd, his opinion or best judgment is held relevant.[2] But this is a dan-

S. W. 145; *Reddick* v. *State,* 35 Tex. Crim. Rep. 463, 60 Am. St. Rep. 56, 34 S. W. 274; *State* v. *Hutchinson,* 95 Iowa, 566, 64 N. W. 610; *Davis* v. *State,* 63 Ark. 470, 39 S. W. 356.

But where the prosecuting witness was not positive as to the identity of accused, it was held relevant to permit an officer to testify that the accused was the man whom the prosecuting witness pointed out. *Reno* v. *State,* 56 Tex. Crim. Rep. 229, 120 S. W. 429.

[23] *Petty* v. *State,* 83 Miss. 260, 35 So. 213.

Thus, in assault where the chief evidence tending to connect the accused with the crime is the unsupported testimony of the prosecuting witness that he identified them by their faces and voices, the conviction cannot be sustained where the accused and four other witnesses testified to facts which established an alibi. *Duffy* v. *People,* 197 Ill. 357, 64 N. E. 308, 12 Am. Crim. Rep. 571.

[1] Supra, §§ 458 and 459; *Williams* v. *State,* — Tex. Crim. Rep. —, 132 S. W. 345. See *Liles* v. *State,* — Tex. Crim. Rep. —, 135 S. W. 1177.

[2] *State* v. *Richards,* 126 Iowa, 497, 102 N. W. 439; *Kearney* v. *Farrell,* 28 Conn. 317, 73 Am. Dec. 677; *Bennett* v. *Meehan,* 83 Ind. 569, 43 Am. Rep. 78; *Kent* v. *State,* 94 Ga.

gerous relaxation of the rule. It may be urged in support of this exception as to nonexpert opinion, that we reach a definite and well-founded conclusion, although we may be unable to trace the steps or to state the facts which lead to the result. The reply to this is that upon the same facts persons equally honest and equally intelligent draw contrary conclusions, and positiveness of opinion does not change the actual fact. Hence, it is important that the witness should always state the facts, and only after describing the appearance of the person whose identity is in question, should he be permitted to state that in his best opinion it was the accused.[3] The facts detailed are not necessarily confined to a description of the appearance of accused, but may cover isolated and apparently trivial circumstances that in themselves are inconclusive, but which, taken together with other evidence, may be sufficient to establish identity beyond a reasonable doubt. And after detailing such facts it seems that it is relevant for the witness to state an inference or opinion as to identity.[4]

Thus, where a druggist testified that he had sold a certain kind of poison the day before the homicide, it was relevant for him to testify "that to the best of his knowledge, belief,

703, 19 S. E. 885; *State* v. *Morrow*, — Wash. —, 115 Pac. 161; *State* v. *Seymour*, 94 Iowa, 699, 63 N. W. 661; *People* v. *Whigham*, 1 Wheeler, C. C. 115.

[3] *Thornton* v. *State*, 113 Ala. 43, 59 Am. St. Rep. 97, 21 So. 356; *White* v. *Com.* 80 Ky. 480; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *State* v. *Powers*, 130 Mo. 475, 32 S. W. 984; *State* v. *Cushenberry*, 157 Mo. 168, 56 S. W. 737; *State* v. *Lytle*, 117 N. C. 799, 23 S. E. 476; *Jordan* v. *State*, 50 Fla. 94, 39 So. 155; *Coffman* v. *State*, 51 Tex. Crim. Rep. 478, 103 S. W. 1128; *State* v. *James*, 194 Mo. 268, 92 S. W. 679, 5 A. & E. Ann. Cas. 1007; *People* v. *Rolfe*, 61 Cal. 540; *People* v. *Stanley*, 101 Mich. 93, 59 N. W. 498; *People* v. *Burt*, 170 N. Y. 561, 62 N. E. 1099; *Paulson* v. *State*, 118 Wis. 89, 94 N. W. 771, 15 Am. Crim. Rep. 497; *Hopper* v. *Com.* 6 Gratt. 684; *State* v. *Powers*, 130 Mo. 475, 32 S. W. 984; *Clary* v. *State*, 8 Ga. App. 92, 68 S. E. 615. See *James* v. *State*, 167 Ala. 14, 52 So. 840.

[4] *Holmes* v. *Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288.

and recollection," he had sold it to the accused on trial.[5] On a prosecution for burglary, a witness testified that the man who entered the house was small of stature; that he was without coat or hat; that she knew accused's figure, but not his face. It was held relevant for the witness to state that the figure of the man who entered the house "resembled accused more than anyone else she could think of." [6] Where a witness testified that he believed he recognized the accused as the one he had seen carrying away stolen property, and that such person left accompanied by two men, and one of such other men testified that he was at the place at the time, the witness's opinion as to the identity of the accused was held relevant.[7] Where the testimony showed that on the night of the homicide, witness heard a man, from whose voice he thought it was the accused, say that he had killed a man, this circumstance was relevant as tending to prove that accused made the statement.[8] Where a witness had known accused from his earliest childhood, it was held relevant for her to say, "I judged that the tall man who came on the night of the murder was the accused," particularly where she further stated that she formed such opinion from his voice and actions.[9]

And where such qualities as the relative strength and temper

[5] *Com.* v. *Kennedy,* 170 Mass. 18, 48 N. E. 770.

[6] *State* v. *Costner,* 127 N. C. 566, 80 Am. St. Rep. 809, 37 S. E. 326. See *Gilford* v. *State,* 54 Tex. Crim. Rep. 510, 114 S. W. 138.

[7] *State* v. *Welch,* 33 Or. 33, 54 Pac. 213. See *State* v. *Powers,* 72 Vt. 168, 47 Atl. 830.

In a prosecution for disturbing religious worship, witness may state that in his "opinion" it was accused's face that he saw at the window, and that in his "opinion" the disturbance came from that window. *Buzan* v. *State,* 59 Tex. Crim. Rep. 213, 128 S. W. 388. And it has been held that the question whether the accused appeared to be scared or not calls for a statemnt of fact, and is not irrelevant as calling for an opinion. *State* v. *Byrd,* 41 Mont. 585, 111 Pac. 407. See *Holland* v. *State,* — Tex. Crim. Rep. —, 131 S. W. 563.

[8] *Deal* v. *State,* 140 Ind. 354, 39 N. E. 930.

[9] *State* v. *Hopkirk,* 84 Mo. 278.

of accused and deceased, and other personal qualities, become material, or where description is not possible, and where qualities cannot be described except by opinion, they may be shown by the testimony of those familiar with the qualities and capable of judging them.[10] But mere thought or impressions of conclusions not based on a statement of facts are not relevant on a question of identity. Thus, where the question of identity was material, and it appeared from the testimony of the witness that he was not able to identify the accused positively, it is relevant to allow him to testify as to his thought or his impression as to the identity of the accused;[11] testimony by an officer who had arrested accused, that the description given to him of the man who committed the offense "tallied with the accused," is a mere conclusion and irrelevant;[12] and where a brother of deceased testified that five months after the homicide, he examined the body and observed several points of resemblance, and was then asked whether or not in his opinion it was the body of the deceased, the question was irrelevant, as the question of identification was for the jury upon the points of resemblance detailed by the witnesses.[13] Opinions are not relevant at all where the facts can be stated and made intelligible to the jury, and are of such a nature that men generally are capable of understanding them.[14]

[10] *Brownell* v. *People,* 38 Mich. 732; *Russell* v. *State,* 66 Neb. 497, 92 N. W. 751. See *State* v. *Hassan,* 149 Iowa, 518, 128 N. W. 960; *State* v. *McKnight,* 119 Iowa, 79, 93 N. W. 63, 12 Am. Crim. Rep. 252; *State* v. *Wright,* 112 Iowa, 436, 84 N. W. 541.

[11] *People* v. *Williams,* 1 N. Y. Crim. Rep. 336.

[12] *Chilton* v. *State,* 105 Ala. 98, 16 So. 797.

[13] *People* v. *Wilson,* 3 Park. Crim. Rep. 199; *Thomas* v. *State,* 122 Ga. 151, 50 S. E. 64.

[14] *State* v. *Musgrave,* 43 W. Va. 672, 28 S. E. 813; *State* v. *Foley,* 144 Mo. 600, 46 S. W. 733; *State* v. *Barrett,* 33 Or. 194, 54 Pac. 807; *State* v. *Taylor,* 57 S. C. 483, 76 Am. St. Rep. 575, 35 S. E. 729; *Robinson* v. *State,* — Tex. Crim. Rep. —, 57 S. W. 811; *McCray* v. *State,* 134 Ga. 416, 68 S. E. 62, 20 A. & E. Ann. Cas. 101; *Dowell* v. *State,* 58 Tex. Crim. Rep. 482,

§ 941. Identification of deceased from circumstances.—As we have already shown, should the decease be satisfactorily proved, the identification of the body after death may be dispensed with.[1] But proof of death is not shown by mere disappearance. Where the body itself, or the remains of it, is discovered, the first step is the identification of it as being the body of the victim of a homicide. Such identification cannot always be proved by direct evidence, but all circumstances that tend in any way to establish identity are relevant to prove the *corpus delicti.* Thus, it is relevant on a homicide trial to admit in evidence a photograph and the evidence concerning it, upon the question of the identity of the deceased.[2] It is relevant to allow persons acquainted with the deceased not only to identify the clothing,[3] but it may also be used as showing the character of the wounds, the position of the parties and other circumstances connected with the homicide.[4] But as clothing is in the nature of demonstrative evi-

126 S. W. 871; *State* v. *Hyde,* 234 Mo. 200, 136 S. W. 316; *Barnes* v. *State,* — Tex. Crim. Rep. —, 133 S. W. 887.

[1] Supra, § 326; *United States* v. *Williams,* 1 Cliff. 5, Fed. Cas. No. 16,707.

See *St. Clair* v. *United States,* 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711.

[2] *Beavers* v. *State,* 58 Ind. 530; *Ruloff* v. *People,* 45 N. Y. 213.

See *Luke* v. *Calhoun County,* 52 Ala. 115; *Cowley* v. *People,* 83 N. Y. 464, 38 Am. Rep. 464; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311.

[3] *Newell* v. *State,* 115 Ala. 54, 22 So. 572; *State* v. *Stair,* 87 Mo. 268, 56 Am. Rep. 449

[4] *Story* v. *State,* 99 Ind. 413.

See *McDonel* v. *State,* 90 Ind. 320; *Hart* v. *State,* 15 Tex. App. 202, 49 Am. Rep. 188; *King* v. *State,* 13 Tex. App. 277; *State* v. *Houser,* 28 Mo. 233; *Watkins* v. *State,* 89 Ala. 82, 8 So. 134; *People* v. *Knapp,* 71 Cal. 1, 11 Pac. 793; *Henry* v. *People,* 198 Ill. 162, 65 N. E. 120; *State* v. *Winter,* 72 Iowa, 627, 34 N. W. 475; *Seaborn* v. *Com.* 25 Ky. L. Rep. 2203, 80 S. W. 223; *People* v. *Wright,* 89 Mich. 70, 50 N. W. 792; *State* v. *Moore,* 168 Mo. 432, 68 S. W. 358; *Hart* v. *State,* 15 Tex. App. 202, 49 Am. Rep. 188; *Johnson* v. *State,* 44 Tex. Crim. Rep. 332, 71 S. W. 25; *State* v. *Cushing,* 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; *Rollings* v. *State,* 160 Ala. 82, 49

dence, it has a strong tendency to arouse feelings of prejudice or passion, and unless the articles so introduced serve the purpose of identifying the deceased, or of honestly explaining the transaction, the introduction is irrelevant, and constitutes prejudicial error; and particularly is this true when it is displayed in such manner as to arouse prejudice and passion.[5] It is also essential to the relevancy of such testimony that the clothing should be clearly identified and shown to be in the same condition as at the time of the homicide, or to be unchanged in any important particular.[6] Where the circumstances show a homicide, parts of the body, bones, tufts of hair, and other portions of the remains found at the scene of the homicide, are relevant for the purpose of identification, and to prove the commission of a crime.[7] The opinions of

So. 329; *Pate* v. *State*, 150 Ala. 10, 43 So. 343; *People* v. *Besold*, 154 Cal. 363, 97 Pac. 871; *State* v. *Moore*, 80 Kan. 232, 102 Pac. 475; *Dobbs* v. *State*, 54 Tex. Crim. Rep. 550, 113 S. W. 923; *Long* v. *State*, 48 Tex. Crim. Rep. 175, 88 S. W. 203; *Adams* v. *State*, 48 Tex. Crim. Rep. 452, 93 S. W. 116; *Sue* v. *State*, 52 Tex. Crim. Rep. 122, 105 S. W. 804; *Tinsley* v. *State*, 52 Tex. Crim. Rep. 91, 106 S. W. 347; *State* v. *Churchill*, 52 Wash. 210, 100 Pac. 309; *Underwood* v. *Com.* 119 Ky. 384, 84 S. W. 310; *Puryear* v. *State*, 50 Tex. Crim. Rep. 454, 98 S. W. 258.

[5] *Christian* v. *State*, 46 Tex. Crim. Rep. 47, 79 S W. 562; *Cole* v. *State*, 45 Tex. Crim Rep. 225, 75 S. W. 527; *Patton* v *State*, 117 Ga. 230, 43 S. E. 533.

See *Rollings* v. *State*, 160 Ala. 82, 49 So. 329.

[6] *State* v. *Cadotte*, 17 Mont. 315, 42 Pac. 857; *State* v. *Porter*, 32 Or. 135, 49 Pac. 964; *Thornton* v. *State*, — Tex. Crim. Rep. —, 65 S. W. 1105; *Barkman* v. *State*, 41 Tex. Crim. Rep. 105, 52 S. W. 73. See *Newell* v. *State*, 115 Ala. 54, 22 So. 572; *Venters* v. *State*, 47 Tex. Crim. Rep. 280, 83 S. W. 832; *State* v. *McLaughlin*, 149 Mo. 19, 50 S. W. 315; *Levy* v. *State*, 28 Tex. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596; *People* v. *Besold*, 154 Cal. 363, 97 Pac. 871; *State* v. *Gallman*, 79 S. C. 229, 60 S. E. 682.

[7] *Follis* v. *State*, 51 Tex. Crim. Rep. 186, 101 S. W. 242; *State* v. *Nordoll*, 38 Mont. 327, 99 Pac. 960; *Sprouse* v. *Com.* 132 Ky. 269, 116 S. W. 344; *Marion* v. *State*, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911; *Ausmus* v. *People*, 47 Colo. 167, 107 Pac. 204, 19 A. & E. Ann. Cas. 491.

But see *State* v. *Hossack*, 116 Iowa, 194, 89 N. W. 1077; *State* v. *Moxley*, 102 Mo. 374, 14 S. W. 969,

witnesses and their impressions or beliefs have been held relevant in establishing the identity of the deceased.[8] It is relevant on a question of identity, to show, by the witnesses, peculiarities of the remains, where such witnesses were familiar with the peculiarities of the deceased in his lifetime.[9] And it is a general rule that identification of the deceased may be established through any of the circumstances that would tend to establish identity in life, and that, from their permanence and persistency, might remain after death had ensued.

VII. Exculpatory Defenses.

§ 942. Presumptions based on circumstantial evidence. —We have already discussed at some length the nature of presumptions.[1] It is necessary, however, more specifically to refer to the basis on which presumptions are founded. The question is never free from difficulty, even where direct evidence of the fact in issue can be adduced. But where the evidence is wholly circumstantial, the difficulty is increased, and the utmost caution is necessary to prevent injustice. The basis of a presumption being founded on a fact, the entire structure fails if that fact is not based on actual truth. The monitory language of Mr. Wills should always be observed in every criminal case in which the question may arise. He says[2] "that of all the various sources of error, one of the most copious and fatal is an unreflecting faith in human testimony; and it is obvious that all reasoning upon the relevancy and effect of

15 S. W. 556; *State* v. *Novack*, 109 Iowa, 717, 79 N. W. 465; *State* v. *Tettaton*, 159 Mo. 354, 60 S. W. 743; *State* v. *Lucey*, 24 Mont. 295, 61 Pac. 994.

[8] *State* v. *Dickson*, 78 Mo. 438. See *State* v. *Martin*, 47 S. C. 67, 25 S. E. 113; *Taylor* v. *State*, 35 Tex. 97; *People* v. *Matthews*, — Cal. —, 58 Pac. 371; *Keith* v. *State*, 157 Ind. 376, 61 N. E. 716.

[9] *Gray* v. *Com.* 101 Pa. 380, 47 Am. Rep. 733.

[1] Supra, chap. XIV.

[2] Wills, Circumstantial Ev. 5th Eng. ed. 205.

circumstantial evidence presupposes its absolute verity, and that such evidence necessarily partakes of the infirmities incidental to all human testimony; and experience has abundantly shown that facts apparently of the most convincing character have been fabricated and supported by false testimony. Every consideration, therefore, which detracts from the credibility of evidence in the abstract, applies *a fortiori* to evidence which is essentially indirect and inferential. In such cases, falsehood in the minutest particular more or less necessarily throws discredit upon every part of a complainant's statement. Hence, since facts can never be mutually inconsistent, or, as it has been well expressed, 'one truth cannot contradict another,' circumstantial evidence frequently affords the means of evincing the falsehood of direct and positive affirmative testimony, and even of disproving the existence of the *corpus delicti* itself, by manifesting the incompatibility of that testimony with surrounding and concomitant circumstances, of the reality of which there is no doubt."

Hence, the strictness of proof required on the part of the state is subjected to the one universal test; that it must establish the guilt of the accused beyond a reasonable doubt in order to overcome the general exculpatory presumption of the innocence of accused. It is not sufficient to prove the death or the absence of the deceased. Thus, on a homicide charge, the prosecution must produce evidence of all the circumstances which have a bearing on the manner of the death, and any tendency to establish the ultimate fact as to whether or not the death was natural, accidental, or felonious;[3] and where accused was charged with the death of a child in his possession when it was last seen, it is prejudicial error to refuse to instruct the jury that its absence does not prove that it is dead, and that it is not incumbent on the accused to show its

[3] *Brown* v. *People*, 17 Mich. 429, 97 Am. Dec. 195.

whereabouts, but that its death must be shown by the state.[4] Where the evidence showed that the witness and deceased were seized and bound by a number of men, and that one of them struck deceased with a sword, and another pierced him in the back when he fell; that witness then escaped, and had never seen the deceased since that time, it is not sufficient to sustain a conviction for homicide.[5]

§ 943. Burden of proof and presumption of innocence.— As we have already shown,[1] the distinction between the burden of proof and the presumption of innocence is clearly drawn. First, the burden of proof is a formal rule confined to determining the order in which the proofs are brought forward. The presumption of innocence is a substantive rule of law, protecting the accused during the trial, and continuing to operate until the charge is finally determined.

It should be clearly borne in mind that the presumption of innocence is a rule of law, and not a weight of evidence. But, the evidence may serve to overthrow the presumption or to establish it. Thus, where the evidence is conclusive, the presumption of innocence ceases to operate; but on a charge where the evidence is wholly circumstantial, it may tend to establish the presumption of innocence. Thus, where the evidence shows absence of any inducement to commit a crime, or strong counteracting motives, or conduct or deportment that bears the impress of truth and honesty, the presumption of innocence is greatly strengthened or conclusively established. But it is a confusion of terms to say that this presumption arises out of evidence, or, to phrase it differently, the presumption of innocence is a standard or a measure of evidence. Where the

[4] *Haynes* v. *State*, — Misc. —, 27 So. 601. See *Lott* v. *State*, — Tex. Crim. Rep. —, 131 S. W. 553; *Morris* v. *Com.* 20 Ky. L. Rep. 402, 46 S. W. 491.

[5] *People* v. *Ah Fung*, 16 Cal. 137.

[1] Supra, § 330.

evidence is sufficient to establish the fact in issue beyond a reasonable doubt, then the prosecution has overthrown the presumption of innocence. Where the evidence fails to establish the fact in issue beyond a reasonable doubt, then the presumption prevails.

A rule of law never arises out of evidence; such a rule is itself a measure of evidence. But "presumptions of innocence" are often confused with presumptions or inferences that are drawn from the evidence by the jury under the instructions of the court. In criminal law there are no real presumptions against the accused. The jury, under the instructions of the court, are at liberty to find certain inferences which arise out of the evidence, and such inferences are usually denominated "presumptions," but such presumptions are not rules of law, and the distinction must always be maintained between such inferences and the rule of law relating to the presumption of innocence.

§ 944. Measure of exculpation required of accused.—In those offenses where the accused has the right to rely upon the presumption of innocence, he is not required to take up the burden of proof unless the prosecution has established every essential element of the crime charged, beyond a reasonable doubt. On his plea of not guilty, the accused puts in issue every essential averment in the indictment. His plea is not affirmative; he negatives the issue when he says "not guilty," and the prosecution, on the negation, must establish its affirmation that he is guilty, beyond a reasonable doubt. [1]

Thus, the measure of exculpation required of the accused is that of casting a reasonable doubt upon the proof adduced by the prosecution. This may be shown, first, from a lack of evidence on the part of the prosecution; second, from the failure of the evidence on the part of the prosecution to es-

[1] *State* v. *Wingo*, 66 Mo. 181, *27* Am. Rep. 329.

tablish the truth of the charge beyond a reasonable doubt; third, by evidence on the part of the accused which casts a reasonable doubt on the evidence of the prosecution.

Therefore, in homicide cases, in matters of defense, mitigation, excuse, or justification, the accused is required to prove such circumstances by evidence sufficient to create only a reasonable doubt of his guilt. And if the circumstances relied on are supported by such proof as produces a reasonable doubt as to the truth of the charge against the accused, when the whole evidence is considered by the jury, there must be an acquittal. [2]

[2] *Kent* v. *People,* 8 Colo. 563, 9 Pac. 852, 5 Am. Crim. Rep. 406; *Zippcrian* v. *People,* 33 Colo. 134, 79 Pac. 1018; *Boykin* v. *People,* 22 Colo. 496, 45 Pac. 419; *Babcock* v. *People,* 13 Colo. 515, 22 Pac. 817; *Hill* v. *People,* 1 Colo. 436; *Petty* v. *State,* 76 Ark. 516, 89 S. W. 465; *Cogburn* v. *State,* 76 Ark. 110, 88 S. W. 822; *Tignor* v. *State,* 76 Ark. 489, 89 S. W. 96; *Hubbard* v. *State,* 37 Fla. 156, 20 So. 235 (But see *Gladden* v. *State,* 12 Fla. 562); *Dorsey* v. *State,* 110 Ga. 331, 35 S. E. 651; *Alexander* v. *People,* 96 Ill. 96; *Wacaser* v. *People,* 134 Ill. 438, 23 Am. St. Rep. 683, 25 N. E. 564; *Smith* v. *People,* 142 Ill. 117, 31 N. E. 599; *Halloway* v. *People,* 181 Ill. 544, 54 N. E. 1030.

So clearly is this doctrine defined, and so strongly is it adhered to, in Illinois, that it is proper for the court to refuse to charge that the degree of evidence required to convict the accused "must be such as to remove all doubt from the mind of a reasonable man," since a reasonable man may have an unreasonable doubt. *Padfield* v. *People,* 146 Ill. 660, 35 N. E. 469; *Plummer* v. *State,* 135 Ind. 308, 34 N. E. 968; *Trogdon* v. *State,* 133 Ind. 1, 32 N. E. 725; *Hawthorne* v. *State,* 58 Miss. 778. (See *Ingram* v. *State,* 62 Miss. 142, 5 Am. Crim. Rep. 485, as condemning a different rule, approved in *Harris* v. *State,* 47 Miss. 318); *Blalack* v. *State,* 79 Miss. 517, 31 So. 105; *McKenna* v. *State,* 61 Miss. 589; *Gravely* v. *State,* 38 Neb. 871, 57 N. W. 751; *State* v. *McCluer,* 5 Nev. 132; *Brown* v. *New Jersey,* 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *State* v. *Jones,* 71 N. J. L. 543, 60 Atl. 396; *State* v. *Hazlet,* 16 N. D. 426, 113 N. W. 374; *Hamilton* v. *State,* 97 Tenn. 452, 37 S. W. 194; *Cupps* v. *State,* 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546; *Trumble* v. *Territory,* 3 Wyo. 280, 6 L.R.A. 384, 21 Pac. 1081.

In California, the earlier cases seem to support the rule that circumstances of mitigation on the part of the accused must be established by a preponderance of the evidence. See *People* v. *Milgate,* 5 Cal. 127. But the later cases uphold the general rule that the ac-

And although this rule is so clearly established by the greater weight of authority, nevertheless a number of courts assert that, after the prosecution has shown an intentional homicide by the accused, the burden is upon him to establish self-defense or circumstances of mitigation by a preponderance of the evidence.[3] In many cases this modification of the general rule can be traced to the statutory requirement, common to many states, that, the killing being proved, proof of circumstances of mitigation devolves upon the accused. But from a careful summary of these cases, the rule appears to be that the fact of self-defense or circumstances of mitigation must appear by a preponderance of evidence, and not that the burden of proof rests upon the accused.[4]

cused is required only to raise a reasonable doubt upon the whole evidence. See *People* v. *Bushton,* 80 Cal. 160, 22 Pac. 127, 549; *People* v. *Matthai,* 135 Cal. 442, 67 Pac. 694; *Holt* v. *United States,* 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 20, 20 A. & E. Ann. Cas. 1138.

[3] *Com.* v. *Palmer,* 222 Pa. 299, 19 L.R.A.(N.S.) 483, 128 Am. St. Rep. 809, 71 Atl. 100.

[4] *State* v. *Welsh,* 29 S. C. 4, 6 S. E. 894; *Com.* v. *York,* 9 Met. 93, 43 Am. Dec. 373; *Territory* v. *McAndrews,* 3 Mont. 158; *Silvus* v. *State,* 22 Ohio St. 90; *State* v. *Ballou,* 20 R. I. 607, 40 Atl. 861; *State* v. *Yokum,* 11 S. D. 544, 79 N. W. 835 (but see *State* v. *Hazlet,* 16 N. D. 426, 113 N. W. 374); *Com.* v. *Drum,* 58 Pa. 9; *Cathcart* v. *Com.* 37 Pa. 108; *People* v. *Callaghan,* 4 Utah, 49, 6 Pac. 49. See *Vaiden* v. *Com.* 12 Gratt. 717; *Clark* v. *Com.* 90 Va. 360, 18 S. E. 440; *State* v. *Thrailkill,* 71 S. C. 136, 50 S. E. 551; *State* v. *Dillard,* 59 W. Va. 197, 53 S. E. 117.

In South Carolina, the courts assert that while the prosecution must prove every essential element of the crime beyond a reasonable doubt, the accused is required to prove his defense only by a preponderance of the evidence; but if it appears from a consideration of all the testimony in the case, that the jury has a reasonable doubt of the guilt of the accused, he is entitled to the benefit of such doubt. See *State* v. *Bodie,* 53 S. C. 117, 11 S. E. 624; *State* v. *Stockman,* 82 S. C. 388, 129 Am. St. Rep. 888, 64 S. E. 595; *State* v. *Chastain,* 85 S. C. 64, 67 S. E. 6.

In North Carolina, the rule is that the burden rests upon the accused to prove self-defense or mitigation, not by preponderance of the evidence, but to the satisfaction of the jury. See *State* v. *Ellick,* 60 N. C. (2 Winst. L.) 56, 86 Am. Dec. 442; *State* v. *Willis,* 63 N. C.

§ 945. Measure of exculpation required of accused as modified by statute.—In a number of the states, statutes have been enacted declaring that certain facts shall be presumptive evidence of guilt, or that the prosecution, in the first instance, is not required to prove the absence of justification, or that, on a prima facie case being established, proof of circumstances of mitigation or excuse devolves upon the accused. These matters are generally held to be a rightful exercise of legislative power, and when confined to matters of proceedure, or to declaring that certain facts shall be presumptive evidence of an untimate fact, they are upheld; but where such statutes attempt to change the rule as to the presumption of innocence, or to declare that certain conduct, innocent in itself, shall constitute evidence of a crime, or to place an affirmative burden upon the accused, the statutes are generally held unconstitutional.

Thus, where an ordinance not only made it unlawful to have possession of a lottery ticket, but further provided that such possession must be shown to be innocent, it was held unconstitutional in that it placed on the accused the burden of showing the innocent possession.[1] Again, an ordinance to prevent gambling houses, which provided that any person found therein should be subject to a fine, was held unconstitutional, as it imposed a penalty for being present, however innocent the purpose might be, and only those facts could be made presumptive evidence of guilt that had a legitimate tendency to show that the accused was probably engaged in the commission

26; *State* v. *Mazon,* 90 N. C. 676; *State* v. *Byrd,* 121 N. C. 684, 28 S. E. 353; *State* v. *Byers,* 100 N. C. 512, 6 S. E. 420; *State* v. *Simonds,* 154 N. C. 197, 69 S. E. 790.

In Delaware, the court charges the jury that the burden is upon the accused to establish self-defense to the satisfatcion of the jury. *State* v. *Miele,* — Del. —, 74 Atl. 8; *State* v. *Primrose,* — Del. —, 77 Atl. 717. But see *State* v. *Lee,* — Del. —, 74 Atl. 4.

[1] *Re Wong Hane,* 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693.

of a crime.[2] But in statutory crimes, no constitutional right is involved where certain facts are made presumptive evidence of a violation of a statute. Thus, a statute in Rhode Island provided that the possession of certain articles should be prima facie evidence to convict, and it was held that where one accused of violating it had the right to explain the possession, no constitutional privilege was denied the accused.[3] Also, it was held that in statutory misdemeanors, where an affirmative defense was relied on, no duty devolved on the prosecution to negative such defense, and to require its proof from the accused was not obnoxious to any constitutional right.[4] And in Oregon, it is held that the rule which places upon the accused the burden of proof in a prosecution for a statutory crime does not violate any constitutional rights.[5] And statutes which make the possession of a gaming implement evidence of gambling;[6] or provide that, on a charge of keeping a disorderly house, its character may be shown from its general reputation in the neighborhood;[7] or that the keeping of intoxicating liquors shall be prima facie evidence that the sale is illegal;[8] or that any person who unlawfully enters in the nighttime, or breaks and enters in the daytime, any dwelling, shall be deemed to have done so with intent to commit a crime;[9] or that a person having possession of an animal permitted to run on the range throws upon such person the burden of explaining such possession,[10] are not constitutional as depriving the accused of a constitutional right.

But in offenses such as homicide, and assault with intent to

[2] *People* v. *Baum,* 133 App. Div. 481, 118 N. Y. Supp. 3.

[3] *State* v. *Sheehan,* 28 R. I. 160, 66 Atl. 66.

[4] *Com.* v. *Standard Oil Co.* 129 Ky. 546, 112 S. W. 632.

[5] *State* v. *Kline,* 50 Or. 426, 93 Pac. 237.

[6] *Com.* v. *Yee Moy,* 166 Mass. 376, note, 44 N. E. 1120; *Com.* v. *Smith,* 166 Mass. 370, 44 N. E. 503.

[7] *State* v. *Altoffer,* 3 Ohio S. & C. P. Dec. 288.

[8] *State* v. *Higgins,* 13 R. I. 330.

[9] *State* v. *Anderson,* 5 Wash. 350, 31 Pac. 969.

[10] *State* v. *Kyle,* 14 Wash. 550, 45 Pac. 147.

kill, and murder, notwithstanding a statutory provision that proof of circumstances of mitigation that justify or excuse the homicide devolves upon the accused, the rule remains that accused cannot be required to do more than raise a reasonable doubt, upon all the evidence submitted to the jury. Under such a statute it was held that the state is required to prove only two facts, namely, the death of the deceased, and that he was killed by accused; and if such proof does not raise a reasonable doubt as to whether or not the homicide was only manslaughter, or was justifiable or excusable, then a prima facie case is made against the accused, whereupon the burden shifts to him; and to discharge it, he must produce evidence sufficient to raise a reasonable doubt as to the degree, or to show justification or excuse, and, failing in this, conviction is warranted. But where the evidence for the accused raises a reasonable doubt, then the burden returns to the prosecution, and to warrant a conviction, it must overcome such doubt thus raised, by proof beyond a reasonable doubt of the existence of each essential element of the crime. [11]

[11] *Hawkins* v. *United States,* 3 Okla. Crim. Rep. 651, 108 Pac. 561.

The criticism to be made on the opinion in the above case is that it loosely states that, after the prima facie case is established, the burden shifts to the accused, and after the accused has created a reasonable doubt, it again shifts to the prosecution. This is unusual in a court that is so generally accurate in its statements as the Oklahoma courts, but it is the sort of expression that gives color and apparent authority for clouding the well-established rule that in a criminal case the burden of proof never shifts, but always remains on the prosecution. It is to be noted that, notwithstanding the loose expression, the law as stated coincides with the rule that where a doubt is raised upon the entire evidence, the accused must be acquitted. See *State* v. *Ware,* 58 Wash. 526, 109 Pac. 459; *State* v. *Byrd,* 41 Mont. 585, 111 Pac. 407; *James* v. *State,* 167 Ala. 14, 52 So. 840; *Monteith* v. *State,* 161 Ala. 18, 49 So. 777; *Culpepper* v. *State,* 4 Okla. Crim. Rep. 103, 31 L.R.A. (N.S.) 1166, 140 Am. St. Rep. 668, 111 Pac. 679; *State* v. *Bailey,* 79 Conn. 589, 65 Atl. 951; *Bell* v. *State,* 69 Ga. 752; *Green* v. *State,* 124 Ga. 343, 52 S. E. 431; *People* v. *Tubbs,* 147 Mich. 1, 110 N. W. 132; *State* v. *Peterson,* 149 N. C.

§ 946. Exculpatory circumstances in rape.—Deportment and conduct which is grounded upon the laws of our moral nature, under normal conditions, is consistently characterized by truth and honesty, and those characteristics are persistent to such an extent that their absence necessarily detracts from the credibility of the person. Thus, where a person has just reason to complain of personal injury or of violated honor, there is generally prompt and unequivocal indication of that sense of wrong which acts of violence instinctively arouse in every human mind. This is particularly characteristic of the crime of rape, where the relevancy, no less than the weight, of the evidence, depends upon prompt complaint; as immediate resentment of the wrong is the strongest corroboration of the fact that the crime was committed by force and against consent.[1] Herein then, we have a clear illustration of exculpation arising from conduct. But delay may be explained, and does not detract from the relevancy or weight of the evidence where there is any circumstance that reasonably accounts for it,[2] as where the victim was a child under control of the accused, and afraid to make complaint.[3]

533, 63 S. E. 87; *State* v. *Bertrand*, 3 Or. 61 (but see *State* v. *Whitney*, 7 Or. 386; *State* v. *Gray*, 46 Or. 24, 79 Pac. 53).

[1] *Donaldson* v. *People*, 33 Colo. 333, 80 Pac. 960; *State* v. *Reid*, 39 Minn. 277, 39 N. W. 796; *State* v. *Shettleworth*, 18 Minn. 208, Gil. 191; *Dunn* v. *State*, 45 Ohio St. 249, 12 N. E. 826; *People* v. *Corey*, 8 Cal. App. 720, 97 Pac. 907; *People* v. *Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013; *State* v. *Miller*, 191 Mo. 587, 90 S. W. 767; *State* v. *Werner*, 16 N. D. 83, 112 N. W. 60.

[2] *People* v. *Lutzow*, 240 Ill. 612, 88 N. E. 1049.

The question as to whether or not the complaint was too late to be relevant is always to be determined by the trial judge. *Com.* v. *Cleary*, 172 Mass. 175, 51 N. E. 746; *Com.* v. *Rollo*, 203 Mass. 354, 89 N. E. 556; *People* v. *Marrs*, 125 Mich. 376, 84 N. W. 284; *Higgins* v. *People*, 58 N. Y. 377; *State* v. *Bebb*, 125 Iowa, 494, 101 N. W. 189; *State* v. *Snider*, 119 Iowa, 15, 91 N. W. 762; *State* v. *Sargent*, 32 Or. 110, 49 Pac. 889.

[3] *Smith* v. *State*, 52 Tex. Crim. Rep. 344, 106 S. W. 1161, 15 A. & E. Ann. Cas. 357. See *Pettus* v. *State*, 58 Tex. Crim. Rep. 546, 137 Am. St. Rep. 978, 126 S. W. 868.

And circumstances showing conduct and demeanor immediately after the crime are always relevant.[4]

§ 947. Exculpatory circumstances that tend to establish innocence.—The presumption of innocence is a rule of law, and does not arise out of evidence. Hence, when a learned author [1] says: "A presumption of innocence may be created by the language, conduct, and demeanor of the party charged with a crime," it is confusing, as leading to the conclusion that the law requires that an accused shall create the presumption, which itself is already a rule of law. But assuming that it was intended to express the fact that the presumption itself is strengthened or lessened by the language, conduct, and demeanor of the accused, it is evident that all circumstances explanatory of matters in evidence are relevant on the part of the accused, to rebut or to explain all such matters. And a satisfactory explanation of suspicious circumstances always operates in favor of the accused. Much importance is always attached to the testimony of the accused by both court and jury, and long prior to the time when an accused person was permitted to be a witness in his own behalf, it was suggested by the English judges that it was extremely important, as much for the protection of innocence as for the discovery of guilt, that the accused should have an opportunity of making a statement.[2] In America, in all the states except Alabama (where the accused is allowed only to make a statement), the rule is

[4] *Brown* v. *State*, 72 Miss. 997, 17 So. 278; *People* v. *Batterson*, 50 Hun, 44, 2 N. Y. Supp. 376; *State* v. *Houx*, 109 Mo. 654, 32 Am. St. Rep. 686, 19 S. W. 35; *Cook* v. *State*, 85 Neb. 57, 122 N. W. 706; *Vogel* v. *State*, 138 Wis. 315, 119 N. W. 190. See *State* v. *DeWolf*, 8 Conn. 99, 20 Am. Dec. 90.

[1] Wills, Circumstantial Ev. 5th Eng. ed. 211.

[2] *Reg.* v. *Baldry*, 21 L. J. Mag. Cas. N. S. 130, 2 Den. C. C. 430, 16 Jur. 599; *Wishart's Case*, Syme, Justiciary Rep. p. 22, Appx.

that the accused may testify or not at his own election. And this has now become the law in England.[3] While it is certain that innocent persons have drawn upon themselves punishment by conduct apparently consistent only with guilt, or conduct which has been resorted to [4] as likely to divert unjust suspicion, nevertheless, with the opportunities for new trial, the right to testify himself, and to the right to force the attendance of witnesses in his behalf, the accused is now so generally safeguarded that the probabilities of the conviction of one who is wholly innocent are very much lessened, although the danger still exists. It must be borne in mind that on his defense an accused has to meet the case as made against him by the prosecution, and necessarily the evidence on his part is that of exculpation, and, to show this, all circumstances that in any way explain the transaction are relevant. Thus, where an accused arrested on a homicide charge made his escape, and the circumstance was given in evidence against him, it was relevant for him to show that he fled from fear of immediate violence, and that his act was not caused by consciousness of guilt.[5] It is relevant, on the part of the accused, for him to give evidence tending to establish other hypotheses to explain matters in evidence against him. It is relevant for him to show a reason for carrying a gun,[6] or to explain the possession of the poison,[7] or to explain why he went to the place of the crime;[8] and the rule is that where two reasonable hypotheses are supported by the evidence, it is the duty of the jury to adopt the hypothesis of innocence, even though that of guilt is the more probable;[9] and where the evidence is wholly circumstantial, any fact which

[3] Criminal Ev. Act 1898 (61 & 62 Vict. chap. 36).

[4] See 3 Co. Inst. chap. 104, p. 232.

[5] *Golden* v. *State*, 25 Ga. 527.

[6] *People* v. *Malaspina*, 57 Cal. 628; *State* v. *Shuff*, 9 Idaho, 115, 72 Pac. 664, 13 Am. Crim. Rep. 443.

[7] *People* v. *Cuff*, 122 Cal. 589, 55 Pac. 407.

[8] *State* v. *English*, 67 Mo. 136.

[9] *Thompson* v. *State*, 83 Miss. 287, 35 So. 689.

is necessary to explain another, or shows opportunity or motives, is relevant.[10] Where the theory of the prosecution was that the homicide was a part of a political plot, and, in support of this, the prosecution was allowed to show use of state troops by the executive immediately after the homicide, it was relevant for the accused to explain the presence of such troops by showing that angry and excited crowds had gathered at the executive building, threatening the occupants with violence.[11] Where the prosecution gave evidence that accused made a secret visit to his father's house about the time of the homicide, it was relevant for him to rebut the suggestion of secrecy or concealment by showing that he had told witnesses of his intended visit, and the purpose of it.[12] Where accused has explained circumstances against him, it is error to exclude evidence on the part of the accused that tends to corroborate his explanation.[13]

§ 948. Absence of motive as exculpation.—While it is true that crimes are often committed without any apparent motive, and while motive is never essential to conviction where a crime has been proved,[1] still the absence of motive or of all apparent inducement to commit the crime, is a strong circumstance in favor of the accused; and in cases depending on circumstantial evidence, it is not only a matter relevant to the issue, but is sometimes a matter of vital importance.[2] Hence, it is always relevant to show any conduct or act or characteris-

[10] *O'Brien* v. *Com.* 89 Ky. 354, 12 S. W. 471.

[11] *Powers* v. *Com.* 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494.

[12] *State* v. *Young,* 119 Mo. 495, 24 S. W. 1038.

[13] *State* v. *Welch,* 22 Mont. 92, 55 Pac. 927; *People* v. *Fournier* — Cal. —, 47 Pac. 1014; *Turner* v. *State,* — Tex. Crim. Rep. —, 46 S. W. 830; *Adams* v. *State,* 47 Tex. Crim. Rep. 347, 84 S. W. 231.

[1] See supra, 878, etc.

[2] *People* v. *Robinson,* 1 Park. Crim. Rep. 649; *Pointer* v. *United States,* 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410; *Salm* v. *State,* 89 Ala. 56, 8 So. 66; *Com.* v. *Corrigan,* 1 Pittsb. 292.

tic that indicates an absence of motive or that explains an apparent motive. Thus, on a homicide charge, the accused showed that he and the deceased were friends, and that he had no motive to kill; that there were no blood stains on his clothing, although the homicide was with a knife and several wounds were inflicted; that the accused did not leave the neighborhood, but, when told of deceased's death, appeared surprised and attended the inquest. These circumstances were all held relevant as consistent with innocence.[3] Where the alleged motive for a homicide was robbery, it is relevant for the accused to show that deceased actually had no money,[4] or to prove that accused had no need of money, and that he himself had more money than the deceased.[5] Where accused is on trial for uxoricide, and there is evidence that the relations between him and his wife were unfriendly, it is relevant for him to introduce letters from her showing her affection for him.[6] And where there is not only absence of motive, but strong counteracting motives, the claim of innocence is strengthened; and in cases where the evidence is wholly circumstantial, and no motive is disclosed, and a counter motive is shown, the guilt of the accused may be clouded by a reasonable doubt.[7]

On the ground that a guilty person may at times so far succeed in stifling his conscience and suppressing his real emotions as to subject his conduct as well as his appearance, in a great measure, to his volition, and thus simulate a demeanor appar-

[3] *Pogue* v. *State,* 12 Tex. App. 283.

[4] *Lancaster* v. *State,* — Tex. Crim. Rep. —, 31 S. W. 515.

[5] *Tilley* v. *Com.* 90 Va. 99, 17 S. E. 895. But see *Reynolds* v. *State,* 147 Ind. 3, 46 N. E. 31.

[6] *Pettit* v. *State,* 135 Ind. 393, 34 N. E. 1118; *State* v. *Leabo,* 84 Mo. 168, 54 Am. Rep. 91.

[7] *State* v. *Rathbun,* 74 Conn. 524, 51 Atl. 540. See *Brunson* v. *State,* 124 Ala. 37, 27 So. 410; *State* v. *Lucey,* 24 Mont. 295, 61 Pac. 994; *State* v. *Green,* 92 N. C. 779; *Lanahan* v. *Com.* 84 Pa. 80; *People* v. *Ah Fung,* 17 Cal. 377.

ently inconsistent with guilt, it is said that to allow such demeanor to go in evidence in his favor would be to permit him to manufacture evidence for himself,[8] but on principles of logic, such evidence is equally relevant with conduct showing a consciousness of guilt, which is always admissible as a circumstance against accused. And, in one case, the accused was allowed to show that he had put officers on the track of the real criminal.[9]

It is clear that facts and circumstances in every transaction exhibit two phases: first, relevancy to establish an ultimate fact; second, an explanation of the facts and circumstances themselves, that is relevant against the ultimate fact. In this view the entire transaction should go before the court, and the accused's whole conduct, his utterances, his acts, and demeanor, should be received, and his explanation of his acts, conduct, and demeanor should go in to rebut or negative the case against him. Any exclusion of this sort renders the decisions of the various courts indefensibly inconsistent, and places an arbitrary limit upon the accused, which is unjust in view of the freedom allowed the prosecution in adducing facts and circumstances against him.

§ 949. Exculpatory circumstances connected with the possession of property.—A natural inference of guilt arises from the recent possession of property shown to have been stolen, or of property known to have been in the possession of the victim of the homicide. But such inference may always be negatived by evidence of facts and circumstances showing that the possession is innocent, or was honestly acquired.

[8] *Campbell* v. *State*, 23 Ala. 44; *State* v. *Strong*, 153 Mo. 548, 55 S. W. 78, 13 Am. Crim. Rep. 278.

[9] *Pinkard* v. *State*, 30 Ga. 759; *White* v. *State*, 111 Ala. 92, 21 So. 330; *Boston* v. *State*, 94 Ga. 590, 20 S. E. 98, 21 S. E. 603. See *Lewis* v. *State*, 4 Kan. 309; *Dilli* v. *People*, 8 Mich. 357; *State* v *Vaigneur*, 5 Rich. L. 391; Wigmore, Ev. § 293.

Thus, it is relevant for an accused charged with the illegal possession of another's money, to explain the possession by evidence that he found it;[1] and where the dispute concerns personal property, evidence that the brand on an animal resembled the brand owned by the accused, or that the herds became mixed by accident, or that property belonging to the accused had been placed near similar property belonging to others, or that the property came into his possession under an honest belief that it belonged to him,[2] or that, upon discovering the mistake, he had sought out the owner and paid the value of the property, or returned the property itself, may be introduced by way of explanation.[3] On a charge of larceny, it is relevant for accused to show that he purchased the property,[4] and, in explaining the possession of stolen goods, he may prove from whom he got them, and what the parties said at the time;[5] and it is relevant for him to offer evidence of what he said, or what explanation he gave, at the time when he was first found with the property in his possession.[6] And on principle, it is always relevant, where any act is shown or conduct charged against the accused, for him to explain such act or conduct by showing some other hypothesis equally or more natural, as a reason for his conduct; and such explanation should always be received.[7]

[1] *White* v. *State*, 28 Tex. App. 71, 12 S. W. 406; *Merriweather* v. *State*, 55 Tex. Crim. Rep. 135, 115 S. W. 44.

[2] *Misseldine* v. *State*, 21 Tex. App. 335, 17 S. W. 768; *Mims* v. *State*, — Tex. Crim. Rep. —, 32 S. W. 540; *Brooks* v. *State*, — Tex. Crim. Rep. — 27 S. W. 141; *Thurman* v. *State*, 33 Tex. 684; *Randle* v. *State*, 49 Ala. 14.

[3] *Hall* v. *State*, 34 Ga. 208; *Bennett* v. *State*, 28 Tex. App. 342, 13 S. W. 142; *Hicks* v. *State*, — Tex. Crim. Rep. —, 47 S. W. 1016.

[4] *Smith* v. *State*, 24 Tex. App. 290, 6 S. W. 40; *State* v. *Mandich*, 24 Nev. 336, 54 Pac. 516.

[5] *State* v. *Jordan*, 69 Iowa, 506, 29 N. W. 430; *Guajardo* v. *State*, 24 Tex. App. 603, 7 S. W. 331. See *State* v. *Humason*, 5 Wash. 499, 32 Pac. 111; *Heed* v. *State*, 25 Wis. 421.

[6] *Goens* v. *State*, 35 Tex. Crim. Rep. 73, 31 S. W. 656; *Payne* v. *State*, 57 Miss. 348.

[7] Wigmore, Ev. § 34.

§ 950. Exculpation by conduct, explanation of flight, etc.—Since flight, concealment, and other like acts are generally assumed to indicate consciousness of guilt, it logically follows that the absence of such conduct indicates innocence. However, courts are unwilling to accept negative conduct, such as that the accused had an opportunity of flight and did not use it, or a chance to conceal a crime and did not do it, on the ground that such acts tend to make evidence in his favor.[1] Where proof is tendered of negative acts indicating innocence, courts illogically meet the offer with the dry, crackling, and inapplicable statement that the accused should not be allowed to make evidence for himself, or that his assertions are irrelevant because self-serving. There is no foundation for such rulings, and they merely arise out of a tendency to reiterate some detached principle that remains in the mind of the court from the years of preliminary study. Thus, courts generally exclude evidence on the part of the accused that he surrendered himself openly and voluntarily,[2] and that he refused to escape when he had an opportunity to do so.[3] At one time in our judicial history, flight resulted in the forfeiture of the goods of the accused, and raised a conclusive presumption of guilt, but flight is now held relevant merely as a circumstance tending to establish guilt, not in itself conclusive; nor can it create a legal presumption of guilt.[4] It is clear that

[1] See Wigmore, Ev. § 1732 (2).

[2] *State* v. *Musick*, 101 Mo. 260, 14 S. W. 212; *State* v. *McLaughlin*, 149 Mo. 19, 50 S. W. 315; *Vaughn* v. *State*, 130 Ala. 18, 30 So. 669; *Oliver* v. *State*, 17 Ala. 587. See *People* v. *Shaw*, 111 Cal. 171, 43 Pac. 593.

[3] *People* v. *Rathbun*, 21 Wend. 509; *Com.* v. *Hersey*, 2 Allen, 173; *People* v. *Montgomery*, 53 Cal. 576; *Jordan* v. *State*, 81 Ala. 20, 1 So. 577; *Kennedy* v. *State*, 101 Ga. 559, 28 S. E. 979; *Pate* v. *State*, 94 Ala. 14, 10 So. 665; *Lingerfelt* v. *State*, 125 Ga. 4, 53 S. E. 803, 5 A. & E. Ann. Cas. 310; *Walker* v. *State*, 139 Ala. 56, 35 So. 1011. See *Howgate* v. *United States*, 7 App. D. C. 217; *Welch* v. *State*, 104 Ind. 347, 3 N. E. 850, 5 Am. Crim. Rep. 450.

[4] *Hickory* v. *United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup.

an accused may testify directly to his motive at the time of the act charged,[5] and may relate his state of mind.[6] This logically followed should admit acts and conduct as tending to establish innocence, but the courts seem unwilling to go further than to allow an explanation of the circumstances surrounding a flight, resistance to arrest, and similar conduct in connection with the charge against the accused.[7] But accused may explain that he evaded arrest by any circumstances consistent with innocence.[8] Thus, he may show that he fled because of great excitement at the inquest, and danger of being lynched;[9] or

Ct. Rep. 327; *Smith* v. *State,* 106 Ga. 679, 71 Am. St. Rep. 289, 32 S. E. 853, 11 Am. Crim. Rep. 474; *Territory* v. *Lucero,* 8 N. M. 561, 46 Pac. 23; *Alberty* v. *United States,* 162 U. S. 510, 40 L. ed. 1056, 16 Sup. Ct. Rep. 864; *Starr* v. *United States,* 164 U. S. 632, 41 L. ed. 579, 17 Sup. Ct. Rep. 223. See *State* v. *Buralli,* 27 Nev. 56, 71 Pac. 536; *Betts* v. *United States,* 65 C. C. A. 452, 132 Fed. 234; *State* v. *Poe,* 123 Iowa, 127, 101 Am. St. Rep. 307, 98 N. W. 591; *State* v. *Baptiste,* 105 La. 661, 30 So. 147; *People* v. *Cismadija,*— Mich. —, 132 N. W. 489 (an instruction that flight is substantive evidence is error).

[5] Supra, §§ 333, 944; *State* v. *Tough,* 12 N. D. 425, 96 N. W. 1025; *Alexander* v. *State,* 118 Ga. 26, 44 S. E. 851; *State* v. *Lowe,* 67 Kan. 183, 72 Pac. 524, 14 Am. Crim. Rep. 693; *Cummings* v. *State,* 50 Neb. 274, 69 N. W 756; *Jackson* v. *Com.* 96 Va. 107, 30 S. E. 452; *Mathews* v. *State,* 9 Tex. App. 138; Wharton, Crim. Law, 10th ed. § 1030.

[6] *Cornelius* v. *State,* 12 Ark. 805; *Hamilton* v. *State,* 36 Ind. 280, 10 Am. Rep. 22; *State* v. *Walker,* 77 Me. 490, 1 Atl. 357, 5 Am. Crim. Rep. 465; *Com.* v. *Abbott,* 130 Mass. 472; *State* v. *Huntly,* 25 N. C. (3 Ired. L.) 418, 40 Am. Dec. 416; *State* v. *Abbott,* 8 W. Va. 741. See *Com.* v. *Trefethen,* 157 Mass. 185, 24 L.R.A. 235, 31 N. E. 961; *Coffman* v. *Com.* 10 Bush, 495, 1 Am. Crim. Rep. 293; *Bonnard* v. *State,* 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462; *Chaney* v. *State,* 31 Ala. 342.

[7] *Smith* v. *State,* 106 Ga. 673, 71 Am. St. Rep. 276, 32 S. E. 851, 11 Am. Crim. Rep. 474. See *Brown* v. *State,* 56 Tex. Crim Rep. 389, 120 S. W. 444; *Brown* v. *State,* 88 Miss. 166, 40 So. 737.

[8] *France* v. *State,* 68 Ark. 529, 60 S. W. 236. See *Brown* v. *State,* 57 Tex. Crim. Rep. 575, 124 S. W. 101.

[9] *Tilley* v *Com.* 90 Va. 99, 17 S. E. 895; *Bailey* v. *State,* 104 Ga. 530, 30 S. E. 817.

that he was in fear of violence,[10] or feared a summary vengeance at the hands of the deceased's father.[11] And where evidence of flight had been offered against accused, it was relevant for him to show by witnesses their version of the difficulty preceding the homicide, and before deceased was present, to aid the jury in determining the weight to be attached to the circumstance of flight.[12] Where accused left the state immediately after the homicide, and on the trial accused called one of the state's witnesses and asked if such witness, in the presence of another person, did not advise accused to leave, and the witness answered that he did not remember, and accused then called the other person who was present, it was held error to deny the accused the right to show that such advice was given him, to rebut the inference that his leaving was caused by a sense of guilt.[13]

§ 951. Exculpation by proof of alibi.—Of all exculpatory defenses, that of an alibi clearly established by credible testimony is the most conclusive. As we have already shown, an alibi is not an affirmative defense,[1] but is evidence that tends

[10] *Batten* v. *State,* 80 Ind. 394.

[11] *Lewis* v. *State,* 96 Ala. 6, 38 Am. St. Rep. 75, 11 So. 259.

[12] *Batten* v. *State,* 80 Ind. 394; *Johnson* v. *State,* 8 Wyo. 494, 58 Pac. 761, 13 Am. Crim. Rep. 374.

[13] *Bradburn* v. *United States,* 3 Ind. Terr. 604, 64 S. W. 550. See *State* v. *Desmond,* 109 Iowa, 72, 80 N. W. 214; *Evans* v. *State,* — Tex. Crim. Rep. —, 76 S. W. 467, 13 Am. Crim. Rep. 140; *Reed* v. *State,* 66 Neb. 184, 92 N. W. 321, 14 Am. Crim. Rep. 556; *State* v. *Kirby,* 62 Kan. 436, 63 Pac. 752, 15 Am. Crim. Rep. 212; *State* v. *Shaw,* 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51; *Smith* v *State,* 106 Ga. 673, 71 Am. St. Rep. 286, 32 S. E. 851, 11 Am. Crim. Rep. 474; *People* v. *Wong Ah Ngow,* 54 Cal. 151, 35 Am. Rep. 69; Underhill, Crim. Ev. § 119.

[1] Supra, § 333; *McNamara* v. *People,* 24 Colo. 61, 48 Pac. 541; *Cochran* v. *State,* 113 Ga. 726, 39 S. E. 332; *State* v. *Ardoin,* 49 La. Ann. 1145, 62 Am. St. Rep. 678, 22 So. 620; *Peyton* v. *State,* 54 Neb. 188, 74 N. W. 597, 11 Am. Crim. Rep. 47; *State* v. *Atkins,* 49 S. C. 481, 27 S. E. 484; *State* v. *Thornton,* 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196; *Saenz* v. *State,* — Tex.

to negative the case made by the prosecution,[2] and hence it is sufficient for the accused to raise a reasonable doubt of his presence at the place of the crime;[3] and it is error to require him to establish it beyond a reasonable doubt. By such traverse, the accused admits nothing,[4] and does not relieve the prosecution of establishing his guilt beyond a reasonable doubt.[5] The attempt to establish an alibi is not a circumstance to be regarded as unfavorable to the accused,[6] nor is the failure to

Crim Rep. —, 63 S. W. 316. But see *State* v. *Latimer*, 88 S. C. 79, 70 S. E. 409.

[2] *State* v. *Freeman*, 100 N. C. 429, 5 S. E. 921; *State* v. *McClellan*, 23 Mont. 532, 75 Am. St. Rep. 558, 59 Pac. 924, 12 Am. Crim. Rep. 13; *Smith* v. *State*, — Tex. Crim. Rep. —, 49 S. W. 583; *Padron* v. *State*, 41 Tex. Crim. Rep. 548, 55 S. W. 827; *Albritton* v. *State*, 94 Ala. 76, 10 So. 426.

[3] *McNamara* v. *People*, 24 Colo. 61, 48 Pac. 541; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Watson* v. *Com.* 95 Pa. 418; *Rudy* v. *Com.* 128 Pa. 500, 18 Atl. 344; *People* v. *Roberts*, 122 Cal. 377, 55 Pac. 137, 11 Am. Crim. Rep. 31; *Pickens* v. *State*, 115 Ala. 42, 22 So. 551; *Schultz* v. *Territory*, 5 Ariz. 239, 52 Pac. 352, 11 Am. Crim. Rep. 44; *Hauser* v. *People*, 210 Ill. 258, 71 N. E. 416; *People* v. *Hare*, 57 Mich. 505, 24 N. W. 843; *State* v. *King*, 174 Mo. 647, 74 S. W. 627, 15 Am. Crim. Rep. 616; *Henry* v. *State*, 51 Neb. 149, 66 Am. St. Rep. 450, 70 N. W. 924; *State* v. *MacQueen*, 69 N. J. L. 522, 55 Atl. 1006; *Com.* v. *Gutshall*, 22 Pa. Super. Ct. 269; *State* v. *Gadsden*, 70 S. C. 430, 50 S. E. 16

[4] *Toler* v. *State*, 16 Ohio St. 583; *State* v. *Worthen*, 124 Iowa, 408, 100 N. W. 330.

[5] *Fife* v. *Com.* 29 Pa. 429; *State* v. *Lowry*, 42 W. Va. 205, 24 S. E. 561; *Hatch* v. *State*, 144 Ala. 50, 40 So. 113; *People* v. *Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951; *People* v. *Morris*, 3 Cal. App. 1, 84 Pac. 463; *People* v. *Lang*, 142 Cal. 482, 76 Pac. 232; *Barr* v. *People*, 30 Colo. 522, 71 Pac. 392; *Com.* v. *Tucker*, 189 Mass. 457, 486, 7 L.R.A.(N.S.) 1056, 76 N. E. 127; *Com.* v. *Tircinski*, 189 Mass. 257, 1 L.R.A.(N.S.) 752, 75 N. E. 261, 4 A. & E. Ann. Cas. 337; *State* v. *Brooks*, 220 Mo. 74, 119 S. W. 353; *State* v. *King*, 174 Mo. 647, 74 S. W. 627, 15 Am. Crim. Rep. 616; *State* v. *Tapack*, 78 N. J. L. 208, 72 Atl. 962; *Burns* v. *State*, 75 Ohio St. 407, 79 N. E. 929; *Tucker* v. *Territory*, 17 Okla. 56, 87 Pac. 307; *O'Hara* v. *State*, 57 Tex. Crim. Rep. 577, 124 S. W. 95; *Tinsley* v. *State*, 52 Tex. Crim. Rep. 91, 106 S. W. 347; *State* v. *Crowell*, 11 Am. Crim. Rep. 74, and note, 149 Mo. 391, 73 Am. St. Rep. 402, 50 S. W. 893.

[6] *State* v. *Collins*, 20 Iowa, 85; *State* v. *Josey*, 64 N. C. 56; *Turn-*

establish it a ground of suspicion,[7] for the fact that it is insufficient is not sufficient to exclude the evidence, but it must be considered by the jury in connection with all the other evidence of the case.[8] The failure to establish an alibi is only a failure to establish a particular fact, and no inference is to be drawn from such failure. But where an alibi is clearly fabricated, and is sought to be shown by evidence clearly false, it is a circumstance unfavorable to the accused.[9]

To establish an alibi, all facts and circumstances that tend to show that the accused was absent from the place at the time the crime was committed are relevant in his behalf. Thus, on a trial for arson, testimony that the accused could not have left his home to set the fire, without arousing the inmates of the house, is relevant.[10] To support his claim of an alibi, it is relevant for an accused to give in evidence any conversation had between him and his associates when they were at a certain house at the time the offense was committed.[11] Where the in-

er v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Ford* v. *State,* 101 Tenn. 454, 47 S. W. 703; *Adams* v. *State,* 28 Fla. 511, 10 So. 106; *Line* v. *State,* 51 Ind. 172, 1 Am. Crim. Rep. 615.

[7] *Miller* v. *People,* 39 Ill. 457; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; Kerr, Homicide, § 512.

[8] *Chappel* v. *State,* 7 Coldw. 92; *Dawson* v. *State,* 62 Miss. 241; *People* v. *Resh,* 107 Mich. 251, 65 N. W. 99; *State* v. *McGarry,* 111 Iowa, 709, 83 N. W. 718; *Harrison* v. *State,* 83 Ga. 129, 9 S. E. 542; *Wisdom* v. *People,* 11 Colo. 170, 17 Pac. 519; *Burns* v. *State,* 75 Ohio St. 407, 79 N. E. 929; *Tucker* v. *Territory,* 17 Okla. 56, 87 Pac. 307; *State* v. *Ward,* 61 Vt. 153, 192, 17 Atl. 483, 8 Am. Crim. Rep. 207; *State* v. *Fair,* 35 Wash. 127, 102 Am. St. Rep. 897, 76 Pac. 731; *People* v. *Fong Ah Sing,* 64 Cal. 253, 28 Pac. 233, 11 Am. Crim. Rep. 33. See McClain, Crim. Law, § 399.

[9] *White* v. *State,* 31 Ind. 262. See *Dean* v. *Com.* 32 Gratt. 912, 925; *Porter* v. *State,* 55 Ala. 107; *Tatum* v. *State,* 131 Ala. 32, 31 So. 369; *People* v. *Malaspina,* 57 Cal. 628; *Gordon* v. *People,* 33 N. Y. 501; *State* v. *Aspara,* 113 La. 940, 37 So. 883; *State* v. *Ward,* 61 Vt. 153, 192, 17 Atl. 483, 8 Am. Crim. Rep. 207; *Adams* v. *State,* 28 Fla. 511, 10 So. 106; Abbott, Trial Brief, Crim. §§ 23 et seq.

[10] *State* v. *Delaney,* 92 Iowa, 467, 61 N. W. 189.

[11] *State* v. *Bedard,* 65 Vt. 278, 26 Atl. 719. See *People* v. *Hare,* 57 Mich. 505, 24 N. W. 843; *People* v. *Kalkman,* 72 Cal. 212, 13 Pac. 500.

formation charged an offense as at a certain time and a certain place, it is relevant for the accused to show that at that time he was at a place remote from the place of the crime; [12] or he may show that he was at the place at a time previous to the date charged.[13] Evidence as to accused's whereabouts is not irrelevant because the witness who testified to the fact cannot fix the time by dates, especially where such dates are fixed by other relevant testimony.[14] Where the homicide occurred at 11 o'clock at night, it was relevant, in support of an alibi, for accused to show that he was at his own house, 7 miles distant, late at night.[15] And where the evidence was wholly circumstantial, and a reliable witness testified that the accused was at her house, 600 or 700 yards from the place of crime, at the time of its commission, and had been there for some time before, such testimony was held sufficient to create a reasonable doubt of the guilt of accused; [16] and a great latitude is allowed accused in explaining such facts and circumstances, and where the offense charged consisted of a single act done at a stated time, the proof of the alibi need cover only the time alleged; [17] and the testimony need not go farther than to show the fact that accused was not at the place when the crime was committed.[18] Where the evidence showed that two persons were killed, robbed, and their bodies sunk in a lake; that accused had a slight motive to kill one of them; that he had a gun with which the wounds inflicted might have been made; and that a boat like his was seen going from the place of the crime to his house, and his manner indicated consciousness of guilt,—these inculpatory circumstances were overcome by proof that, while

[12] *State* v. *Lewis*, 10 Kan. 157.

[13] *Brown* v. *People*, 17 Mich. 429, 97 Am. Dec. 195.

[14] *Blake* v. *State*, 38 Tex. Crim. Rep. 377, 43 S. W. 107.

[15] *Kinnemer* v. *State*, 66 Ark. 206, 49 S. W. 815.

[16] *Otmer* v. *People*, 76 Ill. 149.

[17] *People* v. *Morris*, 3 Cal. App. 1, 84 Pac. 463. See *Barr* v. *People*, 30 Colo. 522, 71 Pac. 392.

[18] *Fortson* v. *State*, 125 Ga. 16, 53 S. E. 767; *Pate* v. *State*, 94 Ala. 14, 10 So. 665.

shots had been heard at 7 A. M., the accused did not leave his home until after 8 A. M. of that day, and that he reached a city at 10 A. M.; that had he been at the scene of the crime he could not have reached such city before 1 P. M.; and this, supported by the circumstance that none of the stolen property was traced to him, was sufficient proof of an alibi to set aside a conviction.[19] On the part of the prosecution, evidence is relevant to rebut the proof of an alibi, even to the extent of showing the commission of another crime by the accused.[20] Where accused showed that he could not have reached the place of crime except by the traveled road, because the country was covered with wire fences, it was relevant to rebut the fact by proof that accused had a wire cutter.[21] Where accused testified that on the night of the crime, he was in a different city and watched a parade, which he described, it was relevant to show by another witness the appearance of such parade, to contradict the accused.[22] Where accused testified that he was present at a circus at B. and returned to R. on the midnight train, it was relevant to show by a witness who knew the accused, and who attended the circus at B. and returned to R. on the midnight train, that he did not see the accused, either at the circus or on the train.[23]

There is no presumption, either in establishing an alibi or in rebutting it, that accused was at the scene of the crime, or that he was at any other place.[24] The prosecution must establish his presence at the scene of the crime as an essential element,[25] and the accused must show his absence on the facts, without the aid of any presumption as to his absence.

[19] *Miller* v. *Territory*, 3 Wash. Terr. 554, 19 Pac. 50.

[20] *Reg.* v. *Briggs*, 2 Moody & R. 199.

[21] *Goldsby* v. *United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216.

[22] *People* v. *Gibson*, 58 Mich. 368, 25 N. W. 316, 6 Am. Crim. Rep. 85.

[23] *State* v. *Phair*, 48 Vt. 366.

[24] *State* v. *Waterman*, 1 Nev. 543.

[25] *State* v. *Woolard*, 111 Mo. 248, 20 S. W. 27. But see *Walters* v.

§ 952. **The basic rule of the law of criminal evidence; reasonable doubt.**—The value of testimony is estimated by the degree of persuasion that it produces in the minds of those who are called upon to determine its affect, and to render a verdict accordingly. The rule in all criminal cases is that such persons must be persuaded of the truth of the charge made against the accused, beyond a reasonable doubt. Where a reasonable doubt exists, the accused is entitled, as a matter of right, to an acquittal. Hence, the fundamental question on a criminal charge is, Does the evidence persuade the mind that the accused is guilty beyond a reasonable doubt? If affirmative, conviction follows; it negative, acquittal follows. While in theory there is no difference between direct and circumstantial evidence,[1] nevertheless, in application, a distinction is drawn. This is true notwithstanding the fact that a line of demarcation cannot be drawn, on one side of which we mark, "direct evidence," and on the other side, "circumstantial evidence." This is based upon that normal instinct in our natures that requires of us, in the serious affairs of life, to be persuaded beyond a reasonable doubt before permitting action upon it. In the lesser concerns of life, we take our chances of success or failure because, the concern being a minimum one, we are not injuriously affected even by failure; but where the question involves life, liberty, or reputation, there must be that certainty which the consensus of mankind expresses by the words, "reasonable doubt." In the law of criminal evidence, this standard is effected, because it is obvious to every intelligent person. It is, perhaps, incapable of a precise definition expressed in words, but a comprehension of its meaning follows instantly upon the use of the words, which comprehension

State, 39 Ohio St. 215, 4 Am. Crim. Rep. 33; *State* v. *King*, 174 Mo. 647, 74 S. W. 627, 15 Am. Crim. Rep. 616.

[1] Supra, § 20.

is sometimes made more vivid, not by attempted definition, but by apt illustration.[2]

This measure of proof can be established as well through circumstances as by theoretically direct evidence. Thus, if the circumstantial evidence satisfies the mind, then it is equal to positive evidence, because it produces the same effect,[3] and hence it is not error, in a criminal case, to refuse to instruct that circumstantial evidence is inferior to direct evidence.[4] The limitation applied is that where the criminal charge rests upon circumstantial evidence, the proof must not only be consistent with the guilt of the accused, but it must be inconsistent with any other reasonable hypothesis.[5] Hence, with reasonable doubt as the measure of the sufficiency of the proof, limited

[2] "The definition of such belief is not to be made by the trial judge to the jury in any other form of words as a matter of law; but he may illustrate to them his own idea of this definition." "Of course, this is not the law, but it ought to be." Prof. John H. Wigmore. Pocket Code of Evidence, § 2025.

[3] *People* v. *Vanderpool,* 1 Mich. N. P. 264.

[4] *Cook* v. *State,* — Miss. —, 28 So. 833; *State* v. *Foster,* 14 N. D. 561, 105 N. W. 938; *State* v. *Coleman,* 17 S. D. 594, 98 N. W. 175.

[5] *United States* v. *Douglass,* 2 Blatchf. 207, Fed. Cas. No. 14,989; *Williams* v. *State,* 41 Tex. 209; *Cohen* v. *State,* 32 Ark. 226; *State* v. *Collins,* 20 Iowa, 85; *State* v. *Hunter,* 50 Kan. 302, 32 Pac. 37; *People* v. *Foley,* 64 Mich. 148, 31 N. W. 94; *State* v. *Summons,* 1 Ohio Dec. Reprint, 416; *People* v. *Nelson,* 85 Cal. 421, 24 Pac. 1006; *Chisolm* v. *State,* 45 Ala. 66; *United States* v. *Martin,* 2 McLean, 256, Fed. Cas. No. 15,731; *Ex Parte Acree,* 63 Ala. 234; *People* v. *Murray,* 41 Cal. 66; *Kennedy* v. *State,* 31 Fla. 428, 12 So. 858; *Martin* v. *State,* 38 Ga. 293; *Otmer* v. *People,* 76 Ill. 149; *State* v. *Terrio,* 98 Me. 17, 56 Atl. 217; *State* v. *Trail,* 59 W. Va. 175, 53 S. E. 17; *State* v. *Collins,* 5 Penn. (Del.) 263, 62 Atl. 224; *State* v. *Woolard,* 111 Mo. 248, 20 S. W. 27; *Smith* v. *State,* 61 Neb. 296, 85 N. W. 49; *Territory* v. *Lermo,* 8 N. M. 566, 46 Pac. 16; *State* v. *McCallister,* — Del. —, 76 Atl. 226. See *Bush* v. *State,* 7 Ga. App. 607, 67 S. E. 685; *Banks* v. *State,* 7 Ga. App. 812, 68 S. E. 334; *State* v. *West,* 152 N. C. 832, 68 S. E. 14; *Garst* v. *United States,* 103 C. C. A. 469, 180 Fed. 339; *State* v. *Suitor,* 43 Mont. 31, 114 Pac. 112; *Sies* v. *State,* — Okla. Crim. Rep. —, 117 Pac. 504.

by the qualification that the conclusion must not only be consistent with the guilt of the accused, but inconsistent with any other reasonable conclusion, and the further requirement that each independent fact must be proved to the same degree as if the whole issue rested on the proof of such independent fact,[6] then the law has safeguarded life and liberty to the highest degree that can be devised by human intelligence.

[6] *State* v. *Crabtree,* 170 Mo. 642, 71 S. W. 127; *Hodge* v. *Territory,* 12 Okla. 108, 69 Pac. 1077; *State* v. *Flanagan,* 26 W. Va. 116; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711.

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